VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT REFERENCE: BP1661/2015**

CATCHWORDS

Co-ownership of land – application for order for sale – *Yeo v Brassil* [2010] VSC 344 – *Property Law Act 1958* ss 225, 228, 229.

APPLICANT:	Mrs June Elizabeth van Smaalen (as administrator of the estate of Corinne Amanda McCreddin (deceased)
RESPONDENT:	Mr Dimitrios Tsakiris
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	3 August 2017
DATE OF ORDER:	3 August 2017
DATE OF REASONS:	9 August 2017
CITATION:	van Smaalen v Tsakiris (Building and Property) [2017] VCAT 1220

ORDERS

1. The applicant is June Elizabeth van Smaalen (as administrator of the estate of Corinne Amanda McCreddin deceased). The application is amended accordingly.

2. Pursuant to s228 of the *Property Law Act 1958*, the Tribunal orders that the land at 1267 Nepean Highway, Mount Eliza more particularly described in Certificate of Title volume 11851 folio 513 and Certificate of Title volume 11851 folio 514 ("the Property") be sold upon the following terms and conditions:

   (a) the parties must jointly and irrevocably appoint a real estate agent ("the Agent") to market the Property and conduct the sale in accordance with this order; if by 30 September 2017 the parties have not agreed upon the appointment of a real estate agent, Twin Waters Estate Agents of Mornington shall be the Agent as if they had been appointed by the parties;

   (b) a reserve price for the sale of the Property be agreed between the parties, or if no agreement is reached, as determined the Agent;

(c) if the reserve price is determined by the Agent pursuant to order 1(b) above then the Agent shall give notice to the parties of the reserve price at least 21 days prior to the auction for the sale of the Property and shall not alter the reserve price without consent from the parties or as otherwise directed by both parties;

(d) the sale of the Property be for a settlement of 30 to 90 days as determined by the Agent and a 10% deposit be paid by the purchaser;

(e) the sale of the Property be by way of public auction on a date to be nominated by the Agent;

(f) Foster Nicholson Lawyers ("the Solicitors") shall be appointed as solicitors to:

(i) prepare a contract of sale for the Property and the statement required by section 32 of the *Sale of Land Act 1962*;

(ii) execute on behalf of the parties or either of them, as if such authority to do so had been given in writing signed by the applicant and the respondent, a section 32 statement prepared by the solicitors for the sale of the Property, if the applicant or the respondent should refuse or fail to sign the section 32 statement within 7 days of the delivery of the section 32 statement to the applicant or the respondent;

(iii) act as solicitors for the parties in the conveyance of the Property upon its sale;

(iv) do all things reasonable and necessary and in the usual course of conveyancing practise to convey the Property to any purchaser;

(v) act as the solicitors for the parties in the settlement of the sale of the Property; and

(vi) receive the deposit and the balance of purchase price pursuant to the contract of sale of the Property and distribute such sums in accordance with this order.

(g) each of the parties must, forthwith upon request to do so by the Solicitors, do all things and sign all documents the Solicitors consider necessary or appropriate to convey the Property to any purchaser of the Property, including executing a transfer of land of the Property from the parties to the purchaser;

(h) if either of the parties does not sign documents pursuant to order 1(g) above within 14 days of a request being made pursuant to order 1(g) for them to do so, then the principal registrar is directed to sign such documents in the parties' name and on their behalf including executing a transfer of land of the Property from the parties to the purchaser; an affidavit by a solicitor that the Solicitors considered the signing of a document to be necessary or appropriate, and that the document has not been signed, shall be conclusive evidence of those facts;

(i) the sale proceeds from the sale of Property be applied by the Solicitors as follows:

(i) to the costs of the Agent in connection with the sale of the Property;

(ii) to pay to the Solicitors any reasonable costs and disbursements for the conveyance of the Property and anything done by them pursuant to this order; and

(iii) divide the balance of the sale proceeds into equal shares as follows:

(aa) pay one half share to the applicant in her capacity as administrator of the estate of Corinne Amanda McCreddin decease, for the benefit of Lara Tsakiris and,

(bb) pay the other half share to the respondent or to his written nominee.

3. Liberty is reserved to both parties to apply with respect to the terms and conditions of the sale of the Property and any question that might arise in connection with the sale or the execution of any document relating thereto including varying the orders hereby made.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. G. Tsogas, solicitor
For the Respondent:	In person (by telephone)

REASONS

1. Land at Mt Eliza is registered in the names of the applicant Ms van Smaalen and the respondent Dimitrios Tsakiris as tenants in common in equal shares. In this proceeding Ms van Smaalen has sought an order for sale of the land under Part IV Division 2 of the *Property Law Act 1958* ("the Act"). Mr Tsakiris has opposed the application.

2. Certificate of Title volume 11851 folio 513 describes Mr Tsakiris as the proprietor of one of two equal undivided shares in the land. Certificate of Title volume 11851 folio 514 describes Ms van Smaalen as the sole proprietor, as "legal personal representative of Corinne Amanda McCreddin deceased", of the other one of two equal undivided shares in the land.

3. Corinne Amanda McCreddin (or Tsakiris) was Ms van Smaalen's daughter and the wife of Mr Tsakiris. She died on 20 March 2008. Letters of administration of her estate were granted to Ms van Smaalen by the Supreme Court of Victoria on 22 October 2015.

4. Mr Tsakiris and the late Ms McCreddin had a daughter, Lara Tsakiris, who is aged 11 years and who lives with Ms van Smaalen in Serpentine, Western Australia.

5. Mr Tsakiris has been convicted of the murder of Ms McCreddin. He is serving a sentence of life imprisonment in Western Australia.

6. Mr Tsakiris attended the hearing on 3 August 2017 by telephone from Acacia prison in Western Australia, and gave evidence by telephone. He told me that his reason for opposing the application for an order for a sale of the land was that he believed it to be in Lara's best interests to postpone the sale until she turned 18, by which time the land would have appreciated in value and she could make her own decision whether or not to sell. He also told me that if I were to make an order for sale he wanted to have a say about the choice of real estate agent engaged to market and sell the land, and would also ask me to make an order that the proceeds of sale be placed in the hands of some independent person rather than in Ms van Smaalen's hands.

7. Ms Tsogas, solicitor, represented Ms van Smaalen at the hearing. She was not present. She had sworn an affidavit dated 26 July 2017. In it she stated that she sought a sale of the land so that funds could be available for Lara's benefit; as an aged pensioner she had limited means of her own. In it she also provided proof

of the grant to her of letters of administration of her late daughter's estate. Mr Tsakiris told me that he had received a copy of the affidavit and did not wish to cross-examine Ms van Smaalen about its contents or at all. So there was no difficulty with my receiving her evidence by way of the affidavit.

8. As owners of the land as tenants in common in equal shares, Ms van Smaalen (as administrator) and Mr Tsakiris are co-owners of the land within the meaning of the Act. In his address to me during the hearing Mr Tsogas carefully set out the substance of those provisions of the Act which entitle one co-owner to apply for an order for sale and which empower VCAT to make such an order. So far as they are relevant to this proceeding, those provisions are ss 225(1) and (2), s 228 and 229, which are:

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; 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).

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; or

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

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

229 Sale and division of proceeds to be preferred

(1) If VCAT determines that an order should be made for the sale and division of land which is, or goods which are the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).

(2) Without limiting any matter which VCAT may consider, in determining whether an order under section 228(2)(b) or (c) would be more just and fair, VCAT must take into account the following—

(a) the use being made of the land or goods, including any use of the land or goods for residential or business purposes;

(b) whether the land is, or goods are, able to be divided and the practicality of dividing the land or goods;

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

9. Neither of the parties has claimed that a physical division of the land is possible or desirable. So, in accordance with s 229(1), I was required to make an order for sale if I was to make any order in accordance with s 228.

10. In *Yeo v Brassil* [2010] VSC 344 Judd J of the Supreme Court of Victoria, hearing an appeal from a VCAT order dismissing an application for an order for sale of co-owned land, had to decide a question of whether VCAT's discretion should be exercised with "a propensity in favour of the sale or division of co-owned property in the absence of any contractual, proprietary or fiduciary obligation with which an order for sale or division could be inconsistent". His Honour, in effect, answered the question "Yes", following decisions in New South Wales courts, and holding that VCAT had "no general discretion which would enable it to refuse an application on grounds of hardship or unfairness." In his address to me Mr Tsogas read out relevant passages from that decision.

11. In the present case there was not any evidence, or any claim, that by reason of any existing agreement or any other facts it would be wrong to make an order for sale of land. So, as I told Mr Tsakiris during the hearing, the possibility that the land will increase in value in future is not a good legal reason for refusing to make an order for sale of the land.

12. For the purpose of an earlier directions hearing Ms van Smaalen had filed a draft of a proposed order for sale. It was headed "Annexure A" and annexed to a written application for a directions hearing. Mr Tsakiris had responded in writing to that document, expressing agreement with some parts of it and disagreement with others, in the event (which he hoped would not occur) of an order for sale being made. He told me that he had a copy of the "Annexure A" document in front of him during the hearing.

13. In the draft order Ms van Smaalen had proposed that Twin Waters Estate Agents be appointed as agent for the purposes of a sale. Mr Tsogas told me that she had made that proposal only because she had made a preliminary enquiry of Twin Waters Estate Agents about values of land in the Mt Eliza area. Mr Tsakiris told me that his brother is knowledgeable in property matters and may be able to recommend a different real estate agent; at all events he sought a say in who should be appointed. That was a reasonable request. So in paragraph 2(a) of the order I have made I allowed until 30 September 2017 for agreement about the identity of the agent but stipulated that if there were no agreement then Twin Waters Estate Agents would be the appointed agent.

14. When commenting in writing on the "Annexure A" document, and in Points of Defence that he filed, Mr Tsakiris stated that he had spent approximately $90,000.00 in maintaining or improving the land and in outgoings in relation to the land, but he was willing to forgo any claim for an adjustment of the division of sale proceeds in his favour if someone other than Ms van Smaalen had control over Lara's share of the proceeds.

15. I told Mr Tsakiris that I had no power to enlarge or reduce to take away any rights or obligations which Ms van Smaalen has, as administrator of her late daughter's estate, so I could not accede to his request either to have someone else appointed to receive Lara's share or to specify what Ms van Smaalen could or could not do as administrator. In paragraph 1 of the order I amended Ms van Smaalen's application so that it was clear that she was making it in her capacity as the administrator of her late daughter's estate, not in her own right. In paragraph 2(i)(iii)(aa) of the order I directed that one half share of the balance of the proceeds of sale be paid to her in that capacity and for the benefit of Lara Tsakiris. That is as far as I could properly go.

16. During the hearing Mr Tsakiris and I discussed the matter of the claim for adjustment by reason of the expenditure of $90,000.00 approximately in relation to the land. He told me that he recognised the extreme practical difficulty he would have in putting together and proving such a claim. He also told me that the money had been spent by members of his family, not by him; I pointed out to him how that would weaken any claim for an adjustment. In the end he said that he would not pursue any such claim. It was clear enough that he had raised it at all only as a means of trying to get Ms van Smaalen to agree to Lara's share being controlled by an independent person. I accept completely that Mr Tsakiris has been acting in Lara's best interests, as he has seen them, when opposing the application.

17. There is therefore no reason not to order that the proceeds of a sale of land be divided equally between Ms van Smaalen (in her capacity as administrator) and Mr Tsakiris, once all expenses of the sale have been met. I have made an order for sale, as I consider that the Act required me to do in the circumstances of this proceeding. Except for matters I have already mentioned, I have made the order in terms of the draft order "Annexure A", with minor modifications. I record that Mr Tsakiris had no objection to the nomination of Foster Nicholson Lawyer as the solicitors for the purposes of the sale.

A. Vassie
Senior Member

9 August 2017