

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP888/2016

CATCHWORDS

Co-ownership – Part IV of the *Property Law Act 1958 (Vic)*, sale and division of property under s 225 of the *Property Law Act 1958*; objection to jurisdiction on the grounds that Tribunal must exercise jurisdiction under the *Bankruptcy Act 1996 (Cth)* and is not empowered to do so; s 75 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* - distinction between exercising jurisdiction and applying the Bankruptcy Act - alleged trust under a will - alleged life interest – whether unequivocally necessary to declare that the trustees in bankruptcy hold the property in trust - whether there is unequivocally a bankruptcy dispute.

FIRST APPLICANT	Mr Scott Pascoe
SECOND APPLICANT	Mr Andrew John Scott
RESPONDENT	Miss Nadia Teresa Angela Gianello
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	19 October 2016
DATE OF ORDER	11 November 2016
CITATION	Pascoe v Gianello (Building and Property) [2016] VCAT 1903

ORDERS

- 1 The respondent's application to dismiss the proceeding for want of jurisdiction is dismissed.
- 2 By 12 December 2016 the respondent must *file and serve* Points of Defence specifying the material facts relied upon. Any set-off claimed must be fully set out.
- 3 **This proceeding (and any counterclaim) is listed for a compulsory conference on 2 February 2017 commencing at 10.00 a.m. at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.**
- 4 The parties may each be represented by professional advocates at the conference.

- 5 All parties must attend a compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has, for all practical purposes, unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.
- 6 The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must *file and exchange* copies by 4.00 p.m. on 30 January 2017. The position paper must be marked 'Confidential and without prejudice – for the purposes of the compulsory conference only'. **Upon receipt I direct the principal registrar to place the position papers in a sealed envelope with the above notation.**
- 7 Costs are reserved with liberty to apply.
- 8 There is general liberty to apply.
- 9 **I direct the Principal Registrar to send copies of these orders and reasons to the parties by email.**

Warning

The parties are warned that the registry will monitor compliance with these directions and may list a further directions hearing if there is any failure to comply. If a directions hearing is listed, orders may be made under s78 of the *Victorian Civil and Administrative Tribunal Act 1998*. Any party who has failed to comply with these directions may be ordered to pay costs including the costs of such directions hearing and any costs thrown away, or an order may be made determining the proceeding against the party who has failed to comply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants:	Mr A. Purton of Counsel
For Respondent	Mr B. Devanny of Counsel

REASONS

- 1 The respondent in this proceeding, Ms Nadia Gianello, has applied to dismiss the proceeding for want of jurisdiction. The applicants, Mr Pascoe and Mr Scott, are the trustees in bankruptcy of the bankrupt estate of Robert Daniel Gianello (“the Bankrupt”). The respondent and Bankrupt are sister and brother. They inherited the Property under their mother’s will (‘the will’).
- 2 On 6 July 2015 the applicants commenced these proceedings under section 225 of the *Property Law Act 1958* (Vic) (“PL Act”) to sell and divide the proceeds of a property in Vermont South (“the Property”).
- 3 Briefly stated, the respondent submits that the proceeding necessitates exercising jurisdiction in bankruptcy, which is beyond the jurisdiction of this Tribunal.

SECTION 75 OF THE VCAT ACT

- 4 Although the respondent did not characterise it as such, I treat her application as being under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) which provides in part:

75 Summary dismissal of unjustified proceedings

- (1) At any time the Tribunal may make an order summarily dismissing or striking out all, or any part of a proceeding that, in its opinion –
 - (a) is frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.

- 5 The operation of s 75 has been considered many times by this Tribunal, In *Norman v Australian Red Cross Society* [1998] 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 VR 102 Deputy President McKenzie said:

...

- (d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, *Civil Procedure Victoria*). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.
- (e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to

disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding. [Underlining added]

- 6 As Judge Bowman VP said in *Wizardry Kennels v Semtech Animal Breeding Services* [2006] VCAT 2368:

[T]his Tribunal is a creature of statute and, whilst it has broad powers, its jurisdiction is limited to that conferred by the VCAT Act and by the enabling enactments ... VCAT may be decision-making body not bound by the rules of evidence, and within a statutory obligation to conduct proceedings with as little formality and technicality as a proper consideration of the matters permits. However its essential jurisdiction must be established, and, however tempting it might be to determine what might appear to be a simple factual matter in a prompt, economical and hopefully fair way, that cannot be done if the jurisdiction so to do does not exist.

- 7 I am satisfied that if the Tribunal lacks jurisdiction, the applicants' application is at least "misconceived" under s 75(1)(a) of the VCAT Act. Nevertheless, I approach the application on the basis that I should exercise caution before summarily dismissing the proceeding, and should only do so if it is unequivocal that jurisdiction is lacking.

The application to dismiss

- 8 On 17 August 2016, the respondent lodged an application as follows:

1. This proceeding be dismissed for want of jurisdiction:
 - (a) the applicants' claim requires determination of the existence of the applicants interest purported to have vested under section 58(1)(a) of the *Bankruptcy Act 1996* (Cth).
 - (b) in order to do so, the Tribunal would be required to make a declaration as to the content of the bankrupt estate of Robert Gianello.
 - (c) that jurisdiction is exclusively conferred on the Federal Court and the Federal Circuit Court and that jurisdiction is exclusive pursuant to section 27(1) of the *Bankruptcy Act 1996* (Cth)

- 9 The respondent's application is supported by an affidavit by her dated 10 August 2016. Written submissions for the respondent dated 20 September 2016 were filed on 13 October 2016 and written submissions of the applicants dated 14 October 2016 were filed on 17 October 2016. At the hearing on 19 October 2016 the applicants were represented by Mr A Purton of Counsel and the respondent by Mr B Devanny of Counsel.

Section 225 of the Property Law Act

- 10 Section 225 of the PL Act relevantly provides:

Application for order for sale or division of co-owned land or goods

- (1) A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.
 - (2) An application under this section may request—
 - (a) the sale of the land or goods and the division of the proceeds among the co-owners; or
 - (b) the physical division of the land or goods among the co-owners; or
 - (c) a combination of the matters specified in paragraphs (a) and (b).
- 11 The applicants say at paragraph 5 of their application that the registered interests in the Property are:
 - (a) the respondent is the sole proprietor of two of a total of three equal undivided shares, and
 - (b) the Bankrupt is the sole proprietor of one of a total of three equal undivided shares.
- 12 The parties agree that this is so, as demonstrated by the respondent’s title search which was attachment B to her affidavit. The applicants handed up a title search with copies of two supporting documents, both of which are dated 6 September 2011 although during the directions hearing it was suggested that the first was dated 5 September 2011.
- 13 The first is document AJ176460E, headed “Application by Legal Personal Representative”. The document includes the words:

The applicant applies as legal personal representative of the deceased registered proprietor to be registered as the proprietor of the estate and interest of the deceased in the land described.
- 14 The “applicant” referred to in the Application by Legal Personal Representative is collectively the respondent and the Bankrupt.
- 15 The second document is headed “Transfer of Land”. The transferors are named as the respondent and the Bankrupt. The transferees are named as the respondent as to two of a total of three equal undivided shares and the Bankrupt as to one of a total of three undivided shares as tenants in common.
- 16 On the basis of the names on the title, the applicants do not appear to be co-owners of the Property. However, they say that by virtue of s 132 of the *Bankruptcy Act 1966* (Cth) the interest of the Bankrupt vested in them on 17 March 2014; the day they were appointed trustees in bankruptcy.
- 17 The respondent says that the determination of the applicants’ application will require the Tribunal to make a determination of the existence of the applicants’ interest which purportedly vested under s 58(1)(a) of the *Bankruptcy Act*. That may be the case. However, for the purposes of determining this s 75 application I do not have to decide the issue today. I

merely find that it is arguable that the applicants have vested in them any interest of the Bankrupt. That finding is sufficient to justify a decision today not to dismiss their claim summarily. They are entitled to have a hearing about the issue.

The will

18 The relevant parts of the will are as follows:

5. I GIVE DEVISE AND BEQUEATH to my Trustees my real estate located at ... Vermont South as to hold in Trust and further direct my Trustees as follows:

5.1 SUBJECT to my daughter paying all rates, taxes and assessments on all payable in respect of the said property, I DIRECT that she be permitted to live and have the use of the house for as long as she likes.

5.2 I GIVE DEVISE AND BEQUEATH my real estate located at ... Drive Vermont South as to:

(a) two (2) parts to my daughter [the respondent];

(b) one (1) part to my son [the Bankrupt].

[There follow provisions regarding gifts of land to grandchildren if the respondent or the Bankrupt do not attain a vested interest]

5.3. THAT SUBJECT TO paragraph 5.2 hereof in the event that either my daughter or my son wishing to attain their respective interest I DIRECT that my Trustees shall invite both of them to offer to buy out the other for a value of their respective share based on property market valuation to be facilitated by the Trustees, failing agreement I DIRECT my Trustees to sell the said property and to distribute the proceeds in accordance with paragraphs 5.2 (a) and (b). [sic]

Alleged life interest

19 The respondent states that to her knowledge she has paid all rates, taxes and assessments, she lives in the Property and wishes to continue to do so.

20 The respondent states that she believes she has a life interest in the Property by virtue of paragraph 5.1 of the will and it would be necessary for the Tribunal to make a declaration as to ownership before there can be an order for sale and division of the proceeds. She states that by its nature, such an application will require a declaration for or against the interest of the Bankrupt's estate.

21 At paragraph 7 of her affidavit the respondent stated:

The Applicants' claim in this proceeding is to sell the property, and they seek to do so free of my interest to remain in the property for as long as I like. I consider this right to be a life interest in the property, and will be seeking a declaration from a court with jurisdiction to

decide this. By its very nature, such an application will require a declaration for or against the interest of my brother's bankrupt estate. [underlining added].

Alleged trust

- 22 The respondent submits that the registration on title is pursuant to paragraph 5.2 of the will and accordingly the Property is held on trust pursuant to the terms of the will. She further submits that as the Property is held on trust pursuant to the will, it does not form part of her brother's bankrupt estate pursuant to section 116(2)(a) of the *Bankruptcy Act* (which relates to property held by the bankrupt in trust for another person) "unless and until a federal court declares that his interest has in fact vested in the trustees".

The will and the bankruptcy dispute

- 23 The respondent submits that in order to make an order under section 225 of the PL Act, the Tribunal will first have to determine whether:
- (a) she has a life interest in the Property.
 - (b) her interest is held on trust under the terms of the will, with the result that it is possible that the *Bankrupt's* beneficial interest under paragraph 5.2 of the will does not form part of his Bankrupt estate.
- 24 The respondent submits that these matters necessitate a determination for or against the bankrupt estate of her brother and therefore require the finder of fact to exercise jurisdiction in bankruptcy. She submits that neither the Tribunal nor a State Court has that jurisdiction.

Is the dispute a bankruptcy dispute?

- 25 The respondent submits that the Court of Appeal decision in *Jakimowicz v Jacks* [2016] VSCA 42 determines that the jurisdiction the applicants wish the Tribunal to exercise amounts to exercising jurisdiction in bankruptcy.
- 26 In order to better understand the respondent's contention it is appropriate to refer to two provisions in the *Bankruptcy Act*. Firstly, s 27 of the Bankruptcy Act provides in part:

Bankruptcy courts

- (1) The Federal Court and the Federal Circuit Court have concurrent jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than:
 - (a) the jurisdiction of the High Court under section 75 of the Constitution; or
 - (b) the jurisdiction of the Family Court ...
- 27 Secondly, s 5 relevantly provides:

"bankruptcy", in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act.

28 The respondent referred to paragraphs 40 and 41 in *Jakimowicz v Jacks*, where the Court discussed jurisdiction in bankruptcy as follows:

... when a trustee is a party to the litigation and claims that the property in dispute... has vested in the trustee pursuant to S 58 of the Act and is divisible property under section 116. In that situation, the question is not just one of standing. Rather, there is also a question that requires a binding determination as to whether the property has vested in the trustee. In those cases a court's finding will necessarily have an effect on the trustee's title. That was the situation in the following cases:

- *Scott v Bagshaw* (claim by trustee to real property and proceeds of sale);
- *Cordes v Dr Peter Ironside Pty Ltd* (claim by bankrupt against trustee for reconveyance of real property);
- *Gorowski* (claim against trustee by third party alleging she had an equitable interest in property); and
- *Truthful Endeavour* (claim by a third party that property held on trust for her by trustee in bankruptcy).

41. Consequently, while it is necessary in determining the sole issue of standing to consider whether the property is divisible property and has vested in the trustee in bankruptcy, all that a court is doing in that situation is applying the Act. It is not determining for or against the title of the trustee to the property, as it must of necessity do if the trustee is a party and makes a claim to the property or if the trustee claims the right to bring the action instead of the bankrupt. Where the trustee makes no claim to the property and does not claim that the cause of action has vested, a court is not exercising jurisdiction in bankruptcy.

29 At paragraph 7 of the respondent's submissions dated 20 September 2016 she argues:

In this case, the trustees are parties to the litigation, and claim the right to bring the action instead of the bankrupt and in order for the Tribunal to make the orders for sale of the property that the trustees seek, the Tribunal must make a declaration that the property has in fact vested in the trustees.

30 At the hearing Mr Devanny expanded on his written submissions to say that there is a question about the capacity in which the Bankrupt holds the Property, whether in trust as an executor, or beneficially and legally in his personal capacity. He added that even if the Bankrupt holds the Property personally, a declaration is still required as to whether it is subject to the respondent's alleged life interest.

31 In response, the applicants draw a distinction between "exercise of jurisdiction in bankruptcy" – which no-one but a Federal Court may do – and "apply[ing] the law under the *Bankruptcy Act*". Paragraph 18 of their submission of 14 October 2016 states:

The Full Court's statement [in *Jakimowicz*] at [40] and [41] of the judgement should properly be confined to cases where there is an actual dispute regarding the trustee's entitlement to a right – whether it be by challenge by the bankrupt or a third party. It should not be read as something of universal application.

- 32 The applicants submit that by operation of s 132 of the Bankruptcy Act, the interest of the Bankrupt in the Property vested in the applicants on 17 March 2014. The applicants submit that s 116(2)(a) of the Bankruptcy Act does not apply. They say that on any view the interest of the Bankrupt has vested in them and the Bankrupt's share is held on trust for the Bankrupt alone.
- 33 The applicants refer to the decision in *Cooper v Maloney (Number 5)* [2012] SASC 211, where Blue J considered the issue at paragraphs 66 to 67 and said:
1. Section 27(1) is the source of the Federal Court's jurisdiction in Bankruptcy. Section 30 and 31 did not confer jurisdiction, although they elucidate what is encompassed as falling within the concept of "jurisdiction in bankruptcy".
 2. The mere fact that it is necessary in a proceeding to apply or interpret the provision of the Bankruptcy Act does not mean that a court is exercising jurisdiction in bankruptcy within the meaning of sections 5 and 27.
 3. The Bankruptcy Act does not deprive State courts of their ordinary jurisdiction in matters arising under the general law as between a bankruptcy trustee and a stranger to the bankruptcy or as between the bankrupt and a stranger to the bankruptcy.
 4. Section 27 of the Bankruptcy Act vests exclusive jurisdiction in the federal courts to determine, in proceedings to which a bankrupt and the trustee are parties, the title to property contested between them.
 5. State and Territory courts have jurisdiction to determine the standing of a bankrupt as between the bankrupt and a stranger to the bankruptcy. This is so notwithstanding that the determination depends upon the construction of sections 58 and 116 of the Bankruptcy Act.
- 34 The applicants submit that *Jakimowicz v Jacks* should not be read to exclude state courts and tribunals from determining cases where a trustee in bankruptcy seeks to exercise a right that has vested in them. They say the judgement does not stand for any such proposition, particularly where there is no challenge to a trustee in bankruptcy's entitlement to a right, but should be limited to cases where there is an actual dispute regarding the trustee's entitlement to a right - whether by challenge by the bankrupt or a third party.

- 35 The applicants say that in this case there is no dispute that the subject right vested in them and there is no credible argument that they are not entitled to exercise the right.

The respondent has not sought a declaration elsewhere

- 36 At the date of the directions hearing the respondent had made no application to a federal court for a declaration regarding her alleged life interest in the property. Mr Devanny submitted that it is unnecessary for the respondent to seek such a declaration. He submitted that as a proceeding has commenced in the Tribunal there could be difficulties commencing elsewhere. I am not sure this is the case. In my opinion, if a Federal Court were to be asked by the respondent to consider the life interest in the context of the bankruptcy, the respondent might apply under s77 of the VCAT Act for an order that the court is a more appropriate forum.
- 37 I note that in the matter of *Dixon (Trustee) v Gamble (Bankrupt) & Anor* [2016] FCCA 572, which was a proceeding brought against a bankrupt and his co-owner by the bankrupt's trustees in bankruptcy, Judge Hartnett made orders similar to those sought by the applicants in this proceeding under s225 of the PL Act. A difference between that proceeding and this is that the Bankrupt is not a party to the proceeding before me.
- 38 As demonstrated in the matter of *Lyle v Lyle* [2011] VCAT 323, the Tribunal has the power to consider whether there is a life interest and what its impact is upon an application for sale and division of property.

CONCLUSION

- 39 For the purposes of the respondent's application and applying s75 of the VCAT Act, I am not satisfied unequivocally that an eventual order by the Tribunal necessitates exercising jurisdiction in bankruptcy.
- 40 I do not have to decide whether the applicants are right in asserting that a distinction exists between the exercise of jurisdiction in bankruptcy and the application of the law under the *Bankruptcy Act*, as is contended by the applicants. It is sufficient for today's purposes that I find that that proposition is arguable. The applicants are entitled to argue the matter in a hearing.

ORDERS

- 41 I dismiss the respondent's application to dismiss the proceeding for want of jurisdiction and reserve costs with liberty to apply.
- 42 As discussed at the end of the hearing, I make orders for Points of Defence and a compulsory conference.

SENIOR MEMBER M. LOTHIAN