VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE: BP1369/2016

CATCHWORDS

Co-ownership – jurisdiction – meaning of "tenants" in the definition of "co-owner" – whether an alleged lessee is arguably a co-owner – dispute over division of proceeds of sale – whether applicant can be compensated for expenditure incurred before she became a co-owner – *Property Law Act 1958* ss 3, 225, 228, 233.

APPLICANT:	Mrs Graziella Tsembas
RESPONDENT:	Mr Walter Ciciulla
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	13 September 2017
DATE OF ORDER:	24 October 2017
DATE OF REASONS:	24 October 2017
CITATION:	Tsembas v Ciciulla (Building and Property) [2017] VCAT 1695

ORDERS

1. Pursuant to s 228 of the *Property Law Act 1958* the Tribunal orders:

   A. The property (116 Morris Street, Sunshine, Victoria, more particularly described in Certificate of Title Volume 02416 Folio 012) be sold at public auction.

   B. The public auction be conducted by a licensed Real Estate Agent selected by the principal registrar of VCAT who shall, to the exclusion of the parties, be empowered to give the necessary directions.

   C. Each party is at liberty to submit the name or names of a Real Estate Agent to the principal registrar who shall consider such submissions but shall not be bound by them.

D. The parties be at liberty to bid at the auction provided each party holds a written pre-approval form from the financial institution for finance of the property for at least the reserve selling price or otherwise provide satisfactory evidence to the principal registrar of an ability to pay the purchase price.

E. The deposit for the purchase price shall be payable of not less than ten percent (10%) upon the signing of the contract with the residue to be payable within such time as the Real Estate Agent determines.

F. The reserve selling price will be $900,000.00 or such other price as the parties may agree upon, or as determined by the Real Estate Agent in the Real Estate Agent's absolute discretion.

G. Upon sale of the property each party to the proceeding shall within seventy-two (72) hours of request by the principal registrar execute a Transfer of Land in respect of the property to the Purchaser.

H. If a party to this proceeding refuses or neglects to execute a Transfer of Land or if in the opinion of the principal registrar it is not practicable for a party to execute it, the principal registrar is authorised to execute the Transfer of Land which shall in all respects be treated as executed by that party. A solicitor's affidavit as to a party's refusal or neglect to execute the Transfer of Land shall be conclusive evidence to the principal registrar of that fact.

I. The principal registrar may give such directions and execute such documents as may be in the principal registrar's opinion, be necessary or desirable to give effect to these orders.

J. If the property is not sold, advertising costs of the auction as the principal registrar deems appropriate, become a charge upon the property.

K. If the property is sold the proceeds will be applied as follows:

(1) The Real Estate Agent's Commission and advertising and any other costs and expenses of the sale.

(2) The discharge of any registered encumbrance on the property.

(3) $6,833.00 to be paid to the applicant.

(4) The nett balance to be divided equally between the applicant and the respondent.

2. There is liberty to apply for any further orders or directions:

   (a) as to any matter arising under this order; or

   (b) as to how moneys held in the trust account of Ray White Taylors Lakes, estate agents, should be disbursed.

3. The respondent's application for costs is refused.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. W. Gillies of Counsel
For the Respondent:	Mr. L. Hogan of Counsel

REASONS FOR DECISION

1. The applicant Graziella Tsembas – whom her family call Grace, or Gracie – and her brother Walter Ciciulla, the respondent, are registered as proprietors of land at 116 Morris Street, Sunshine ("the Morris Street land") as tenants in common in equal shares. So they are co-owners of the Morris Street land within the meaning of Part IV of the *Property Law Act 1958* ("the Act"). In this proceeding she applies for an order for sale of the Morris Street land and division of the proceeds of sale. Her brother does not oppose an order being made for sale. The dispute in the proceeding is about how the proceeds of sale should be divided: what compensation, reimbursement or adjustment should be allowed or made to achieve a just and fair division.

2. The parties are the children of Angelo Ciciulla and Lina Ciciulla. Several male members of the Ciciulla family have been named in the evidence given at the hearing. I do not need to mention them all, but it would still be confusing to refer to "Mr Ciciulla". Without meaning any disrespect to anyone, I propose for convenience to refer to persons concerned as follows:

Reference	**Person/s**
Grace	Graziella Tsembas, applicant
Walter	Walter Ciciulla, respondent
The father	Angelo Ciciulla
The mother	Lina Ciciulla
The parents	Angelo Ciciulla and Lina Ciciulla
Robert	Robert Ciciulla, a cousin of Grace and Walter

3. The parents had purchased the Morris Street land in 1990, in the names of the mother and Walter as tenants in common in equal shares. An existing house was demolished and two units, unit 1 and unit 2, were built on the land. The parents paid for the construction costs although Grace alleges that she paid for completion of the construction of unit 2 beyond lock-up stage. Walter and his wife began to live in unit 1. Grace and her husband began to live in unit 2.

4. In 2003 the mother made a gift of her half share in the Morris Street land to Grace. On 31 July 2013 Grace became registered as a proprietor of the Morris Street land as tenant in common with Walter. So Grace and Walter became co-owners on 31 July 2003. The Morris Street land is described in Certificate of Title volume 02416 folio 012.[1]

[1] Exhibit R2, the applicant to the Tribunal Book, contains at page 53 a copy of a page from the Certificate of Title and the registration date of 31 July 2003.

5. Another parcel of land, at 21 Sun Crescent, Sunshine ("the Sun Crescent land"), has been made the subject of Grace's claim. She and the parents are registered as proprietors of the Sun Crescent land as tenants in common in unequal shares. She alleges that she and Walter have been co-owners of the Sun Crescent land because they have been joint tenants of it. The Sun Crescent land consists of a shop and dwelling. Grace claims, presumably under ss 28A and 234 of the Act, an order that Walter account to her for rent he has received in relation to the Sun Crescent land. She also claims to be entitled to an adjustment in the division of the proceeds of sale of the Morris Street land because she has paid rates levied upon the Sun Crescent land.

6. For reasons I give below I consider the Tribunal has no jurisdiction under the Act, and probably no jurisdiction at all, to determine the claims that Grace makes against Walter in relation to the Sun Crescent land, and so I leave those claims out of the reckoning when I deal with the question of how the proceeds of sale of the Morris Street land should be divided between Grace and Walter.

Use and Occupation of Unit 1, Morris Street land

7. Unit 1 on the Morris Street land was complete and ready for occupation by 1996. Walter and his wife occupied unit 1, rent free, from 1996 to 2001. He and the mother were the co-owners of all the Morris Street land during that period.

8. After Walter moved out of unit 1 in 2001, he wished to lease unit 1 to tenants but the mother would not agree. That was Walter's evidence, which I accept. I infer that unit 1 was left vacant until the time in 2003 when Ahmad Afanahi began to occupy it as a tenant.

9. In the meantime the mother had made the gift of her half interest in the Morris Street land to Grace. She and Walter became co-owners on 31 July 2003.

10. Grace and Walter agree that after that date he took no part in finding a tenant for unit 1 or in paying rates, land tax and other outgoings in relation to unit 1. Grace alleges that after that date she paid all rates, land tax and other outgoings for both unit 1 and unit 2, up to the present. Walter does not concede that but does not seriously dispute it.

11. Ahmad Afanahi was an acquaintance of the parents. With their and Grace's approval he became a tenant of unit 1. The date upon which he began to occupy unit 1 as a tenant was not specified in the evidence but Mr Afanahi's evidence was that it was some date in 2003. There was no written tenancy agreement. At first the rent was $150.00 per week but it was increased in 2012 to $200.00 per week.

12. How that rent was paid and received is the largest issue of fact in this proceeding. Grace's case is that Mr Afanahi paid the rent monthly, in cash, at the parents' home in Hampshire Road, Sunshine; by appointment, he would in one month make a cash payment of rent for the month to Grace, and in the next month make a cash payment to Walter for that month's rent, so that he paid rent to each of them in alternate months. He did this until 1 July 2014. Grace's case in that respect is supported by evidence of the parents and of Mr Afanahi himself. Walter's case is that he has never received any rent from Mr Afanahi or has had anything to do with the tenancy of unit 1.

13. After 1 July 2014 and until he vacated unit 1, Mr Afanahi paid rent to Grace only, at her request. He vacated on 14 November 2016. There has been no evidence of unit 1 being occupied after he vacated. I infer that unit 1 has been left vacant pending the outcome of this proceeding, which Grace began on 14 October 2016.

14. Grace claims to be entitled to an adjustment in her favour when the proceeds of sale are divided, because she has paid rates, land tax and insurance for unit 1 but Walter has not. Walter claims to be entitled to an adjustment in his favour because he has not received any rent from Mr Afanahi but Grace has.

Use and Occupation of Unit 2, Morris Street land

15. According to Grace, unit 2 was built only to lock-up stage by 1996. Her evidence was that she and her husband completed and paid for all work after the lock-up stage and then moved into unit 2 in 1998. She claims to have spent $17,800.00 in the completion of unit 2 to make it ready for occupation.

16. Grace and her husband continued to occupy unit 2, rent free, until shortly before 1 December 2009. In the meantime, following the mother's gift, she had become co-owner of the Morris Street land with Walter on 31 May 2003.

17. On or about 1 December 2009, Nexmije (known as Nancy) Lipovica and her husband Faton Lipovica took possession of unit 2 as tenants. For convenience I refer to them as Nancy and Faton. Nancy was a work colleague of Grace. According to a witness statement which Grace made, the basis of Nancy and Faton's tenancy at the beginning was that they paid outgoings of $150.00 per week but no rent. During Grace's oral evidence, however, it became apparent that her version was that Nancy and Faton paid her $150.00 per week, which she used towards payment of outgoings. So it would be correct to characterise the payment as rent. According to Grace's evidence, the arrangement changed in 2014 once Nancy qualified for rent assistance: Nancy and Faton thereafter paid rent of $200.00 per week. Hearsay evidence from Nancy, given through Walter's solicitor, was that she and Faton had paid $200.00 per week from the beginning of their tenancy until the end.

18. On 26 February 2016 Nancy and Faton vacated unit 2. Grace's evidence was that unit 2 required extensive repairs to be done to it to make it re-lettable after Nancy and Faton had vacated, and that she spent $36,616.65 on maintenance of and repairs to unit 2 during and after Nancy and Faton's tenancy. She has also paid all rates, land tax, and insurance in relation to unit 2.

19. On 18 May 2016 unit 2 was leased to a Ms Nogueira and Mr Jalloh. There was written tenancy agreement[2] which named Grace alone as the landlord. The rent payable was $1,477.00 per month, or $340.00 per week. In cross-examination Grace gave evidence that for the first three months of the tenancy she received the rent; then, at Walter's insistence, the estate agents managing the tenancy, Ray White Taylors Lakes, have retained the rent in a trust account. A letter from Ray White Taylors Lakes[3], evidencing the arrangement, states that the first four months' rent, not three, were paid to Grace.

20. Grace claims to be entitled to adjustments in her favour, when the proceeds of sale are divided, for (a) what she paid to improve unit 2 when she took possession of it in 1998, (b) the rates, land tax and insurance for unit 2 which she has paid, and (c) the cost of repairs to and maintenance of unit 2 during and at the end of Nancy and Faton's tenancy.

21. Walter claims to be entitled to adjustments in his favour for (a) the rent that Grace alone received from Nancy and Faton, (b) the first three or four months of rent received from the present tenants of unit 2, and (c) an amount equivalent to the market rent that could have been achieved for unit 2 from 31 May 2003 until the tenancy to Nancy and Faton began. He says that he is entitled to make that last claim because Grace is claiming for the cost of improvements, outgoing, maintenance and repairs.

The Hearing

22. Grace's legal representatives had prepared a three-volume Tribunal Book, which included copies of all documents which were said to be evidence of payments made by her in respect of which she was making claims for adjustment in the division of proceeds of sale. Walter's legal representatives had prepared a supplementary book of documents. The parties agreed that I should receive all of those volumes as evidence.[4]

23. For Grace, there was oral evidence from:

    (a) Grace, who verified two witness statement she had made and gave other evidence;

[2] Tribunal Book ("TB") pp 306-311.
[3] TB p 167.
[4] The Tribunal Book is exhibit AR. The supplementary book is exhibit R2.

(b) The father and the mother who each gave evidence with the assistance of an interpreter, verified a witness statement that he or she had made, and gave other evidence; and

(c) Ahmad Afanahi, who gave evidence by telephone, in the course of which he verified a short witness statement he had made.

24. For Walter, there was oral evidence from the following persons, who each verified a witness statement he had made and gave other evidence:

(d) Walter himself;

(e) Robert; and

(f) Walter's solicitor, David Campbell Skeels, who gave evidence of conversations with Nancy and of email communications to and from Nancy.

25. For Walter I also received, without objection, written evidence from a valuer, Karl Cundall, of market rent that unit 2 would have attracted at all material times.

26. When opening their respective cases, and when making their respective final addresses, Counsel for each of the parties spoke to detailed written outlines, which have assisted me considerably.

The Act

27. So far as is relevant to the claims made in this proceeding, s 225 of the Act provides:

> **225 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: …

"This Division" is Division 2 of Part IV of the Act.

28. Section 226 of the Act provides that all co-owners of the land to which the proceeding related are parties to a proceeding brought under Division 2.

29. In the definition section s 222, "co-owner" is defined, for the purposes of Part IV of the Act, as follows:

> In this Part—
>
> co-owner means a person who has an interest in land or goods with one or more other persons as—
>
> (a) joint tenants; or
>
> (b) tenants in common.

30. Section 222 defines "land" as having the same meaning as it has in the *Interpretation of Legislation Act 1984*. In that Act, "land" is defined so as to include (amongst other things) any estate or interest in land.

31. So far as is relevant to the claims made in this proceeding, s 228 provides:

> **228 What can VCAT order?**
>
> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
>
> (2) Without limiting VCAT's powers, it may order—
>
> (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners;
>
> ……

32. Section 232 provides that in any proceeding under Division 2 VCAT may order that the land be sold by private sale or at auction, and goes on to specify other orders that VCAT may make in relation to the sale. I shall be making orders that accord with s 232 and are not contentious. What are contentious are issues of compensation, reimbursement or adjustment in the reckoning of what is a just and fair division of the proceeds of sale.

33. In that respect, s 233, so far as is relevant to the claims made in this proceeding, provides:

233 Orders as to compensation and accounting

(1) In any proceeding under this Division, VCAT may order—

(a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;

(b) that one or more co-owners account to the other co-owners in accordance with section 28A;

(c) that an adjustment be made to a co-owner's interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.

(2) In determining whether to make an order under subsection (1), VCAT must take into account the following—

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

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

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

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

(e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;

……

(3) VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—

(a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or

(b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or

(c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owners.

……

34. Section 28A of the Act, referred to in s 233(1)(b), provides:

28A Liability of co-owner to account

(1) A co-owner is liable, in respect of the receipt by him or her of more that his or her just or proportionate share according to his or her interest in the property, to account to any other co-owner of the property.

(2) In this section, co-owner means a joint tenant, whether at law or in equity, or a tenant in common, whether at law or in equity, of any property.

35. Section 234 of the Act, which is in Division 3 of Part IV, provides:

234 Application for order for accounting

(1) A co-owner of land or goods may apply to VCAT for an order under this Division to be made for an accounting in accordance with section 28A.

(2) An application under this section may be made whether or not an application is made under Division 2.

36. Section 234A provides that all co-owners of land to which the proceeding relates are parties to a proceeding in VCAT under Division 3.

37. Section 234B provides:

234B What can VCAT order?

(1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or goods occurs.

(2) Without limiting VCAT's powers, it may—

(a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or goods to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and

(b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or goods.

Sun Crescent land

38. In this proceeding Grace claims, presumably (although not explicitly) under s 234, for an accounting by Walter of rent that he has received from tenancies of the Sun Crescent land. She also claims reimbursement for rates she has paid for the Sun Crescent land from 2002-2003 to the present. She asks that the amounts of rent and rates be reckoned in the calculation of what is a just and fair division of the proceeds of sale of the Morris Street land.

39. Grace is a co-proprietor of the Sun Crescent land. Walter is not and never has been. Nevertheless, Grace alleges that he is a "co-owner" of the Sun Crescent land, as a "joint tenant" or "tenant in common" with her, because by a family arrangement when she became a co-proprietor of the Sun Crescent land the parents agreed with her and Walter that she and Walter should be tenants of it and be free to sub-lease it and collect rent. Walter denies that there was any such arrangement or agreement. His evidence is that he did collect rent from tenants of the Sun Crescent land on behalf of the parents and paid the father a share of it. The father denies that.

40. The Tribunal would have jurisdiction to determine Grace's claims with respect to the Sun Crescent land only if Walter has been and is a "co-owner" of that land. The argument is that, as a tenant under the family arrangement, he became either a joint tenant or a tenant in common, and thus a "co-owner" with the meaning of Part IV and of s 28A of the Act.

41. The argument is based on a misconception of the meaning of "tenant" in the definition of "co-owner." It is best dispelled by a quotation from an old English textbook on real property law – old, but good – where the authors began the chapter on "Co-ownership":[5]

[5] R.E. Megarry and HWR Wade, *The Law of Real Property*, 2nd edition (1959), p 390.

> Hitherto no consideration has been given to cases where two or more persons have been entitled to the simultaneous enjoyment of land. Four types of such ownership must be considered:
>
> (1) Joint tenancy.
> (2) Tenancy in common.
> (3) Coparcenary.
> (4) Tenancy by entireties.
>
> In these titles "tenancy" means simply ownership, and has nothing to do with leases. The terms "co-ownership," "concurrent interests" and "estates and interests in community" may each be used to include all four forms of co-ownership. Of the four types, the first two are far more important than the others and they will be considered together.

In the special sense in which it is used in the definition of "co-owner" in Part IV of the Act, "tenant" reflects the usage in the traditional classification of types of co-ownership. A leasehold interest in land, which a tenant (in ordinary parlance) has, is not an ownership interest. If the argument put on Grace's behalf were correct, it would mean that a lessee of land would have a right under Part IV to apply for an order for a partition of the leased land, or for a sale of the leased land and a division of the proceeds of sale: on extraordinary result. I see no reason to give the word "co-owner" in s 28A of the Act any different meaning from that in Part IV. Walter is not a "co-owner" of the Sun Crescent land.

42. It follows that the Tribunal has no jurisdiction under the Act to determine the claims Grace makes in relation to the Sun Crescent land. Mr Gillies of Counsel for Grace did not argue that there is jurisdiction under any other enabling enactment, and I greatly doubt that there is. Grace's allegations are not consistent, for instance, with any possible allegation that there was a supply, or possible supply, of "services" by Walter to her so that there was a "consumer and trader dispute" about which the Tribunal would have jurisdiction under the *Australian Consumer Law and Fair Trading Act 2012*.[6] Any cause of action that Grace may have against Walter (or that the parents may have against Walter) in relation to the Sun Crescent land will have to be pursued elsewhere.

43. A good deal of evidence was given at the hearing about the Sun Crescent land and about what Walter did or failed to do about rent collected. He and the father gave conflicting evidence. Robert's evidence, of a meeting with the two of them and with other members of the Ciciulla family which he convened in the hope of brokering a settlement of the disputes about the two parcels of land, supported Walter's version of events. Although I have no jurisdiction to determine disputes between Grace and Walter about the Sun Crescent land, I could use the evidence

[6] See Chapter 7 of that Act, especially ss 182 and 184.

about it as an aid to assessment of the credibility of Walter and of the father generally. I have decided against doing that. In case there has to be litigation elsewhere I think I should not make any finding about disputed facts in connection with the Sun Crescent land. Moreover I have been able to reach conclusions about issues concerning the Morris Street land without any need to have resort to the evidence about the Sun Crescent land.

44. For those reasons I am deciding nothing, and propose to say nothing more, about Grace's claims in relation to the Sun Crescent land, except on the matter of an application that Walter has made for costs, with which I shall deal below.

Rent: Unit 1, Morris Street land

45. Ahmad Afanahi was a tenant of unit 1 from some date in 2003 until 14 November 2016. He gave evidence that from the beginning of the tenancy he paid rent at the rate of $150.00 per week but from 2012 paid at the rate of $200.00 per week.

46. Walter swore that, although a co-owner of the Morris Street land, he received none of the rent that Mr Afanahi paid. He claims an adjustment, in the division of the proceeds of sale, for one-half of the rent which, he says, Grace received.

47. Walter's evidence is directly contradicted by Mr Afanahi and by the father, and is indirectly contradicted by Grace and by the mother:

    (a) Mr Afanahi swore that, by arrangement with the parents, with Grace and with Walter, he paid rent on a monthly basis to Grace and to Walter, month and month about, in cash at the parents' home in Hampshire Road, Sunshine. He made that arrangement because he knew the parents; he and the father had shops near each other in Sunshine. The parents were present when he made the payments. Walter was present each alternate month and received the rent for that month, and Grace was present each other alternate month and received the rent for that month. Then, in 2014, at Grace's request, he made all payments of rent to her and none to Walter. He moved out of unit 1 in early November 2016.

    (b) The father swore that Mr Afanahi made the rental payments by appointment; he would telephone the father and arrange a time for either Walter or Grace to be at the Hampshire Road home to receive a payment. He saw Mr Afanahi pay money to Walter[7] and to Grace in alternate months.

[7] The father's evidence about that is in his witness statement, paragraph 14: TB p 836.

(c) Grace swore that both she and Walter knew of the arrangement for the payment of rent on alternate months, and that she attended the parents' home to receive rent each alternate month under the arrangement. She did not claim to have been present on any occasion when Walter received rent. In July 2014 she asked Mr Afanahi to pay rent to her alone, and he did so.

(d) The mother swore that she agreed with Grace's version of events, insofar as she was able to.

48. Despite the preponderance of evidence in Grace's favour, there are difficulties about accepting it and rejecting Walter's evidence on this matter.

49. In an unhappy family dispute about money, the parents have taken Grace's side. The father has his own dispute with Walter about rent collected from tenants of the Sun Crescent property. In her evidence the mother was openly antagonistic towards Walter. The father, who was able to give some of his evidence in English, was less so; he recounted his efforts to treat Walter and Grace equally and to give them equal educational opportunities. He is not, however, an independent witness.

50. Mr Afanahi is closer to being an independent witness, although he has had more association with the parents than with Walter. But he gave his evidence by telephone. Mr Gillies asked for leave for him to give his evidence in that way. Mr Hogan, Counsel for Walter, opposed the application. I allowed it. It is more common in the Tribunal than it is in the courts for persons to be permitted to give evidence by telephone. Cross-examination of a witness by telephone is difficult. Mr Hogan was at a disadvantage when doing so. The disadvantage is something I have borne in mind when deciding what weight to give to Mr Afanahi's evidence.

51. Despite the reservations I have expressed about the parents' evidence and Mr Afanahi's evidence, the probabilities of the case seem to me to accord with Grace's case on the matter of Mr Afanahi's rental payments.

52. Although, by gift, Walter and Grace became co-owners of all the Morris Street land, they and the parents seem to have treated the land as if Walter was entitled to unit 1 and Grace was entitled to unit 2. In cross-examination the father said, "When I finished [construction of] the property, I donated it to Walter and Graziella, half and half", and that Walter had "owned half" before Grace had. Walter moved into unit 1 and occupied it rent free, as if it were his alone, until 2001. Grace moved into unit 2 and occupied it rent free, as if it were hers alone,

until 2009. It is improbable that Walter took no interest at all in what happened to unit 1 after he vacated it and, as he claims, allowed Grace alone to receive any rent that a tenant paid for it. It is also improbable that Mr Afanahi could be so confident that Walter would take no interest in rental payments that he could, with the father's connivance, pay rent only every second month, to Grace, instead of paying full rent each month to Walter and Grace alternately.

53. I therefore accept the evidence of Mr Afanahi and of the father and, on the balance of probabilities, find that until 1 July 2014 Walter received from Mr Afanahi and equal share of rent for unit 1. Neither he nor Grace is entitled to any adjustment, in the division of proceeds of sale of the Morris Street land, by reason of rent paid for unit 1 to that date. There was no direct evidence of 1 July 2014 being the actual date when Grace alone began receiving rent, but a letter from Grace's solicitors to Walter's solicitors dated 22 August 2016[8] alleged, I infer on Grace's instructions, that 1 July 2014 was the date. I accept that admission against her interest.

54. From 1 July 2014 to 14 November 2016, however, Grace alone received rent to which she and Walter were jointly entitled. For those 123 weeks at $200.00 per week Grace received $24,600.00. There was no direct evidence of 14 November 2016 being the exact date when Mr Afanahi vacated unit 1, but Mr Gillies gave to me calculations based upon that date, Mr Hogan did not dispute the date, and it seems a fair approximation from Grace's and Mr Afanahi's evidence.

Rent: Unit 2, Morris Street land

55. On or about 1 December 2009[9] Nancy and Faton took possession of unit 2 at the Morris Street land as tenants. They remained as tenants until 26 February 2016 when they vacated.[10] There is no dispute that Walter received none of the rent they paid, and that Grace received it all. Walter claims to be entitled to an adjustment in his favour for his half-share of the rent.

56. I have already said[11] that I regard all payments that Grace received from Nancy and Faton as rent, although at first Grace had sought to characterise some of them as outgoings. Her evidence was that she received $150.00 per week at first, but Nancy and Faton began to pay $200.00 per week in rent in 2014. Nancy, however, has told Mr Skeels by telephone[12] and emphatically in emails[13] that the

[8] TB pp 1234 – 1235.
[9] The date comes from a letter from Grace's solicitors to Walter's solicitors dated 22 August 2016, which is at TB pp 1234 – 1235: and admission by Grace against her interest: see paragraph 53 above. It is consistent with Grace's evidence in paragraph 5 of her second witness statement (TB p 802) and with Mr Skeel's hearsay evidence about Nancy's statement (TB p 1309).
[10] Mr Skeel's hearsay evidence about Nancy's statement (TB p 1309).
[11] In paragraph 17 above.
[12] See footnote 10.
[13] Exhibit R3.

rent was $200.00 per week from the beginning of the tenancy to the end. Mr Skeels' evidence about those matters is hearsay but there was no difficulty in my receiving it, because the Tribunal is not bound by the rules of evidence and may inform itself on any matter as it sees fit.[14]

57. There is nothing in writing to assist in determining whether Grace or Nancy is correct about the commencing rent. Unusually, in this matter I prefer the hearsay evidence to Grace's evidence. Nancy and Grace were work colleagues and on friendly terms in 2009, although they may be on friendly terms no longer, Nancy apparently having taken umbrage at the news that Grace was claiming to have needed to repair unit 2 after she and Faton had vacated. When payments are made in cash, as the rent payments evidently were, the payer is usually more likely than the payee to remember how much exactly was paid on each occasion. I find that throughout their tenancy of unit 2 Nancy and Faton paid Grace rent of $200.00 per week.

58. From 1 December 2009 to 26 February 2016 there were, on my calculations, 312 weeks. At $200.00 per week Grace received $65,000.00 in rent for unit 2.

59. Walter is entitled to a further adjustment in his favour for the four months, which I find it to have been, during which Grace received rent from the new tenants who took possession of unit 2 on 18 May 2016. The letter from the managing agents[15], which stated that the first four months' rent were paid to Grace, is likely to be correct. According to that letter, the amount she received, after fees, totalled $4,918.28.

60. There remains additional rent which is being held in the managing agent's trust account. I am unable to take it into account in the division of proceeds of sale. I do not know the amount presently held. It will be increasing monthly. I see no reason why Grace and Walter should not be entitled to one-half of it each, after any fees have been deducted. In the orders I am making I shall reserve liberty to apply. If any difficulty should arise in relation to the money held in the trust account, an application may be made pursuant to that liberty.

Market Rent from Grace: Unit 2, Morris Street land

61. Without objection I received written evidence[16] from a valuer, Karl Cundall of Value It Pty Ltd, of his opinion as to the market rental value of unit 2 between 1999 and 2017. Walter is claiming to be entitled, by way of an adjustment, to an amount equivalent to rent from Grace during the period that she occupied unit 2

[14] *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") s 98(1)(b) and (c).
[15] See footnote 3: TB p 167.
[16] Exhibit R4, which supplemented Mr Cundall's earlier report, at TB pp 240 – 258.

as a co-owner, between July 2003 until the end of 2009. Because Grace is seeking from him compensation or reimbursement for money she has expended in relation to unit 2, s 233(3) of the Act does not preclude him from making that claim.

62. I accept Mr Cundall's evidence, which was of market rent of $130.00 per week in 2003 increasing annually to $240.00 per week by 2009. Applying that evidence, Mr Hogan produced a calculation of $31,178.50 for half the total market rent from July 2003 to the end of 2009. I have not attempted to check the accuracy of that figure, because I am not allowing the adjustment claimed.

63. The Tribunal's principal responsibility in making orders in a proceeding brought under Part IV of the Act is to ensure that a just and fair sale occurs: s228(1). That responsibility translates, in my view, into one to ensure that the division of the proceeds of sale in accordance with s 228(2)(a) is just and fair. Upon the completion of the construction of unit 1 and of unit 2 to the stage where each was habitable, Walter treated unit 1 as if it were his, by living in it rent free from 1996 to 2001, just as Grace treated unit 2 as hers, by living in it rent free from 1998 to 2009. Each treated his or her unit in that way without any demur by the other and without any suggestion at the time that the other should be paying rent. I accept Mr Gillies' submission that it is unfair for Grace now to be debited for an amount equivalent to market rent for the time of her occupancy of unit 2 after she became a co-owner of the Morris Street land. Walter's claim now that there should be an adjustment in his favour for that reason is opportunistic. Because Grace is claiming compensation, reimbursement or adjustment for what she says she has spent on or in relation to the Morris Street land, it is open to Walter to make his claim but that does not mean I am required to allow it. It would not be just and fair to do so.

"Undocumented" Expenses for Improvements

64. Grace claims to be entitled to an adjustment in her favour of the division of the proceeds of sale of the Morris Street land by way of compensation for what she spent, she says, to take unit 2 from lock-up stage to completion. She described the expenditure as having been for painting, installing ducted heating, installing a hot water system, installing evaporative cooling, installing roof insulation, tiling the bathroom and kitchen and laundry walls, installing carpets and building a pergola.[17] She has prepared a list of those items and what she says was the cost of each; the total comes to $17,800.00.[18] She has headed the list "Undocumented" because she has not been able to produce any receipts, invoices or quotations to substantiate the cost of any of those items. That is not surprising, because they relate to a time before and during 1998.

[17] Grace's second witness statement, paragraph 5, TB p 802.
[18] The list is part of exhibit A3.

65. Mr Hogan made two submissions as to why I should not allow an adjustment for the amount claimed or any amount for the alleged improvements. The first was that any expense that Grace incurred in making improvements was not incurred by her as a co-owner; it was incurred before she became a co-owner in 2003. The second was that she has not discharged the onus of proving the amount claimed. I do not accept the first submission. I do accept the second submission, in part.

66. The first submission involved the proposition that a party to a proceeding under Part IV who claims an adjustment in the division of proceeds of sale by reason of expenditure by that party can succeed in that claim only if the expenditure was made by that party in his or her capacity as a co-owner; so that party cannot succeed if the expenditure was incurred before the co-ownership began. I do not accept that submission, for these reasons:

    (i) A person must answer to the description of co-owner to have standing to make an application under s 225 for an order under Part IV Division 2 of the Act or to have the standing to be a party to a proceeding brought under that Division (s 226) or to be a person against whom an order for compensation, reimbursement or accounting may be made (s 233). Nothing in Part IV supports the view that a capacity as a co-owner has any other significance.

    (ii) The only provision in Part IV that ties a matter that may be taken into account to the period of co-ownership itself is s 233(1)(c), which provides that an adjustment may be made to a co-owner's interest in land "to take account of amounts payable by co-owners to each other during the period of co-ownership". Section 233(1)(a), enabling an order of "compensation or reimbursement" for a co-owner, and s 233(1)(b), enabling an order for an "account" by a co-owner to another co-owner, do not similarly tie those matters to what occurred "during the period of the co-ownership." Had the parliament intended such a limitation to apply to all of s 233(1), not just to s 233(1)(c), it could easily have said so.

    (iii) The purpose of the statute is important to its meaning. A purpose evident in Part IV of the Act, and in s 228 in particular, is the achievement of a just and fair sale or division of land. Section 232 enables orders for a private sale at a fair market price as determined by an independent valuer, or that an independent valuation of the land take place. An amount that a co-owner has reasonably spent in improving the land must be taken into account in the Tribunal's determining whether to make an order for compensation or reimbursement (s 232(2)(a)), for the obvious reason that

> the improvement has enhanced the value of the land and is important for determining what a just and fair sale price would be. That enhancement will occur whether the amount in question was spent before or during the period of co-ownership. A construction of those provisions which confined the benefit of compensation or reimbursement to a person who had spent an amount in improving the land in that person's capacity as a co-owner, and not otherwise, would not be consistent with their evident purpose.

67. The second submission was that Grace had not proved the claim she was making. She told me that she had prepared the list of "undocumented" expenses last year and had arrived at that time at the amount she was claiming for each item of expenditure. I conclude that the amounts claimed are little more than guesswork, attempted about 18 years after the alleged improvements to unit 2 had occurred, and so the estimate of the quantum of the claim is unreliable.

68. Nevertheless, I accept her evidence of what work was actually done to take unit 2 from lock-up stage to completion. Walter in his evidence did not contradict Grace's evidence that unit 2 was only at lock-up stage when she commenced to occupy it. He was in a position to contradict it if he wished, because he gave evidence that he had been responsible for project-managing the entire development of the Morris Street land, supervising all tradesmen and arranging for the delivery of all materials.[19]

69. Grace has proved on the balance of probabilities that she effected the improvements to unit 2 before and during 1998 that she claimed to have effected, but has not proved the amount she claimed to have expended on them. I do not think that I would be achieving a just and fair division of proceeds of sale of the Morris Street land if I allowed nothing at all as an adjustment in her favour on account of those improvements because she had not proved the quantum. I propose to allow $5,000.00, on the basis that I cannot conceive of the improvements that she identified having cost her less than that.

Rates, Land Tax, Insurance: Morris Street land

70. The amount which Grace swore that she spent on rates, land tax and outgoings for both unit 1 and unit 2 from 2003 onwards – that is to say, during the periods of co-ownership – is $39,257.44, calculated as follows in one of her exhibits:[20]

[19] Walter's witness statement, paragraph 13, TB p 793.
[20] The calculation is within exhibit A2.

Documented Outgoings

Description of payment	Amount
Land Tax	$11,771.80
Brimbank City Council Rates – unit 1 and 2	$24,935.68
Electricity	$ 36.14
Water Rates – unit 1 and unit 2	$ 2,360.45
Origin Energy Gas Account – unit 2	$ 50.00
Origin Energy Gas –unit 2	$ 103.87
	$39,257.94

The above calculation has included small amounts for gas and electricity. They should not have been included. They are for usage charges, not rates. After the deletion of those three, the balance is $39,067.93. In another exhibit[21] she has set out particulars of the land tax paid, the Brimbank City Council rates and the City West Water rates.

71. The Tribunal Book has included Brimbank City Council rate notices for 2003 onwards[22] which document the amount in the calculation. I accept her evidence that she has paid in cash those rates, even though some of the rate notices were addressed to the mother. The water rates are not as well documented in the Tribunal Book; only City West Water rate notices from 2014 have been included.[23] Nevertheless, I accept her evidence of having paid in cash all of them since 2003, and of the total amount that she paid. As for land tax, she claims to have paid land tax for the Morris Street land from 2006 onwards, either from a Westpac bank account or by BPay. The land tax notices for those years are in the Tribunal Book[24], but no banking records of hers are included. Nevertheless, I accept her evidence of having paid the land tax. She has proved her expenditure of $39,067.93.

72. Part of exhibit A3 specifies a total of $26,779.82 which she has sworn she paid for building insurance for both units on the Morris Street land since 2003. It does not give particulars of the calculation of that amount in the same way that particulars have been given of the amount paid each year for rates and for land tax. The Tribunal Book, however, contains renewal notices from, and other evidence of building insurance cover given by, first NAB Insurance and then NRMA Insurance, since 2003.[25] Grace has sworn that she paid the insurance each year by direct debit. Again, the Tribunal Book contains no banking records of hers which showed the debits, but I accept her evidence of payment. She has proved expenditure of $26,779.82 on building insurance.

[21] The particulars are set out on the second, third and fourth pages of exhibit A3
[22] TB pp 366 – 442.
[23] TB pp 443 – 470.
[24] TB pp 337 – 344.
[25] TB pp 471 – 477 and 488 – 745.

Repairs and Maintenance: Unit 2, Morris Street land

73. In her exhibits Grace has given detailed particulars[26] of what she spent on making unit 2 fit for re-letting after Nancy and Faton vacated. The Tribunal Book contains invoices or quotations[27] which correspond to almost all of the particularised items; the only exceptions are two items of "carpet" where amounts of $299.30 and $676.00 are claimed. Receipts are attached to most of the invoices. There is no receipt for $1,496.00 she claimed to have paid for an air conditioning unit to be replaced, but a quotation for the amount is included. There is an invoice from "MST" for $6,500.00 for painting, but no receipt; Grace swore that she had paid that sum in cash, from money she has saved for the christening of a child. I accept her evidence about that. She has proved expenditure of $36,626.65[28] on repairs to and maintenance of unit 2.

The Final Adjustments

74. I now set out a table that, under the heading "Grace's claim", includes amounts that I have found that Grace has expended for which she is entitled to compensation or reimbursement and that, under the heading "Walter's claim", includes amounts that I have found that Grace alone has received in rent, not the both of them. The figures have been rounded up or down to the nearest dollar. The appropriate adjustment in favour of Grace is one-half of the balance:

Item	Grace's Claim	Walter's Claim
Unit 1: rent from Afanahi: 1 July 2014 to 14 November 2016		$24,600.00
Unit 2: rent from Nancy and Faton		$65,800.00
Unit 2: rent after 18 May 2016		$ 4,198.00 $93,798.00
Unit 2: improvements from lock-up stage	$ 5,000.00	
Units 1 & 2: rates and land tax	$ 39,068.00	
Unit 1 & 2: insurance	$ 26,780.00	
Unit 2: repairs and maintenance	$ 36,616.00 $107,464.00 $ 93,798.00	

[26] Exhibit A2 lists them under the heading "Documented Maintenance." The fourth, fifth and sixth pages of exhibit A3 gave details of the manner of payment.
[27] TB pp 289 – 305.
[28] The amount is the balance of the total of $63,396.47 set out in exhibit A2 under the heading "Documented Maintenance", less $26,779.82 for insurance, which she had included under that heading.

Balance:	$ 13,666.00
One half thereof:	$ 6,833.00

75. So I conclude that from the nett proceeds of sale of the Morris Street land there should be an adjustment of $6,833.00 in Grace's favour so that he is paid that sum before the nett proceeds are divided equally between the parties.

The Orders

76. The order that I make follows a draft order that Mr Gillies provided to me when he made his final address, with amendments to which I understood both parties agreed; of course the adjustment in favour of one party or the other still had to be decided.

Costs

77. Mr Hogan submitted that if I decided that there was no jurisdiction to determine Grace's claim in relation to the Sun Crescent land I should order her to pay Walter's costs of the proceeding to that extent.

78. Section 109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* sets out a general rule that parties to VCAT proceedings should bear their own costs. Section 109(2) empowers the Tribunal nevertheless to make an order that a party pay all or a specified part of the costs of another party, but sub-section (3) provides that the Tribunal may do so only if satisfied that it is fair to do so, having regard to the matters set out in the sub-section.

79. The only matters set out in s 109(3) on which Mr Hogan relied were those in sub-paragraphs (c) (including whether a party has made a claim that has no tenable basis in fact or law) and (e): "any other matter that the Tribunal considers relevant".

80. My determination that the Tribunal has no jurisdiction in the matter of the Sun Crescent claim does not mean that the claim itself has no tenable basis. For VCAT's jurisdictional purposes it is untenable, but that is all. I have refrained from any comment on the merits of the claim, and have explained why. Whether the claim ultimately succeeds elsewhere, or fails but is regarded to have been tenable elsewhere, remains to be seen.

81. The other relevant matter on which Mr Hogan relied was the undoubted fact that the Sun Crescent claim took up at least half of the time taken to hear the proceeding (which, thanks to the efficiency and good judgment of both Counsel, was a day less than it might have been), at least half of the subject matter of directions hearing in the proceeding and at least half of the material in the Tribunal Book. Indeed, all of the discovery of documents to which Walter were

put related almost entirely to the Sun Crescent land. On one view of the matter, he needlessly incurred costs in meeting a claim which could not succeed in the Tribunal. On another view of the matter, some of those costs will not be wasted if the Sun Crescent claim has to be litigated elsewhere. I accept the submission of Mr Gillies that it was reasonable for Grace to test the jurisdiction of the Tribunal first on the issue, and not to run the risk of Walter contending, in proceedings elsewhere, that the issue was a co-ownership dispute over which VCAT alone has jurisdiction.

82. For those reasons I am not satisfied that it would be fair to order Grace to pay any part of the costs of the proceeding. I refuse Walter's application for costs.

A. Vassie
Senior Member

20 October 2017