

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP925/2015

CATCHWORDS

CO-OWNERSHIP – Terms of settlement – accord and satisfaction – whether existing cause of action discharged – whether orders are to reflect the settlement agreement entered into between the parties – Interpretation of the settlement agreement.

APPLICANT	Marinko Palinic
RESPONDENT	Gordana Palinic
WHERE HELD	Melbourne
BEFORE	Senior Member E Riegler
HEARING TYPE	Hearing
DATE OF HEARING	8 December 2015
DATE FOR WRITTEN SUBMISSIONS	18 December 2015
DATE OF ORDER	13 January 2016
CITATION	Palinic v Palinic (Building and Property) [2016] VCAT 32

ORDERS

1. The properties known as 74 Board Street, Doncaster in the State of Victoria, more particularly described in Certificate of Title Volume 8586, Folio 785 (**‘the Doncaster Property’**) and 33 Fairhills Drive, Rye in the State of Victoria, more particularly described in Certificate of Title Volume 8633, Folio 375 (**‘the Rye Property’**) (collectively referred to as **‘the Properties’**) shall be offered for sale by auction in the first instance and then by private treaty (if applicable) in accordance with these orders.
2. The sale of the properties shall be conducted by two licensed real estate agents; namely:
 - (a) in respect of the Doncaster Property, Fletcher & Parker (Balwyn) Pty Ltd of 5/1012 Doncaster Road, Doncaster East, 3109 (**‘the Doncaster Real Estate Agent’**); and
 - (b) in respect of the Rye Property, Prentice Real Estate Pty Ltd of 2395 Point Nepean Road, Rye, 3941 (**‘the Rye Real Estate Agent’**).
3. The Doncaster Real Estate Agent and Rye Real Estate Agent (collectively known as **‘the Real Estate Agents’**) shall each carry out such sales using all proper and lawful methods, including advertising as appropriate (whether by

board or otherwise) and arranging open for inspection times but not so as to be at an excessive or unreasonable cost.

4. The auctioneer for each of the sales shall be appointed by the relevant Real Estate Agent.
5. By **23 January 2016**, the parties must sign an Exclusive Sale/Auction Authority in relation to the sale of each of the Properties in favour of each of the Real Estate Agents, subject to each Exclusive Sale/Auction Authority containing, inter alia, the following terms:
 - (a) The commission payable to each of the Real Estate Agents shall not exceed 2.2% (inclusive of GST) of each of the Properties' respective sale prices.
 - (b) The auction date for each of the Properties is to be as recommended by the Real Estate Agents.
 - (c) The exclusive authority period set out in each of the Exclusive Sale/Auction Authorities is to be 60 days after the auction date, so as to enable the Properties to be offered for sale by private treaty if not sold at auction.
 - (d) The reserve price shall be such sum as the parties agree in writing, save and except that if no agreement is reached by no later than two calendar days prior to the auction date, such reserve price is to be determined by the Doncaster Real Estate Agent and Rye Real Estate Agent, as the case requires.
 - (e) If there are no opening bids at the auction, the Real Estate Agents shall open the bidding with a Vendors' bid at the reserve price.
 - (f) Neither party may bid at the auction either by himself or herself or through his or her agent.
 - (g) The parties must ensure that vacant possession of each of the Properties is given at or prior to settlement of any sale.
 - (h) The terms of each contract of sale shall provide for a deposit of not less than 10% upon the signing of the contract with the residue to be payable within 30/60/90 days or as the relevant Real Estate Agent otherwise determines.
6. The parties are equally liable for the payment of the Real Estate Agents' marketing and advertising expenses. In the event that the marketing and advertising expenses relevant to a particular Property is not paid prior to settlement of the sale of that Property, those expenses are to become a charge on the Doncaster Property or Rye Property, as the case may be.
7. The parties shall jointly appoint *Roy Jaffit Rockman & Co*, solicitors of Suite 1, Level 1, 368 Hawthorn Road, Caulfield South as the solicitor to prepare all necessary documents and conduct the conveyance of the Properties upon sale (**'the Solicitor'**).
8. Each party must, within 72 hours of a written request by the Solicitor, execute a *Vendors' Statement* for each of the Properties. If a party refuses or neglects to execute a *Vendors' Statement* or if in the opinion of the Solicitor it is not practicable to make the necessary request of that party, the Principal Registrar

is empowered to execute the *Vendors' Statement* which shall in all respects be treated as an execution by the party that has failed to do so.

9. Prior to the Principal Registrar executing a *Vendors' Statement* pursuant to Order 8 of these orders, the Principal Registrar may require that the Solicitor file an affidavit stating that to the best of the Solicitor's knowledge and belief, the information contained in the *Vendors' Statement* is true and correct.
10. If either Property is not sold at public auction:
 - (a) The unsold Property shall be offered for sale by private treaty at the best price available as determined by the relevant Real Estate Agent but not less than the reserve price. Such reserve price may be varied by written agreement of the parties.
 - (b) If the advertising costs of the auction of a Property has not been paid by the parties in accordance with these orders, those costs will become a charge upon that Property pursuant to Order 6 of these orders.
11. If either of the Properties are sold:
 - (a) Each party must, within 72 hours of a written request by the Solicitor, execute a *Transfer of Land* in respect of the sold Property to the purchaser. If a party refuses or neglects to execute a *Transfer of Land* or if in the opinion of the Solicitor it is not practicable to make the necessary request of that party, the Principal Registrar may execute the *Transfer of Land* which shall in all respects be treated as an execution by the party that has failed to do so.
 - (b) The proceeds of sale of each Property will be applied as follows and in the following priority:
 - (i) The relevant Real Estate Agents' commission or fee, including the auctioneers' fee;
 - (ii) The discharge of any registered encumbrance on the Property;
 - (iii) Any outstanding rates, charges, taxes and imposts levied against the Property;
 - (iv) The reasonable legal costs and disbursements associated with the sale and conveyance of the Property; and
 - (v) The net balance to be paid to the parties in the following proportions:
 - A. Applicant: 46.5%; and
 - B. Respondent: 53.5%.
12. Pursuant to s 228 of the *Property Law Act 1958*, the parties' legal interests in each of the Properties is divided such that their respective holding as joint tenants in the Properties is severed and in lieu thereof, their interests in the Properties are to be held as tenants in common as follows:
 - (a) The Applicant 46.5 parts or shares of 100 parts or shares; and
 - (b) The Respondent 53.5 parts or shares of 100 parts or shares.

13. In order to give effect to Order 12 of these orders:
 - (a) the parties must, by **5 pm on 23 January 2016**, execute *Transfers of Land* for each of the Properties;
 - (b) the executed *Transfers of Land* are to be held by the Respondent's Solicitors, *RF Legal* of 25 Were Street, Montmorency, Vic 3094; and
 - (c) if one or both of the parties dies prior to the sale and settlement of the a Property, then, but only then, the parties must arrange for the relevant Transfer of Land to be registered, in which case:
 - (i) the cost to register the *Transfer of Land* shall be borne equally by the parties and or their estates; and
 - (ii) The surviving party or if there is no surviving party, the personal representative of the deceased party or parties must arrange for such registration within fourteen (14) days of the death of a party.
14. The obligations imposed on each party bind that party and that party's executors and other successors in title (other than a successor in title who purchases either of the Properties in an arm's length transaction at open market).
15. The parties shall comply with all reasonable requests of the Solicitor in a timely manner, failing which, upon the written request of the Solicitor, the Principal Registrar is empowered to execute and deliver on the non-complying party's behalf as its duly authorised agent, any document (including, but not limited to, the Contract of Sale or Transfer of Land) which the non-complying party has failed to sign, execute and/or deliver.
16. Where any contract for the sale of either of the Properties by public auction has not been signed by a party prior to the day of the auction, such contract may be executed on behalf of that party by the Doncaster Real Estate Agent or Rye Real Estate Agent (as the case may be) if a sale is effected.
17. The Respondent must fully and in a timely manner co-operate with the Doncaster Real Estate Agent including:
 - (a) to present the Doncaster Property for inspections at such times as the Doncaster Real Estate Agent requests;
 - (b) to maintain the Doncaster Property in a clean and tidy state prior to all inspections; and
 - (c) to allow the Doncaster Real Estate Agent to make such amendments to furniture and other chattels located in or about the Doncaster Property as the Doncaster Real Estate Agent recommends - at the joint expense of the parties.
18. The parties must not do anything which could adversely affect the advertising/marketing of the Properties for sale or the sale prices thereof.
19. Not less than seven (7) days following settlement of a sale of either of the Properties, the Solicitor and/or the Real Estate Agents must distribute the net sale proceeds from such sale to each of the parties in accordance with these orders.

20. **By 23 January 2016, either party may make application to the Tribunal for an order that these orders be varied or revoked, provided such application is made on the ground that the orders do not reflect the terms of the settlement agreement entered into between the parties on 31 August 2015 or are otherwise impracticable.**
21. Where an application is made by either party pursuant to Order 20 of these orders, the application must be made in writing with a copy of the application served on the opposing party. The application must set out the grounds upon which the application is made and what orders are sought to be varied or revoked.

SENIOR MEMBER E RIEGLER

APPEARANCES:

For Applicant	Mr J Katz
For Respondent	In person

REASONS

INTRODUCTION

1. The Applicant and Respondent are co-owners of two residential properties, one located in Doncaster, the other in Rye. By this proceeding, the Applicant sought orders that each property be sold at public auction or alternatively by private treaty, and that the net proceeds of sale be distributed between the parties.
2. On 31 August 2015, the proceeding was mediated, with the result that terms of settlement were entered into between the parties on that day (**'the Settlement Agreement'**). The Settlement Agreement provided for the sale of both properties on certain conditions and that the proceeding be struck out with no order as to costs. In accordance with that Settlement Agreement, orders were made on 10 September 2015 striking out the proceeding.
3. The Applicant alleges that the Respondent has failed to comply with the Settlement Agreement. As a result, the Applicant filed an application to reinstate the proceeding for the purpose of obtaining orders giving effect to the Settlement Agreement.
4. The application for reinstatement was heard on 8 December 2015. On that day, the Applicant produced draft sale orders, which he contended reflected what was set out under the Settlement Agreement. Although the Respondent did not oppose the sale of the properties, she contended that the orders proposed by the Applicant were either inappropriate or did not accurately reflect what was agreed in the Settlement Agreement.
5. Given the continuing dispute between the parties, I ordered that the proceeding be reinstated. However, I reserved my decision as to what orders should be made for the sale of the properties because I considered that the Respondent should be given more time in which to consider her position. Consequently, I ordered that written submissions, setting out the form of orders which each party sought for the sale of the properties, were to be filed and served by 18 December 2015, following which I would determine the nature and scope of the orders to be made.
6. Written submissions dated 17 December 2015 were filed on behalf of the Applicant. No written submissions were filed by the Respondent. However, supplementary written submissions filed by the Applicant on 18 December 2015 made reference to, and attached, written submissions prepared by or on behalf of the Respondent. Consequently, I have had regard to those submissions in my determination of this proceeding.
7. In summary, the Applicant contends that orders should be made which reflect a settlement agreement entered into between the parties on 31 August 2015.

8. It is clear from the Respondent's written submissions, attached to the Applicants supplementary written submissions, that the Respondent largely agrees that the Properties are to be sold, however, disagrees with certain aspects of the proposed sale orders.

THE SETTLEMENT AGREEMENT

9. The Settlement Agreement is recorded in a handwritten document. That document has been transcribed into a typed document entitled *Heads of Agreement*. Having compared that typed document with the handwritten Settlement Agreement, I find that it substantially accords with what is set out in the handwritten document, save that it has been grammatically corrected and renumbered for ease of reference. The typed *Heads of Agreement* states:

1. The properties known as ... (**Doncaster Property**) and ... (**Rye Property**) (together, **Properties** and each a **Property**) shall be sold in accordance with the terms set out herein and after deducting from the proceeds of such sales or costs and expenses related to such sales, the net sale proceeds shall be paid to Marinko as to 46.5% thereof and to Gordana as to 53.5% thereof.
2. The parties release each other from all claims which each had against the other at the date hereof in relation to any asset which they or either of them owned or owns and agree not to commence any proceedings in relation to any such asset other than to enforce the terms of these Heads of Agreement.
3. By 5 PM on 4 September 2015, the parties' solicitors shall agree in writing on the selling agent for each of the Properties, failing which, the Principal Registrar of VCAT (PR) shall appoint the agent for each of the Properties on the application to the PR by either party.
4. The parties shall sign such Exclusive Sale/Auction Authority in relation to the sale of each Property in favour of the appointed agents within seven (7) days of being provided with such Authority. Each Authority shall contain, inter alia, the following terms:
 - 4.1 the commission payable to the agent shall not exceed 2.2% (inclusive of GST); of the Property's sale price;
 - 4.2 subject to paragraph 4.12 below, such auction date as is recommended by the agent;
 - 4.3 such marketing/advertising expenses and a budget therefor as is recommended by the agent;
 - 4.4 the agent shall have a 60 day exclusive authority period after the auction date to sell the property by private treaty if the property is not sold at auction;

- 4.5 the reserve price shall be such sum as is agreed in writing by the parties not less than 2 days prior to the auction, failing which, such reserve price as is determined by the agent;
 - 4.6 if there are no opening bids at the auction, the agent shall open the bidding as a Vendors' bid at the reserve price;
 - 4.7 neither party may bid by him/herself or his or her agent;
 - 4.8 vacant possession to be provided at settlement;
 - 4.9 a 10% deposit is to be paid by the purchaser on the day the contract of sale for the Property is executed by the purchaser;
 - 4.10 the balance of the purchase price to be payable within 30/60/90 days or as the agent otherwise determines;
 - 4.11 the agent may charge the Property with the agent's commission and marketing/advertising expenses; and
 - 4.12 the auction of the Doncaster Property is to be held not earlier than 7 November 2015.
5. By 11 September 2015 the parties shall agree on the Solicitors to act for the Parties on the sale of the Properties, failing which, the PR shall nominate such Solicitors on application to the PR by either party.
 6. The parties hereby sever the joint tenancy in the Properties and agree, subject to their receipt of the amounts as set out in paragraph 1 hereof, that:
 - 6.1 their interests in the Properties are held as tenants in common with Marinko's share thereof being 46.5% and Gordana's share thereof being 53.5%;
 - 6.2 the parties must execute Transfers of Land for each property to the above effect by 5 p.m. on 4 September 2015 and for such executed Transfers to be held by Gordana's Solicitors, RF legal of 25 Were Street, Montmorency and;
 - 6.3 such Transfers shall only be registered if either Marinko or Gordana dies and in that event:
 - 6.3.1 must be registered forthwith;
 - 6.3.2 the cost to register the Transfers shall be borne equally by the parties; and
 - 6.3.3 each party must procure such registration within fourteen (14) days of the death of a Party.

7. The obligations imposed on each Party bind that Party and that Party's executors and other successors in title.
8. The Parties shall comply with all requests of the Solicitors acting on its sale in a timely manner, failing which, on written request of a Party the PR may assign, execute and deliver on the non-complying party's behalf as its duly authorised agent, documents (including, but not limited to, Contract of Sale and Transfers of Land) which the non-complying party fails to sign, execute and/or deliver and a copy of these Heads of Agreement may be produced to any person in support of the PR's entitlement to do so.
9. The agents marketing/advertising expenses shall be paid equally by the Parties within seven (7) days of being requested to do so by the agent in writing.
10. Gordana shall fully and in a timely manner co-operate with the agent appointed to sell the Doncaster Property including, if so requested:
 - 10.1 to present the Doncaster Property for inspections at such times as the agent requests;
 - 10.2 to maintain the Doncaster Property in a clean and tidy state prior to all inspections; and
 - 10.3 to allow the agent to make such amendments to furniture and other chattels located in or about the Doncaster Property as the agent recommends, at the joint expense of the Parties;
11. The Parties shall do nothing which could adversely affect the advertising/marketing of the Properties for sale or the sale prices thereof.
12. The Parties shall authorise in writing the Solicitors acting on the sale of each Property not less than seven (7) days prior to the settlement of the sale of the Property, to distribute the net sale proceeds from such sale in accordance with these Heads of Agreement.
13. The terms of these Heads of Agreement are legally binding upon and enforceable by each of the Parties.

ACCORD AND SATISFACTION

10. Paragraph 2 of the Heads of Agreement expressly states that the parties *release each other from all claims which each had against the other at the date hereof in relation to any asset which they or either of them owned or owns and agree not to commence any proceeding in relation to any such asset other than to enforce the terms of the Heads of Agreement.* In my view, that release constitutes an accord and satisfaction, such that the original cause of action has been discharged and is now buried beneath the surface of the compromise entered into.

11. The principles applicable to an accord and satisfaction were succinctly set out by Phillips JA in *Osborne v McDermott*.¹ In that case, Phillips JA explained the distinction between the effect of a settlement agreement which is conditional upon the parties doing something and a settlement which operates immediately upon the parties reaching agreement. He stated:

The fundamental distinction between the effect of a compromise by way of mere accord executory and the effect of a compromise by way of accord and satisfaction is that the former does not operate to discharge existing rights and duties unless and until the accord is performed, whereas the latter operates as a discharge immediately the accord (or agreement) is achieved. The reason for the difference in effect flows from their different nature. The first, the mere accord executory, is the compromise of an existing cause of action if and when something is done (usually to the direct advantage of the plaintiff) whereas the second, the accord and satisfaction, is the compromise of an existing cause of action in return for the promise that something be done. To put it more shortly, in return for abandoning his cause of action the plaintiff accepts, in the case of the former, an act, and in the case of the latter, a promise.²

12. In my view, the release set out in paragraph 2 of the *Heads of Agreement* clearly expresses that the original cause of action is discharged in return for what has been agreed under the Settlement Agreement. That being the case, the Settlement Agreement now determines the future rights and obligations of the parties in dealing with the Properties. Therefore, I find that the orders to be made upon reinstatement of this proceeding are orders which must reflect, as far as practicable, what was agreed under the Settlement Agreement.

ORDERS TO BE MADE

13. The Applicant has filed a document entitled *Minute of Proposed Consent Orders* dated 7 December 2015. That document sets out the form of orders which the Applicant sought to be made in this proceeding. Those proposed orders were mirrored in the Applicant's written submissions dated 17 December 2015, save and except for dates, which were adjusted given the passage of time since the *Minute of Proposed Consent Orders* was filed and for the deposit amount on sale be reduced to 5% from 10% (**'the Proposed Orders'**).
14. The Proposed Orders sought largely reflect the terms of the *Heads of Agreement*, save and except that there are some aspects of the Proposed Orders, which go beyond what I consider to be terms of the Settlement Agreement. Therefore, it is necessary to consider the Proposed Orders further to ensure that what is being sought does not conflict with what was agreed.

¹ [1998] 3 VR 1.

² *Ibid* at 7-9.

15. Having regard to the Respondents written submissions, it appears that there are three aspects of the Proposed Orders which the Respondent takes issue with. They are:
- (a) she does not want the Applicant's legal representatives to be involved in the sale process of either Property;
 - (b) she elects *Contour Conveyancing* as the conveyancing agent to prepare the necessary documentation and conveyance for the Rye Property; and
 - (c) she elects *Fletcher & Parker (Balwyn) Pty Ltd* as the Rye Real Estate Agent.

Involvement of Applicant's legal representatives

16. In relation to the Respondent's first point of contention, it has not been suggested or proposed that the Applicant's legal representatives are to be involved in the sale process of either of the Properties, save and except that they are to hold executed Transfers of Land reflecting the partition of the Properties in accordance with paragraph 6 of the Heads of Agreement (see above). I do not regard this to be an involvement in the sale process of either of the Properties. Therefore, I do not find that the Proposed Orders conflict with what the Respondent has submitted.

Who should be the solicitor?

17. The Respondent submits that Contour Conveyancing should be appointed as the conveyancing agent responsible for preparing contract documentation and conveyancing of the two Properties. The Applicant submits that it would be more appropriate to appoint a solicitor to undertake that task. To that end, the Respondent has nominated *Roy Jaffit Rockman & Co* as the solicitor to be engaged to prepare all relevant documentation and effect the conveyance of the two Properties. The Respondent submits that in the circumstances surrounding the parties' acrimonious relationship, it is in the best interests of the parties to appoint a solicitor and not a conveyancer to act for the parties in relation to the sale of the Properties.
18. In my view, there are complexities in this proceeding which may ultimately require legal knowledge going beyond the qualifications of a conveyancing agent. In particular, the potential partitioning of the Properties, the requirement to hold monies in trust, the disbursement of those monies and the preparation of special conditions in the contracts of sale are matters which I consider more appropriately dealt with by a legally qualified legal practitioner, rather than a conveyancing agent. Accordingly, I find that given the nuances of this proceeding, *Roy Jaffit Rockman & Co* is to be appointed as the solicitor responsible for preparing documentation and effecting the conveyance of the Properties.

Should there be one or two real estate agents appointed?

19. Both at the hearing on 8 December 2015 and in her written submissions, the Respondent queried why two real estate agents would need to be appointed, one for each of the properties to be sold. In answer to that, the Applicant contended that it was inappropriate for one real estate agent with local knowledge of one area to be engaged to sell the other property located in a geographically and demographically different area. Mr Katz, solicitor for the Applicant, argued that each real estate agent would need to be experienced in selling property in each of the particular areas where each property was located. Therefore, it was appropriate for two local agents to be engaged, rather than have one real estate agent sell both properties.
20. In my view, the express words of the Settlement Agreement are to be construed to mean that two real estate agents will be nominated, rather than one agent engaged to conduct the sale of both properties. In particular, paragraph 3 of the Heads of Agreement states that *the parties Solicitors shall agree in writing on the selling agent for each of the properties, failing which, the Principal Registrar of VCAT (PR) shall appoint the agent for each of the properties*. I consider that the words *for each of the properties* means the appointment of two real estate agents. Had the parties intended that there be only one real estate appointed the Settlement Agreement would have simply stated that the parties *shall agree in writing on a selling agent for the properties*.
21. Further, to the extent that there is any ambiguity in the Settlement Agreement as to whether one or two real estate agents are to be appointed, I am of the opinion that an interpretation that results in a more reasonable outcome is to be adopted.
22. In *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*,³ Gibbs J said:

... The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate'...⁴
23. Having regard to the language used in the Settlement Agreement, I accept the Applicant's submission that experience in selling properties in a particular area is desirable. The corollary of that proposition is that the appointed real estate agent should not be called upon to sell property in an area which he or she is unfamiliar with. Therefore, I consider that, to the extent that there is any ambiguity in the words used in the Settlement

³ (1973) 129 CLR 99.

⁴ Ibid at 109-10.

Agreement, an interpretation which lends itself to the appointment of two real estate agents, each with specialised knowledge or experience in the particular area of each Property, is the preferred interpretation.

CONCLUSION

24. Given that the above deals with each of the issues in contention, the remaining aspects of the Proposed Orders are accepted by the Respondent.
25. Moreover, as I have already indicated, the Proposed Orders largely reproduce what is stated in the Heads of Agreement. Accordingly, I find that those Proposed Orders reflect what I consider to be the form of orders required to ensure a just and fair sale and division of the Properties, subject to the following limitations:
 - (a) where the proposed orders conflict with what is written in the Settlement Agreement, the words of the Settlement Agreement shall prevail;
 - (b) having regard to the fact that some aspects of the Settlement Agreement either seek to extend the powers of the Tribunal beyond what is contemplated under the *Property Law Act 1958* or otherwise are unclear or inappropriate, the orders will be varied accordingly; and
 - (c) in a limited number of places, the wording of the Settlement Agreement had been clarified in order to eliminate potential conflict in the future (see for example Orders 5, 6, 7, 11(b) and 13).
26. As my determination of the nature and scope of the sale orders marginally departs from both the terms of the Settlement Agreement and the Proposed Orders, I will give the parties liberty to make application to vary or revoke those orders, should they consider that the orders do not accord with the terms of the Settlement Agreement or are otherwise impracticable.

SENIOR MEMBER E RIEGLER