CO-OWNERSHIP DISPUTES

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INTRODUCTION

1. This is the paper that accompanying my Foleys CPD podcast on 28 May 2020 on co-ownership disputes. I however include reference to cases decided up to the date of this paper, ie 2 July 2020, and also add several earlier cases. This paper covers -

   A. Co-ownership disputes outside the Property Law Act 1958 ("PLA") Part IV – paras. 2 - 9
   B. Central Concepts under the PLA Part IV – paras. 10 - 15
   C. The extent of VCAT's jurisdiction – paras. 16 - 17
   D. Grounds for refusing an order under Part IV – General – paras. 18 - 25
   E. Grounds for refusing an order under Part IV – Express Trust para. 26
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   References in this Paper to section numbers are to those in the PLA unless otherwise stated.

A. CO-OWNERSHIP DISPUTES OUTSIDE THE PROPERTY LAW ACT 1958 ("PLA") PART IV

2. The origin of this paper is the author's Law Institute Journal Article "Co-ownership Disputes" (August 2018 LIJ 26) which dealt solely with Part IV of the PLA which lawyers have traditionally referred to as "partition". However it is opportune at the outset briefly to mention several recent cases on co-ownership outside Part IV.

Severance of joint tenancy

3. Section 223 provides that nothing in Part IV affects or prevents the severing of a joint tenancy by other legal means. In *Hrycenko v Hrycenko & Hrycenko* [2016] VSC 247 (note that on AustLII the name of the plaintiff is misspelt as *Hycenko*) the plaintiff (Nicholas) alleged that:

   in late 2000 or 2001 his father (George) in the presence of Nicholas' mother said in effect that the remainder of the family properties would go to his living sons (Nicholas and Victor);

   shortly afterwards the parents said they wanted to move to a smaller house, which Nicholas then located, the parents paying the purchase price and becoming registered as joint tenants;

   subsequently Nicholas told his parents that he and Victor had agreed to renovate the property, that this would involve a lot of work, and George replied in effect that the house would be his sons';

   and consequent upon these representations he renovated and regularly maintained the home.

4. Nicholas asserted that the joint tenancy was severed in equity when these representations were made. Sifris J granted summary judgment to the defendant, on the following grounds –

   1. The methods of severing a joint tenancy were –
      (a) an act of a joint tenant operating upon his or her own share, ie disposal of that person's interest;
      (b) agreement, which need not be specifically enforceable or even binding as a contract at law, and which could not be defeated by subsequent repudiation of

the agreement. Eg: a consent order agreed between husband and wife, after negotiations for the distribution of matrimonial property;

(c) any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common, ie: "a mutual intention of the parties to sever … [which] may be an expressed intention ... (underlying intention revealed by agreement) or may be inferred from the conduct and dealings of the parties."; or "a course of conduct inconsistent with a joint tenancy from which one would objectively infer an intention to hold property as tenants in common."

2. As to the course of dealing ground, previous authorities had established –

(a) events in the sale process falling short of actual sale may suffice, eg: an agreement by joint tenants to equally divide the deposit received; or an intention to sell and divide the proceeds. But insufficient was mere entry by joint tenants into a contract of sale;

(b) certain dealings between couples may suffice, eg the following in agreements between present or former spouses: a provision that the wife have sole use and occupation of the former matrimonial home, on cessation of which it would be sold and the proceeds distributed between them; agreement as to division of the proceeds of a joint bank account in particular proportions, notwithstanding that one party subsequently withdrew consent to a court order sanctioning the agreement; a court approved agreement to settle property claims, whereby each acknowledged that the other was legally and equitably entitled to a half interest in each of their properties and that the properties should be sold upon the happening of specified events and the proceeds divided equally;

(c) certain dealings did not suffice, eg: negotiations which came to nothing for the purchase of one co-owner's interest, or for its partition, or sale and division of proceeds; a unilateral declaration of intention by one co-owner as in *Corin v Patton* (1990) 169 CLR 540, in which a wife executed documents purporting to transfer to her brother her interest in land held in joint tenancy with her husband – she died before registration of the transfer and there was no evidence that her intention to sever had ever been communicated to her husband.

3. The highest point of Nicholas' case was his father's alleged statement to the effect that "the house will be yours and Victor's" which was insufficient to indicate any

intention to sever the joint tenancy. This did not amount to a suggestion that with immediate effect the unity of estate between the parents would cease.

5. In *Re Wilson* [2019] VSC 211 Leonard and Austral Wilson were joint proprietors of interests in various pieces of land. In 1998 Austral, who was five years older than Leonard and so anticipated to die first, appointed him as her attorney pursuant to an enduring power of attorney. In 2000 Austral was diagnosed as suffering from dementia and so lost legal capacity. In 2008 Leonard executed instruments of transfer in relation to the properties. In each case:

   (a) the transferor was expressed to be "Leonard Charles Wilson and Austral Jean Wilson";

   (b) the transferee was expressed to be "Leonard Charles Wilson and Austral Jean Wilson … as Tenants in Common in equal shares";

   (c) the consideration was expressed to be "Love and Affection"; and

   (d) the document was expressed to be executed by Leonard in his personal capacity, and as attorney for Austral pursuant to the enduring power of attorney.

   Leonard died in 2011. Austral died in 2016.

6. Derham AsJ held –

   (a) the execution of the transfers demonstrated a mutual intention to sever the joint tenancies in equity. Equity favoured a tenancy in common, and (quoting authority) "requires little by way of evidence to show an intention that joint tenants are to hold as tenants in common". That evidence arose from the execution of the severance transfers. Where the relevant transactions took place between the registered proprietors themselves, and no third parties were involved, equity favoured a tenancy in common if intention to sever the joint tenancy can be shown;

   (b) it was within Leonard's power and authority to have the transfers registered, thus severing the joint tenancies at law;

   (c) Leonard acted lawfully and within the scope of his authority as attorney.

   The transfers should be registered so as to sever the joint tenancies at law.

Adverse possession between co-owners

7. A recent decision of Croft J. re-iterates that one co-owner can lose their interest to another by adverse possession: *Fourniotis v Vallianatos* [2018] VSC 369. Section 14(4) of the Limitation of Actions Act provides:

> "When any one or more of several persons entitled to any land or rent as joint tenants or tenants in common have been in possession or receipt of the entirety or more than his or their undivided share or shares of such land or of the profits thereof or of such rent for his or their own benefit or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them but shall be deemed adverse possession of the land".

8. The facts were –

- In 1970 Andreas Vallianatos purchased a suburban property improved by an old house, which he demolished, constructing a block of flats. He also transferred the land to himself (two sixths) and his wife and three daughters (one sixth each), registered in 1971, one daughter being the plaintiff then aged 13;
- She remained so registered. Her brother the defendant gradually acquired the other shares by transfer. Neither lived there;
- Andreas collected the whole rent and treated it as his own money until his death in 1994, after which the defendant did the same other than also partially applying it for his mother's benefit until her death in 2014. The plaintiff received no rent and its receipt by her father and brother was not subject to her consent: she knew she was not receiving any rent but did nothing about it.

9. Croft J. held -

(a) Section 14(4) did not require continuous letting of all parts of the subject property: the rent flowed from the property continually notwithstanding some unit vacancy. The manner in which the rent flowed was irrelevant as long as it was within the control of the "excluding" co-owner(s) and no rent flowed to the "excluded" co-owner [109];

(b) Under s. 14(4) it was unnecessary to show an intention to possess the land in a case of adverse possession between co-owners, at least when the deeming occured by the receipt by one co-owner of an excess share of profits or rent. Unlike the ordinary case of adverse possession by someone with no interest in the land, or even a claim between co-owners based on possession, in the case of a claim under s. 14(4) there was no need to prove factual possession or the animus possidendi [93];

(c) The defendant was required to show adverse possession within the meaning of s. 14(4) during a continuous 15 year period (s. 8). There had been such adverse possession since the 1970s, he being permitted to aggregate previous periods. The plaintiff's right of recovery expired in 1986. [102]

B. CENTRAL CONCEPTS UNDER THE PLA PART IV

10. The right of a co-owner to sale or division is statutory, found in the PLA Part IV, radically amended into its current form which came into operation on 1 July 2006. A co-owner, defined as someone with an interest in land or goods with one or more other persons as joint tenants or tenants in common (s. 222), may apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order for sale and division of proceeds or physical division or a combination of both: s. 225(1) and (2). However, as stated at the end of this Paper, in certain circumstances courts have jurisdiction.

11. "Co-owner" covers equitable and legal co-owners (*Garnett v Jessop* [2012] VCAT 156 at [21]) and even an owner with no equitable interest: *Krsteski & Anor v Jovanoski* [2011] VSC 166 at [43]. It applies to legal and equitable interests acquired before the commencement of s. 225: *Tien v Pho* [2014] VSC 391 at [29] – [39].

12. A co-owner is more than some who just receives rent. Accordingly in *Tsembas v Ciciulla* [2017] VCAT 1695 VCAT did not have jurisdiction over a claim by a registered proprietor for an accounting under Part IV from the respondent who had never had an interest in the land but had merely received rent on behalf of the registered proprietors.

13. Ancillary statutory provisions are –

(a) "goods" means chattels personal or fixtures severable from land (s. 222). This includes a co-owned dog: *Grover v Grover* [2016] VCAT 1122;

(b) In addition to any other parties all co-owners are parties (s. 226). VCAT may adjourn its hearing if proceedings under the Family Law Act are on foot or to enable such proceedings (s. 227);

(c) The severing of a joint tenancy in accordance with Part IV does not affect any security interest over the property (s. 224).

14. No particular matters are specified as requiring proof for the grant of any form of relief, nor are any particular matters nominated as defences (*Moll v Noblett* [2009] VCAT 353 at [39]). Part IV has been said to be part of general legal policy favouring alienability, embodying a principle of, in the words of Deputy President Macnamara, "no fault divorce" for co-ownership and accordingly an applicant does not have to prove unsatisfactory behaviour by co-owners (*Moll* at [40]).

15. As a claim under Part IV is statutory not equitable it cannot be defeated by the equitable defence of laches: *Stewart v Owen* [2019] VCAT 140 at [108] (appeal allowed by not on this point).

C. THE EXTENT OF VCAT'S JURISDICTION

Bankruptcy

16. Where one of two co-owners becomes bankrupt, and accordingly it is arguable that his interest in land vested in his trustee, VCAT has jurisdiction and is not inpermissibly exercising Federal jurisdiction in bankruptcy: *Pascoe v Gianello* [2016] VCAT 1903. However, a trustee in bankruptcy is able to apply to the Federal Court for an order under Part IV at the point that the bankrupt's property vests in the trustee in equity, even if legal title has not yet vested: *Scott, in the matter of Le* [2019] FCA 1661.

No jurisdiction

17. VCAT's jurisdiction does not cover claims –

(a) For damages unrelated to land (*Garnett v Jessop* [2012] VCAT 156 at [21]). Similarly *Riffat v Riffat* [2016] VCAT 1398 - no jurisdiction where the applicant was seeking damages, being the cost of a loan required because the she was involved in other court proceedings with family members. Conversely in *Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51 VCAT allowed each co-owner to apply under s. 233 for damages including for fall in value alleged to have been suffered through delay in being able to sell by breaches by the other co-owner of a joint venture agreement.

(b) Arising from a fraudulent transfer: *Trani v Trani* [2019] VSC 2 (Daly AsJ) [2019] VSC 294 (Kaye JA). The plaintiffs and the first defendants were co-owners of land.

The second defendant was a company controlled by the first defendant. The third defendant was a conveyancer engaged by the first defendant. The plaintiffs sued the defendants in the Supreme Court alleging that the first defendant had sold the land to a third party without their consent and by forging their signatures, that the second defendant was liable for knowing receipt of the proceeds of sale, and the third defendant was liable for misrepresentations to the Registrar of Titles.

It was argued that the plaintiffs were in fact seeking an order that the first and second defendants account for the receipt by them of more than their just and proportionate share of co-owned property, and therefore the proper forum was VCAT. This argument failed. Kaye JA observed that the question was whether the proceeding constituted an "application" under Part IV. It was not: in particular not an application, pursuant to s 234(1) of the Act, for an "accounting" in accordance with s 28A.

Conversely in *Li v So* [2017] VCAT 31 an application to have two related VCAT proceedings under Part IV concerning a piece of land referred to the Supreme Court was dismissed. The applicant for referral had commenced a Supreme Court proceeding alleging that the other co-owner had breached fiduciary obligations by a signature forgery to obtain a loan using the property as security – if established the Tribunal could give effect to this allegation under s. 228 as part of a just and fair division of proceeds of sale;

(c) Probate. VCAT does not before probate or letters of administration have jurisdiction over a proceeding by a co-owner against persons involved in the estate of the other co-owner who is deceased: *Noble v Noble* [2020] VCAT 567. It also does not have jurisdiction concerning an executor's performance. In *Bills-Thompson v Bills-Thompson* [2017] VCAT 341 the applicant and respondent were executors of their late father's estate under which they became tenants in common of a piece of land. One brother commenced an application under Part IV. Consent orders for sale were made appointing him trustee of the property for sale and directing how the proceeds of sale be distributed. His brother claimed relief for unreasonable delay in distributing the proceeds of sale. VCAT held that it was not empowered to make orders directing executors and trustees of testamentary trusts on how to exercise their duties.

D. GROUNDS FOR REFUSING AN ORDER UNDER PART IV – GENERAL

18. The jurisdictional requirement for an order is an application by a co-owner for an order in respect of land or goods (*Yeo v Brassil* [2010] VSC 344 at [16]). There is no general discretion to refuse an application on grounds of hardship or unfairness, eg, that no equity will remain after discharge of encumbrances: *Yeo.* However, if the applicant holds no equitable interest this may effect whether any order for sale and/or division will be made or at least its form (*Krsteski v Jovanoski* [2011] VSC 166 at [43].)

19. Nonetheless, the power to make an order may be declined if inconsistent with some proprietary right or some contractual or fiduciary obligation (*Yeo* at [21]). It is the apparent intention of Parliament that any order made will be just and fair and it could not be just and fair to make an order that was not in accordance with the parties' existing contractual rights or that breached some fiduciary obligation or other equitable right or entitlement: *Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51.

20. In succeeding paragraphs the examples given in *Yeo* will be set out with further authorities, followed by examples of trusts establishing inconsistency.

21. The first inconsistency identified in *Yeo* is a binding agreement entitling a party to occupation or an estoppel to this effect (*Yeo* at [22]). Thus in *McColley v Mathers* [2017] VCAT 1529 the applicant and respondent were registered proprietors as tenants in common of land, being a step-father and step-son. McCollery applied for an order for sale. The defence of Mathers was that McColley had agreed by deed in 2005 to leave his interest in the land to Mathers by will. The defence was upheld on the ground that a contract to make a will, or to make particular provisions in a will, was valid and enforceable, notwithstanding that a will is inherently revocable. Conversely in *Chrisanthou v Chrisanthou* [2020] VCAT 200 one brother failed to establish that there was a family agreement whereby his co-owner brother held his interest on trust for him. A binding agreement no long on foot will not suffice. Thus in *Czapp v Czapp* [2019] VCAT 1481 erstwhile Terms of Settlement whereby the parties they agreed to a particular sale procedure were held not to bar the order for sale. The argument that enforcement of the Terms was a legal right which was inconsistent with the making of

an order for sale was rejected. The first respondent's actions showed a clear intention not to be bound by the Terms.

22. A further inconsistency arises where there is an existing contract of sale (*Yeo* at [24]).

23. Another inconsistency may arise from an estoppel (*Yeo* at [22]). This argument failed on the facts in *Koroneos v Koroneos* [2016] VCAT 461 at [74]-[80]. VCAT rejected an argument that one co-owner was estopped from seeking orders for sale under Part IV by representation to the other co-owner that he would be entitled to live exclusively at the property for life: no such representation was established.

24. Also inconsistent with an order for sale is where the transaction by which the applicant obtained an interest in the land is liable to be set aside. Thus in *Grech v Richardson* [2019] VCAT 363 Member Edquist dismissed an application for sale by a co-owner, who had made no contribution to the purchase price and had obtained her interest in the land by gift from the other co-owner in contemplation of marriage to him which had never occurred, and moreover had exercised undue influence over him.

25. However, not inconsistent with a proprietary right or contractual or fiduciary obligation are:

(a) a mortgage, charge or other form of security (*Yeo* at [24]);

(b) arguably a contractual provision requiring that the interest of one tenant in common be first offered to the other (*Bluestone Park Pty Ltd v Kevin Hunt Property Pty Ltd* [2015] VCAT 1813);

(c) depending on its terms, a joint venture agreement (*Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51 at [90].

E. GROUNDS FOR REFUSING AN ORDER UNDER PART IV – EXPRESS TRUST

26. A proprietary interest commonly raised as inconsistent with sale or division is that the applicant holds his/her interest on trust for the respondent. The simplest example is an express trust, not established in *Donkin v Donkin* [2019] VCAT 1057, where the respondent unsuccessfully argued that the land was held on trust for him by reason of the contents of a letter from the applicant to the applicant's solicitors.

F. GROUNDS FOR REFUSING AN ORDER UNDER PART IV – RESULTING TRUST

27. In *Stewart v Owen* [2019] VCAT 140 Senior Member Vassie stated basic principles thus (although this form of trust was not established in that case) -

(a) Where two persons contribute towards the cost of acquiring land, and their relationship is not one that creates a presumption of advancement, there is instead a presumption that they hold the land in trust for themselves as tenants in common in the proportions that they contributed. The presumption is rebutted by evidence that the intention of the two persons was otherwise;

(b) Where those persons enter into a mortgage to secure repayment of a loan that is applied to fund the acquisition of the land, they are regarded as having contributed to the acquisition costs one half each of that loan. However, payment of instalments in reduction of the mortgage debt are not regarded as direct contributions to the purchase price;

(c) For the purpose of calculation of the acquisition costs one may include incidental costs such as stamp duty and disbursements.

Resulting trust established.

28. Two illustrative cases of resulting trusts established at VCAT, albeit not in the context of blocking a sale, are *Michell v Winch* [2012] VCAT 1524 and *Sherwood v Sherwood* [2013] VCAT 1746. In *Michell v Winch* –

- Mr and Mrs Johnson and their daughter Mrs Winch and her spouse Mr Winch purchased vacant land. The Johnsons paid the full amount but the couples became registered proprietors in equal shares. The parties intended that each couple own half, because a house was to be built and the Winches were to service the mortgage;
- Subsequently the Johnsons transferred their interest in the land to the Winches without consideration and the couples continued to intend to own half each;
- The Winches sold the property, used the proceeds to purchase two further properties of which they became registered proprietors, but the parties continued to intend half ownership per couple;
- The interest of the Johnsons in one property was in question, VCAT finding that it was held on a resulting trust in favour of Mrs Johnson (Mr Johnson having died) she having a 38% share (subject to further evidence as to minor adjustment).

29. In *Sherwood v Sherwood* land was transferred to siblings as joint registered proprietors, the brother having paid $20,000 of the $30,000 deposit, the balance of price being financed by a loan to them jointly. VCAT found a resulting trust and accordingly varied the legal interests of the parties in the property to respective shares of 54.33%/45.67%.

Resulting trust not established.

30. As stated above the presumption of resulting trust may be rebutted by evidence that the intention of the purchasers was other than to hold the land in trust for themselves in the proportions that they contributed. This intention was evident in *Gates v Robinson* [2018] VCAT 40, *Stewart v Owen* [2019] VCAT 140 and *Bozdogan v Concept Corp Pty Ltd* [2020] VCAT 643.

31. Unsuccessful resulting trust arguments based on other grounds than that stated in the previous paragraph are:

- *Hopkins v Hopkins & Anor* [2013] VCAT 414. The first respondent had purchased a succession of properties. The applicant paid 5% of the price of the first property. VCAT found that while this created a resulting trust it ended by agreement and repayment at the sale/settlement of the property;
- *Miller v Martin* [2016] VCAT 854 - the source of the purchase monies was not the applicant personally but a partnership between the parties. An appeal on this point failed (*Miller v Martin & Ors* [2018] VSC 444; Miller v Martin [2020] VSCA 4)
- *Trakas v Aravopoulos* [2016] VCAT 592 – no contribution to purchase price, merely a loan guarantor.

G. GROUNDS FOR REFUSING AN ORDER UNDER PART IV – COMMON INTENTION CONSTRUCTIVE TRUST

32. This form of constructive trust arises if –

(i) the parties formed a common intention, usually at the time of acquisition of the land, as to the ownership of the beneficial interest in it;

(ii) the party claiming the beneficial interest acted to that party's detriment in reliance upon the common intention, and

(iii) it would be a fraud upon the claimant for the other party to assert that the claimant had no beneficial interest.

: *Stewart v Owen* [2019] VCAT 140 at [89].

33. Such trusts were not established in –

- *Stewart v Owen* – parties' intention had changed from time to time;
- *Krsteski v Jovanoski* – lack of evidence;
- *Sherwood v Sherwood* [2013] VCAT 1746 – no agreement as to proportion of loan repayments or beneficial interest.

34. This form of trust has been overtaken in popularity by the form of trust dealt with under the next heading, which arises on similar facts and is easier to establish.

H. GROUNDS FOR REFUSING AN ORDER UNDER PART IV – TRUST BASED ON *MUSCHINSKI v DODDS*

35. *Muschinski v Dodds* (1984) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137, being "two landmark High Court decisions on constructive trusts in the mid-1980's" (*Stewart v Owen* [2019] VCAT 140 at [91]), articulated the law on joint endeavour constructive trusts. In the words of McMillan J in *Zekry v Zekry* [2020] VSC 221 at [88] -

> "A joint endeavour constructive trust will be 'imposed regardless of the actual or presumed intention to create a trust'. In *Australian Building & Technical Solutions Pty Ltd v Boumelhem*, Ward J summarised the proper approach as follows:
>
> First, it is necessary that there be both a joint relationship or endeavour, in which expenditure is shared for the common benefit in the course of and for the purposes of which an asset is acquired. ...
>
> Secondly, the substratum of that joint relationship or endeavour, must have been removed or the joint endeavour prematurely terminated 'without attributable blame'.
>
> Thirdly, there must be the requisite element of unconscionability — it would be unconscionable for the benefit of those monetary and non-monetary contributions to be retained by the other party to the joint endeavour."

Trust based on Muschinski v Dodds established

36. The first sustained exposition of the principles of *Muschinski v Dodds* blocking an application under Part IV was *Lyle v Lyle & Ors* [2011] VCAT 323 (Deputy President Macnamara). The facts were –

- Arthur and Janet Lyle had six children. They decided to sell land in Melbourne to fund erection of a house and other accommodation on land owned by Arthur at Grantville at which they would live;
- In the late 1990s they agreed to transfer and subsequently transferred 13 of a total of 17 parts or shares (namely 6.5 ha.) of the Grantville land (by oversight the transfer did not affect both titles but this did not affect the outcome) to their children as tenants in common, and they all entered into an agreement whereby in substance any child wishing to sell had first to offer that share to the other children. The agreement showed the parents as divesting themselves of part of their interest in the land - the existence of a life interest over the divested part would have thwarted their attempt to obtain the age pension which they required for retirement income. No consideration was paid. At the "signing ceremony" a family member said "of course we would never sell" and everyone appeared even by silence to agree with this arrangement;
- The parents spent approximately $400,000 on a house and granny flat at Grantville, moved in in 2000, and Arthur died in 2001.

37. One child sought relief under Part IV. Deputy President Macnamara dismissed the application. He found that there was a joint endeavour of the *Muschinski v Dodds* type to provide for the retirement of the parents in the family which had failed without blame. The applicant knew that her parents were disposing of their other assets with a view to spending them on the property. It would be unconscionable for the property now to be sold. Accordingly a constructive trust existed giving Janet an entitlement to reside at the property for life.

38. In *Trakas v Aravopoulos* [2016] VCAT 592 –

- The applicant became registered as proprietor of a third share in a property. The applicant and first respondent then cohabited there for six months, after which the relationship broke down and the applicant vacated;
- The applicant subsequently applied under Part IV for a sale;

VCAT found or held –

1. That the applicant had not contributed to the purchase price or loan repayments or ongoing costs, only to the living expenses of the occupants.
2. (Apparently accepting counsel's submission) that although the respondents agreed to include the applicant as owner of a one third legal interest in the property, that agreement was motivated by the assumptions or understandings that the applicant would commit to a long-term de-facto relationship with the first respondent and would contribute a third of payments of the loan, costs and expenses.
3. The breakdown of this arrangement constituted a failed joint endeavour.
4. It would be unconscionable for the applicant to retain his interest in the property, which he had only acquired through promises which never came to fruition.

39. *Ngatoko v Giannopoulos* [2017] VCAT 360 –

- The applicant and respondent agreed to purchase a property to be owned equally to provide a home for their respective families;
- They further agreed: to buy a particular house and land package; to enter into a joint mortgage; to borrow a particular amount to finance the purchase and construction; as to what the house would contain and how it would be occupied; to share all expenses, mortgage payments and other costs;
- This all occurred save that the applicant made virtually all payments and the respondent never moved into the house.

VCAT found or held –

1. The parties bought the property and undertook their joint borrowing as part of a joint enterprise to provide a home for themselves and their respective families. The purpose of the endeavour was to enable them all to live in and enjoy the property for an indefinite period of time. This had broken down.
2. A *Muschinski v Dodds* trust existed, such that the respondent held his interest upon trust for the applicant, subject to the applicant repaying the respondent his contributions of under $10,000 and assuming sole responsibility for the mortgage.

40. In *Grech v Richardson* [2019] VCAT 363 a *Muschinski v Dodds* trust was established where: the respondent put the applicant's name on the title of his land in circumstances where they were engaged and he thought they would get married and live together

there forever; within months of cohabitation their relationship failed without blame; it was not his intention that she should continue to enjoy the benefit of half ownership of the property once the relationship failed. It was accordingly unconscionable for her to continue to retain the benefit of her half interest in the property.

Trust based on Muschinski v Dodds not established

41. In *Sherwood v Sherwood* [2013] VCAT 1746 a brother and sister who were co-owners were held to hold the equitable estate in proportions favouring the brother (para. 29 above). He also argued for a *Muschinski v Dodds* constructive trust, the alleged joint endeavor being to purchase the property as a residence for both failing because they parties could not amicly co-habit. VCAT however found merely a joint intention to purchase a property as an investment, notwithstanding that the parties intended to live there before realisation: the fact that they now desired sale or a buy out did not entail failure of a joint venture.

42. In *Gates v Robinson* [2018] VCAT 40 –

- Mr Gates and his cousin Ms Robinson purchased a residential property with a view to holding it as investment, renovating it and renting it out. They had a common intention, at the time of acquisition, that their interests in the land should be equal. They agreed to bear all expenses equally. They became registered as joint owners in equal shares;
- However, soon after purchase they changed their plans to Ms Robinson occupying the house herself, which she always thereafter did, making all subsequent payments related to the property save for a payment by Mr Gates for floor polishing and him contributing until 2008 to mortgage loan repayments.

Her claim for *Muschinski v Dodds* trust failed because:

(a) the joint endeavour of holding the land as an investment property and renting it out, did not break down but because of a change of minds did not begin;

(b) the circumstances in which Ms Robinson has made greater contributions did not involve any conduct making it unconscionable for Mr Gates to retain a half interest in the land, in particular –

(i) he only stopped making mortgage repayments because she wanted to buy him out and asked him to stop paying;

(ii) with one exception all her work and payments for it were on her own initiative without consultation. The exception was where he was consulted and did not consent.

43. In *Stewart v Owen* [2020] VSC 175 Forbes J overturned VCAT's decision that a *Muschinski v Dodds* trust existed. Senior Member Vassie had found: that a joint endeavour existed in a couple's acquisition of an investment property; that it ended without blame when Ms Owen, with Mr Stewart's agreement, took up occupation of the property as a home for herself and their daughter; each made financial contributions to the joint endeavour; it was unconscionable for him to assert that he had a one-third beneficial interest in the property in substance because he caused or allowed her to act in a manner giving her reason to be reassured that she had the sole beneficial interest in the property. Forbes J found that it was not unconscionable for Mr Stewart to permit Ms Owen to treat the property as her own during the period of tenancy and continuing to do so once she commenced living there, nor was he unconscionably enjoying the benefit of contributions made by Ms Owen while refusing to recognise her entitlement such that a constructive trust should be imposed.

44. In *Bozdogan v Concept Corp Pty Ltd* [2020] VCAT 643 no unconscionability was established in the situation where the title was as the parties intended it to be.

I. SALE AND/OR PHYSICAL DIVISION – GENERAL

45. VCAT may make any order to ensure a just and fair sale or division and without limiting its powers may order sale and the division of proceeds (s. 228(2)(a)) and/or physical division (s. 228(2)(b) and (c)). If VCAT determines to make an order under s. 228(2), the order must be for sale, by a choice of methods (s. 232), unless it considers an order for sale and physical division or for physical division alone more just and fair (s. 229(1)). Without limiting what it may consider, VCAT, in determining justness and fairness (but not whether relief should be given at all – merely what form of relief should be granted: *Moll v Noblett & Ors* [2009] VCAT 353 at [36]) must take into account factors referred to in s. 229(2)(a) – (c) which are referred to below in the discussion of *Keam v Mason & Ors.*

Justness and fairness is not determined by applying instinctive justice but in a manner best according with the legitimate rights and interests of each party: *Edelsten v*

Burkinshaw & Ors [2011] VSC 362 at [27] (in that case concerning division of land, but it is submitted generally applicable). The Tribunal should have regard to and be informed of the general law as well as Part IV, but with the general law yielding to Part IV in case of difference: *Gates v Robinson* [2018] VCAT 40.

46. In any proceeding under Part IV Division 2 (Sale and division) VCAT may order any or all of a large number of matters as to sale, purchase, determination of price, reserve, valuation, time, costs, documentation (s. 232). VCAT has pro forma draft property sale orders. VCAT may make orders fitted to the peculiar circumstances of the case. Thus it may order removal of a caveat adversely affecting sale where orders for the net proceeds of sale to be held by a solicitor were sufficient protection for the caveator: *Colaci v Colaci* [2016] VCAT 1191. However, in the recent case of *Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51 an application for peculiar sale orders to protect the applicant from paying GST, ie for:

separate contracts of sale containing separate terms concerning GST ([101]); or

the purchase price attributable to the applicant's share to be paid to him separately ([106]); or

all contracts to provide that the sale of the applicant's interest was not subject to GST ([111]).

was rejected on the ground of inconsistency with a previous agreement between the parties. The application for an order for separate contracts of sale was also rejected on the ground that VCAT had no jurisdiction to make a separate order for the sale of either undivided share – its jurisdiction was to make an order for the sale of the whole of the co-owned land ([103]).

Sale at the request of a minor co-owner and/or to the other co-owner

47. In *Sigal v Astakhov* [2017] VCAT 456 the parties were co-owners of a boarding house subject to a substantial mortgage debt. The respondents, who held an 80% interest in land and opposed sale, sought adjustments in their favour and an order that the applicant assign her interest in the land to them for various reasons. Senior Member Davis found that even with the respondents having an adjustment in their favour nothing but a sale would be just and fair. Similarly an application for an order for sale by one co-owner to another was refused in *Bozdogan v Concept Corp Pty Ltd* [2020] VCAT 643 on the ground that there insufficient evidence that this would yield a fair price.

Private sale

48. In *Bornyan v Bornyan* [2014] VCAT 1103 an order of sale was made despite evidence that it would cause substantial loss to a company because of cost of re-locating its business, difficulty of finding suitable alternate premises and potential loss of goodwill. The property was ordered to be sold privately at a price fixed by valuation, with, however, an order that any of the parties could on sufficient evidence of adequate finance purchase at or above the reserve, failing which it would be auctioned.

Sale v Physical Division

49. The main example of a dispute between two groups of co-owners – one favouring sale, the other physical division – is *Keam v Mason & Ors* [2010] VCAT 242. The facts were –

- 11 ha. at San Remo, with old deteriorating farm buildings, had been farmed until the early 1980s but had not been significantly farmed since. One respondent lived there and carried out small scale sheep grazing. The land was surrounded by residential development;
- The land was owned as a whole by the co-owners as tenants in common in various fractional interests. Those with approximately 75% of the fractional interests wanted the sale and the rest desired physical division into two lots.

The Tribunal stated that to find for the proposed physical division into two lots it must be convinced on the balance of probabilities that the co-owners were assured of getting the value of their fractional interest, as would occur on a sale and distribution of the proceeds in proportion to the fractional interests.

The Tribunal dealt with the factors referred to in s. 229(2)(a) – (c) as follows

- Use – the use as a residence for a respondent and minor grazing was far below the highest and best use of residential subdivision;
- whether physical division is possible and practicable. The two lot subdivision was possible. As to practicablity the Tribunal must find on the balance of probabilities that this two lot plan would accurately reflect in value the fractional interests of all co-owners. There was insufficient evidence on: any town planning permit and conditions; unquantified contingencies and how they could be dealt with; the costs and the returns from sale of the two lots;
- any particular links with or attachment to the land, including whether it is unique

or has a special value to any co-owner. "Special value" was held to have the same meaning as in the law of compulsory acquisition, ie (in summary) value to the owner over and above its market value. Links and attachment included length of attachment and the intensity of the sentimental attachment. Evidence of this was lacking here.

The land was accordingly ordered to be sold.

J. PHYSICAL DIVISION

50. Physical division may be into parcels or shares differing from original entitlements, with compensation (s. 230). Because of the preference in s. 229(1) for sale over physical division, physical division only tends to occur when all parties desire it – in that case it is more just and fair that any relief be by way of physical division: *Moll v Noblett & Ors* [2009] VCAT 353. In that case two co-owned Crown allotments in bushland, one of which was improved by a bunkhouse, were physically divided by drawing of lots or toss of a coin with financial adjustment to compensate one co-owner for loss of the bunk house - Deputy President Macnamara commented that it was difficult to believe that there is a strong sentimental attachment to one part of a relatively small and unsubdivided piece of land over another part of the same land.

51. In *Edelsten v Burkinshaw & Ors* [2011] VSC 362 all parties desired to continue to live on and farm the properties but could not agree on the division. Kaye J. ordered that each party obtain the lot on which each resided and that a third lot go to the defendants with compensation to the plaintiff because the defendants were better equipped to farm it.

52. Physical division will not be ordered if inconsistent with an agreement between the parties: *Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51 at [100].

K. ACCOUNTING, COMPENSATION, REIMBURSEMENT AND ADJUSTMENT – GENERAL

53. In *Trani v Trani* [2019] VSC 294 at [36] Kaye JA observed –

> "It is trite, but important, to bear in mind that the application for an accounting, provided for under s 234(1) of the Act, comprises a statutory right of action available to a co-owner of land. Such a cause of action is exclusively a creature of the Act. The

elements of that cause of action, and the relief provided by it, are defined by the applicable provisions of the Act".

This applies generally under this heading.

54. In any proceeding under Part IV Division 2 (Sale and division):

- VCAT in discharging its obligation to achieve a "just and fair" division of the proceeds of sale of the land may order any or all of compensation or reimbursement between co-owners, account in accordance with s. 28A, or adjustment 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 (s. 233(1); *Gates v Robinson* [2018] VCAT 40 at [23]);
- in determining whether to make an order under s. 233(1) VCAT must take into account reasonable expenditure in improving the land or goods, costs reasonably incurred in maintenance or insurance, payment of more than a proportionate share of rates, mortgage repayments, purchase money, instalments or other outgoings, damage caused by unreasonable use, whether a co-owner occupying land or one using goods should pay an amount equivalent to rent to the non-occupants (s. 233(2)). This list is not exhaustive: *Protyniak v Henry* [2009] VCAT 8 at [46];
- however, this order for rent can only be made if the occupant or land or user of goods is seeking compensation, reimbursement or an accounting for money expended in relation thereto or the co-owner seeking an amount equivalent to rent has been excluded from occupation of land or use of goods or has suffered a detriment because of impracticability of occupying the land or using the goods with the other co-owner (s. 233(3), (4)).

Warranting extended separate treatment below are: adjustment of interests; compensation and reimbursement; improvement and maintenance; and rent.

55. Further -

- a co-owner of land or goods may seek an order for an accounting in accordance with s. 28A (s. 234). Under s. 28A a co-owner is liable, in respect of receipt of more than a just or proportionate share according to his or her interest to account to any other co-owner;
- VCAT may make any order it thinks fit to ensure a just and fair accounting of amounts received, including ordering a co-owner who has received more than the share of rent or other payments from a third party to account (s. 234B).

56. Whether particular expenditure dictates compensation/reimbursement on the one hand or adjustment of interests on the other depends on what is fair and just: eg *Gates v Robinson* at [19]. The power under s. 233 is to be exercised judicially, having regard to and being informed of the general law, rather than simply imposing some form of instinctive justice: *Sherwood v Sherwood* [2013] VCAT 1746**.**

57. Although s. 233(1) uses the general phrase "amounts payable by co-owners to each other during the period of the co-ownership" VCAT has held that any sought compensation, reimbursement or adjustment must relate to the position of the parties as co-owners and accordingly excluded will be –

- an extraneous debt: *Sutherland v Corkhill* [2011] VCAT 709 at [21]; *Bornyan v Bornyan* [2014] VCAT 1103. For example half of the cost of a tombstone: *Andreadis v Lofthouse* [2018] VCAT 1454 – the co-owners were the respondent and the mother of both parties – the mother died and her will directed sale of her interest and division of the proceeds between the parties;
- redress for breach of fiduciary duty: *Cappellin v Brondolino* [2011] VCAT 1778 at [148], [193];
- a claim for compensation, if known to the law at all, for the other co-owner causing termination of a contract by a public authority using the land: *De Winter v Widdowson* [2020] VCAT 299.

L. ADJUSTMENT OF INTERESTS

58. In *Stewart v Owen* [2019] VCAT 140 Senior Member Vassie held that adjustment of interests in land could be made by VCAT in two circumstances:

(a) Under 233(1)(c) – limited to where there were "amounts payable by co-owners to each other during the period of the co-ownership";

(b) Where, as in that case, there were not amounts so payable, under s. 228(1) when it empowered VCAT to make any order it thinks fit "to ensure that a just and fair sale or division of land", eg where VCAT ordered a physical division of land but the order would be ineffective without a further order that one co-owner transfer one part of the land to the other.

This accorded with considerable VCAT authority, commencing with *Pavlovich v Pavlovich* [2012] VCAT 809, and further *Binns v Binns* [2018] VCAT 759. See also

Weatherley v Weatherley [2019] VCAT 1393; *Mathers v McColley* [2019] VCAT 1230 (order refused); *Venn v Saward* [2012] VCAT 1970.

59. However, on appeal Forbes J. held that the second proposition stated in the previous paragraph was unsound: *Stewart v Owen* [2020] VSC 175. Her Honour held that absent an application contemplated by Part IV the Tribunal does not otherwise have jurisdiction to make a declaration as to the interest of a co-owner. Any order transferring title as between co-owners must derive from the statutory power to order sale of the property, a physical division of the property, a combination of both, or by a determination that the adjustment of interest in an application between co-owners requires the transfer.

60. Accordingly Forbes J held that VCAT, having dismissed the applicant's claim under Part IV for the sale of the property and distribution of proceeds and for orders for compensation and accounting, had no power to declare that the applicant held his interest on trust for the respondent and to order that he transfer it to her. There was also no power, having found an equitable interest held in favour of the respondent, to offset this by the imposition of an equitable charge in favour of the applicant.

61. However, notwithstanding her holding that the second proposition was unsound, her Honour left open the possibility that a somewhat similar result could nonetheless be accomplished by another route. In particular –

(a) her Honour also held that the unequal contributions and differing occupation of the property by each of the co-owners and their departures from a written agreement called for an adjustment of their respective interests. As both had made contributions, the Tribunal having determined any adjustment and compensation had to determine whether or not it would make an order for the sale of land [43];

(b) it may be that in such an accounting generally one co-owner's interest in land is adjusted to nil value or to 100% of the value, so that any adjustment of interest in the land would result in one co-owner holding the entire indivisible share bringing to an end the co-ownership [44];

(c) it was unnecessary to determine whether there was jurisdiction to grant a remedy by way of declaration of the equitable interest of a co-owner pursuant to s 124 of the Victorian Civil and Administrative Tribunal Act, ie the section giving general

power to VCAT to make a declaration in a proceeding before it [48]. (A declaration under this section was made in *Grech v Richardson* [2019] VCAT 363).

62. The subtlety involved in weighing factors relevant whether to adjust is demonstrated by *Protyniak v Henry* [2009] VCAT 8. The facts were –

- The applicants were the parents of the respondent, their daughter. On the daughter expressing a desire to leave her husband, her father suggested that she look for a property to buy, and her parents offered to lend her the deposit and it was agreed that she be responsible for all other payments. Each party became registered proprietors in thirds of vacant residential land purchased for $54,000 and were co-mortgagees. A house was eventually erected;
- After several years the daughter moved into the property with her daughter. Subsequently she remarried and her new husband, his son and subsequently their daughter also lived at the property;
- Notwithstanding the daughter having agreed to be responsible for all other payments the parents in fact made considerable payments in respect of the land including under the mortgage;
- The parents sought an order for sale and after payment of the mortgage the entire net proceeds of sale. This would in effect adjust the parties' interests in the land;

Deputy President Macnamara declined to make any adjustment, balancing the factors as follows –

(a) Given that the purpose for the acquisition was to provide a home for the daughter and her children and in the classic sense to "advance her" it would not be equitable now retrospectively to charge her with an occupancy rent;

(b) It was appropriate to consider some adjustment to the property entitlements such that the mortgagors' equity should be divided 75%/25% in favour of the parents because they had outlaid almost twice as much as her (no adjustment was in fact made);

(c) Whilst not in a formal sense providing for an occupancy rent the fact that the property had been used solely for the daughter's benefit should bear some weight under s. 233;

(d) In exercise of the Tribunal's wide discretion it took into account that until almost the eve of hearing the daughter by delay, omission and obstruction was opposed to

the making of the sale order, despite her entirely failing to observe her promise to meet the mortgage payments and outgoings and that she well knew that nobody was paying the bank;

(e) However, the daughter had made greater contributions than a third;

(f) Nevertheless the daughter should not receive more than her registered third interest based upon the various considerations weighing against her referred to above which ultimately boiled down to her having conducted herself badly as regards her parents despite the very large assistance which they gave her and to her having had the exclusive enjoyment of the occupancy of the premises.

63. Interests have also been adjusted in the following circumstances –

- *Tien v Pho* [2014] VSC 391. Kaye J dismissed an appeal from a decision of VCAT which had adjusted the percentage interests of two co-owners to take account of the defendant paying a disproportionate part of the purchase price and mortgage loan repayments, but not making an adjustment to take account of the plaintiff's receipt of all the rent but rather requiring that it be paid out of the plaintiff's share of the proceeds of sale.
- *Bornyan v Bornyan* [2014] VCAT 1103 - adjustment securing part of a mortgage debt solely over one party's interest. The applicant wrongly withdrew funds which he was required to apply to reduce a second mortgage debt.

M. COMPENSATION AND REIMBURSEMENT

64. As the capacity for financial dealings between co-owners are myriad it would be impossible and pointless to attempt a list of possible items of compensation or reimbursement. However, to give a flavor, albeit mundane, of a typical case, in *Gates v Robinson* [2018] VCAT 40 Senior Member Vassie awarded compensation, under the following headings –

(a) acquisition costs;

(b) mortgage repayments;

(c) municipal rates;

(d) water rates excluding usage charges (the respondent being the sole occupier);

(e) other outgoings,

(f) building insurance,

(g) improvements to the land and maintenance of the house including repairs and renovations. Included in this were items, including solar panels, which could be reasonably regarded as improvements to the property, whether additional or upgrading fixtures and fittings. Not allowed were: items purchased for the purpose of the respondent occupier's do-it-yourself painting and performance of other minor maintenance items; locks and keys and similar items for her personal security and benefit rather than improvement to the property; items notoriously susceptible to depreciation in value and to fair wear and tear;

(h) garden and other external works. The respondent occupier claimed an amount for maintaining the garden and improving or otherwise altering the exterior. Allowed were the more substantial items of expenditure which could reasonably be regarded as improvements to the land, eg water tanks and fences. Not allowed were items just as readily regarded as for the respondent's personal amenity and enjoyment, eg landscaping, paving, removal of a healthy tree, general garden maintenance items, or an item to which the co-owner refused to agree.

Compensation and reimbursement for some of the above items was also allowed in *Sherwood v Sherwood* [2013] VCAT 1746**.**

The person claiming the expenditure is not required to prove that it increased the value of the property: [44].

65. In *Tsembas v Ciciulla* [2017] VCAT 1695 the registered proprietors obtained adjustments against each other derived on the one hand from rent received from tenants and on the other from payments for improvements, rates, land tax, insurance, repairs and maintenance. One amount allowed was $5,000 for an unproved quantum "on the basis that I cannot conceive of the improvements that she identified having cost her less than that" (Senior Member Vassie at [69]).

66. More unusual successful claims for compensation have been –

(a) compensation for loss of a chance for sale at a higher price, due to the applicant frustrating and delaying the sale: *Grigoriu v Petran* [2009] VCAT 2272 at [139]. In the recent case of *Morey v Auslong Development Management Pty Ltd* [2020] VCAT 51 VCAT allowed each co-owner to apply under s. 233 for damages including for fall in value alleged to have been suffered through delay in being able to sell by breaches by the other co-owner of a joint venture agreement.

(b) payment of the equivalent of statutory interest on the contribution ordered: *Sherwood v Sherwood (No 2)* [2013] VCAT 2017;

Unsuccessful was a claim for the cost of two formal valuations obtained by the applicant to convince the respondent of value and so induce her to increase her offer to buy out his interest: *Andreadis v Lofthouse* [2018] VCAT 1454.

N. IMPROVEMENT AND MAINTENANCE

67. Under s. 233(2) reasonable expenditure in improving the land or goods and costs reasonably incurred in maintenance are to be taken into account. Two cases have considered these headings at length.

68. In *Venn v Saward* [2012] VCAT 1970 the facts were –

- The applicant and the respondent purchased a residential property and became tenants in common in equal shares. The respondent was at that time the domestic partner of the applicant's son;
- The price was paid by a contribution by the applicant, a loan to both parties secured by mortgage, and a contribution by the applicant's former husband**.**
- The applicant, her son and the respondent commenced to reside on the property. They had agreed to live there only briefly while the son repaired the roof and eradicated termites after which the property would be rented to the son and another man for $270 per week. However instead of doing the agreed works the son renovated unilaterally according to his own priorities and in "fits and starts". The applicant was forced to accede to his demand that she pay for these works;
- Her son beat the applicant so severely that she finally left the house. He continued to rent it out;
- Under the agreement between the parties she was entitled to half the rent, which exceeded her share of the mortgage repayments. However, she received no rental. Accordingly the respondent and the son had from the time of the applicant's vacation sole use of the property and any rental income derived from it. They also did not make the agreed mortgage repayments;
- The applicant made various claims. The respondent claimed compensation for renovation expenses.

The Tribunal held –

1. expenditure on works without a co-owner's consent or adoption of their benefit would be unrecoverable at common law but might be recoverable under s. 233 if just and fair;
2. The claim failed because: the respondent via the son made the expenditure with money supplied by the applicant, the applicant's former husband or the tenants; lack of accounting evidence; it was not reasonable for the respondent to incur large sums of money without the consent of the applicant to carry out unfinished work of doubtful value; it had not be demonstrated that the property had been improved.

69. In *Sigal v Astakhov* [2017] VCAT 456 the Tribunal held that "reasonably spent" (s. 233(2)(a)) and "reasonably incurred" (s. 233(2)(b)) did not cover a co-owner's own labour. The claim for expenditure was rejected on grounds including unreasonableness because no improvement of value had been achieved (ie the property was worth land value only). Further, any authority to do works on behalf of the other co-owner necessarily ended when the parties fell out.

O. RENT

70. As noted above, under s. 233(2)(e) and (f) VCAT can take into account whether a co-owner occupying land or one using goods should pay an amount equivalent to rent to the non-occupants, but this order for an equivalent of rent can only be made in certain circumstances. These are dealt with in succeeding paragraphs.
Occupation may also be taken into account under s. 233(1) which "creates an open discretion allowing adjustment": *Protyniak* [2009] VCAT 8 at [45], [46].

71. The first circumstance is if the occupant or land or user of goods is seeking compensation, reimbursement or an accounting for money expended in relation to the property (s. 233(3)(a), (4)(a)) –

- *Michell v Winch* [2012] VCAT 1524;
- *Gates v Robinson* [2018] VCAT 40 (conceded in any event).
- *Protyniak v Henry* [2009] VCAT 8 – claim unsuccessful because the purpose of the acquisition was to provide a home for the occupier and her children and it was not equitable now retrospectively to charge her with an occupancy rent.

72. Rent is also claimable if co-owner seeking an amount equivalent to rent has been excluded from occupation of land or use of goods (s. 233(3)(b), (4)(b)) –

- *Edelsten v Burkinshaw & Ors* [2011] VSC 362 – occupation fee for farmland;
- *Venn v Saward* [2012] VCAT 1970 (para. 70 above) – violence of partner of respondent;
- *Paolini v Apostoleris* [2020] VCAT 37 – rent payable by one co-owner to the other under a lease of the property by them to that co-owner.

73. Rent is also claimable if co-owner has suffered a detriment because of impracticability of occupying the land or using the goods with the other co-owner (s. 233(3)(c), (4)(c)). In *Grech v Richardson* [2019] VCAT 363 occupation rent was payable by a co-owner who had been asked to leave: Mr Richardson deposed that "living together just didn't work for us."

74. A rent claim may be defeated by a trust arising in favour of the occupying party before the non-occupier departed, eg *Trakas v Aravopoulos* [2016] VCAT 592; *Ngatoko v Giannopoulos* [2017] VCAT 360; *Stewart v Owen* [2019] VCAT 140. In *Ngatoko* the Tribunal also took into account that: it was not fair to make the adjustment because it was non-occupier's decision not to move into the house; the applicant and his wife had not benefitted by this non-residence; and any allowance for rental should be balanced against expenditure in relation to the land by the co-owner in occupation.

P. SUPREME AND COUNTY COURT JURISDICTION

75. The Supreme Court and County Court, not VCAT, has jurisdiction to hear an application under Part IV Division 2 (Sale and division) if the subject of the application relates to a proceeding under Part IV of the Administration and Probate Act, or the Partnership Act. In *Miller v Martin* [2020] VSCA 4 a finding that the source of the purchase monies was not the applicant personally but a partnership between the parties was insufficient to deprive VCAT of jurisdiction.

76. Those courts also have jurisdiction if in a proceeding commenced in those courts the issue of co-ownership arises in the proceeding or in the opinion of that court special circumstances exist which justifying the court hearing the application, namely circumstances in which the subject matter is complex or at least a substantial part of the matter does not fall within the jurisdiction of VCAT (s. 234C).

77. Examples of the courts assuming jurisdiction are –

- In *Edelsten v Burkinshaw & Ors* [2011] VSC 362 the co-owners were also in a business partnership. A proceeding under the Partnership Act 1958 was involved and there was complexity;
- *In Re F Vitale & Sons Pty Ltd & Ors* [2018] VSC 111 – three brothers owned and controlled numerous companies and trusts. They also co-owned three properties and a fourth property was co-owned by one personally and by the other's respective superannuation funds. There were Supreme Court proceedings seeking relief under the Corporations Act from oppressive conduct in relation to the affairs of various companies. A VCAT application was issued seeking orders for sale of the four properties. Sifris J found "special circumstances". His Honour considered dictionary definitions of "complex". The proper exercise of the broad discretion under s. 228(1) required the Court to consider all relevant matters including the content and context of the dispute. The relationship between the matters relevant to the relief sought under Part IV and those relevant to the oppression claims created a complexity of issues that should not be determined separately in two fora. The complexity arose out of the need to determine the appropriate relief available in the circumstances, given the relationship of the parties, the subject matter of the various proceedings and the role and use of the properties within the family and the corporate structures.

In *Trani v Trani* [2019] VSC 294 Kaye JA held that if the plaintiffs' claim had, contrary to his Honour's conclusion, fallen within Part IV, the Supreme Court would nonetheless have had jurisdiction under s. 234C(4) on the ground of special circumstances.

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