

CPD LECTURE FOR COLLEGE OF LAW

ON

CO-OWNERSHIP DISPUTES – NAVIGATING SEC 66 G APPLICATIONS

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THINGS FALL APART; AND THE WAR OF THE ROSES

1. “Things fall apart; the centre cannot hold;

Mere anarchy is loosened upon the world.....”

Yeats in his poem, *The Second Coming*, may just as well have been writing about co ownership disputes. Even the line “Surely some revelation is at hand”, is apt to describe the way the client turns to their lawyers to seek vindication of their position.

2. Or if one is being slightly less poetic, perhaps one recalls the War of the Roses with Michael Douglas and Kathleen Turner. After almost two decades of marriage, the characters they play want out of the marriage, but not out the opulent matrimonial mansion. Thus begins a war between husband and wife, including plans to partition the home.

Co-ownership disputes arise in various contexts, and as regards different classes of property, viz real property (i.e. land), intangible assets (e.g. goodwill, IP) and chattels (e.g. shares, a yacht).

WHAT IS CO-OWNERSHIP OF PROPERTY ¹

3. “Co-ownership exists when two or more people have an interest in property (either land or some other form of property, such as chattels) which entitles them to possess the property at the same time.

1.2 Married couples and de facto partners often become co-owners of land when they buy a house together. People may also become co-owners of land if they buy a house together to live in or for investment purposes, or if they inherit land under a will.

1.3 People can also co-own personal property, for example goods or shares in a company. Co-ownership often occurs when people open a bank account together or when property such as company shares or goods is left to them in a will.”

Examples given are as follows:

A and B, who are friends, buy a beach house together. They are co-owners.

T leaves all her property 'to my children'. T's three children become co-owners of the property.

Two forms of co-ownership are recognised in Victoria and other parts of Australia.

4. These are the joint tenancy and the tenancy in common.

The most important difference between tenancy in common and joint tenancy is that joint tenants have a right of survivorship. This means that when a joint tenant dies, the property belongs to the remaining joint tenant or joint tenants. The right of survivorship arises because joint tenants are seen as sharing the same interest in the property, rather than as having separate interests. Because each of them is treated as having the same interest in the whole property, a joint tenant's interest in the property simply vanishes when she or he dies. A joint tenant can convert his or her interest into a tenancy in common by selling or giving the interest away.

Chattels are goods which are not affixed to land, for example, a car, white goods, jewellery, a boat or caravan. A and B, who are friends, buy a beach house

¹ Extracted from the Victorian Law Reform Commission paper referred to below.

together. They are co-owners.

T leaves all her property 'to my children'. T's three children become co-owners of the property.

Joint tenancy

5. A joint tenancy exists where two or more people own a single interest in property. If a joint tenant dies, the surviving joint tenant(s) are entitled to the whole of the property while he or she is alive (this is known as severance), but he or she cannot leave it to anyone by will, so as to defeat the right of survivorship.

By contrast, tenants in common are seen as having separate (although undivided) shares in the property, which entitle them to possess the property at the same time. When a tenant in common dies, survivorship does not apply. His or her interest in the property passes to the beneficiaries nominated under his or her will, or is distributed under the legal rules governing inheritance when a person dies without a will (intestate)."

6. The example given is as follows:

"X, Y and Z are tenants in common of land. Z dies leaving all his land to P.

P becomes a tenant in common with X and Y."

DIVISION OF ASSETS GENERALLY IN THE LAW

7. There are legislative provisions dealing with when marriages and *de facto* relationships break down, e.g. 79 of the *Family Law Act 1975* (Cth).

So too when partnerships are dissolved because of e.g. oppression. One strong indicator of a partnership is the combining of assets for the purpose of deriving profits.

8. Absent a partnership agreement that addresses the distribution of assets and liabilities, *the Partnership Act* (NSW) 1892 applies.

Sec 1 of the *Partnership Act* is headed "Definition of partnership" and provides:

(1) Partnership is the relation which exists between persons carrying on a business in common with a view of profit and includes an incorporated limited partnership.

(2) But the relation between members of any company or association which is:

(a) incorporated under the *Corporations Act 2001* of the Commonwealth, or

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or Letters Patent or Royal Charter,

is not a Partnership within the meaning of this Act.

Sec 2 contains rules for determining existence of partnership, and provides in part:

“(1) In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) *Joint tenancy, tenancy in common, joint property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.*

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business,
.....”

9. Under section 9 of the Act, each partner is jointly liable with the other partners for all of the business' debts and obligations incurred while a partner. Section 39 of the Act provides that upon dissolution, partners can have the property of the partnership applied to the payment of debts and liabilities of the business.

10. Extracts follow from *Rushton (Qld) P/L & Anor v Rushton (NSW) P/L* [2002] QCA 210:

“[9] It is an axiom of partnership law that any change in the membership of a partnership occurring, whether by reason of the retirement, expulsion, death or otherwise of a partner, has the consequence of dissolving the partnership: S J

Mackie Pty Ltd v Dalziell Medical Practice Pty Ltd [1989] 2 Qd R 87, 90-91. After dissolution, the next step is to wind up the affairs of the partnership by realising the assets and paying the debts and liabilities of the firm *before distributing the surplus, if any*, among the partners according to their rights and interests. See *Partnership Act 1891* (Qld), s 42; *Partnership Act 1892* (NSW), s 39. Winding up in that way may be avoided if the parties agree on a sale to one or more of the remaining partners of the shares of the outgoing partner, or if there is a provision in the partnership agreement to that effect.”

[13]it becomes necessary to analyse more closely the effect of an agreement by continuing partners to buy the share of an outgoing partner in a solvent partnership. Such an agreement has, when carried out, the effect not only of dissolving the partnership but of terminating the outgoing partner’s right to continue to share in the accruing profits of the business and to receive on winding up his due proportion of the surplus remaining after discharging the liabilities.”

[17]Although having no title to specific property owned by the partnership, a partner has a beneficial interest in each and every asset of the partnership: *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440, 446. Because his share consists of a right to a proportion of the surplus after paying debts and liabilities of the partnership (*ibid*), it necessarily comprises, for the purpose of disposing of it, of a share in the net surplus of partnership assets over liabilities. In that respect it resembles the interest of a beneficiary in the assets of a trust: *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties* [1984] 1 Qd R 576, 587, which is to say, it is the interest in that net surplus on dissolution, whether present or prospective, and not the title to any particular partnership asset, that is capable of being disposed of by a partner. It is for that reason that a testamentary disposition of “my livestock” or “my real estate” can be interpreted as carrying to the legatee or heir the net proceeds of the testator’s interest in the livestock or the real estate of a partnership of which he is a member. See *Hendry v Perpetual Executors & Trustees Association of Australia Ltd* (1961) 106 CLR 256; *Calcino v Fletcher* [1969] Qd R 8, 18-19. The chose in action disposed of when a share or interest in a partnership is transferred or assigned is one that assumes that the liabilities of the partnership have already, if notionally, been paid or at least provided for out of the available assets.....”

Oppression proceedings

11. Sections 232 and 233 of the *Corporations Act* empower the Court to make certain orders in the event of oppression. Section 232 of the *Corporations Act* provides that the Court may make an order under s 233 if:

“(a) the conduct of a company’s affairs; or

2. (b) an actual or proposed act or omission by or on behalf of a company;

or

3. (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

4. (d) contrary to the interests of the members as a whole; or

5. (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.”

12. The orders that may be made include:

--that the company be wound up (s 233(1)(a))

--an order for the purchase of any shares by any member (s 233(1)(d)).

13. Issues which arise in this context include whether the majority who wish to buy out the minority, ought pay a premium for that privilege. In *MMAL Rentals Pty Ltd v Bruning* [2004] NSWCA 451, the Court of Appeal held that:

“the majority shareholder has an interest in ensuring that the minority holding is not acquired by someone who has no relationship with the majority holder of mutual co-operation or trust ... The majority holder will therefore be prepared to pay more for the minority shareholding than another person” (at [71]).

In *Cumberland Holdings Ltd v Washington H Soul Pattinson & Co Ltd* (1977) 13 ALR 561, Lord Wilberforce said: “to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made.”

14. However, cases such as *Hillam v Ample Source International* (No 2) [2012] FCAFC 73 demonstrate that courts will not shy away from winding up a company

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if some less drastic remedy, e.g. a share buy out, is not appropriate.

Further reading: Commercial Law Association Judges Seminars June 2013 Practice in the Corporations List of the Supreme Court of New South Wales, by Justice Ashley Black, Supreme Court of New South Wales, viewed online Feb 2019.

NEW SOUTH WALES LEGISLATION

15. SEC 66 G is contained in Division 6 of Part 4 of the *Conveyancing Act 1919* and headed "Statutory trusts of property held in co-ownership".

New South Wales reformed its partition and sale procedures in the 1930's: see *Conveyancing (Amendment) Act 1930* (NSW).

Under section 66G, a co-owner of property *other than goods* can apply to the court to appoint trustees to hold the property on a trust for sale or on a trust for partition.

Sec 66 G provides as follows:

"(1) Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

. . . .

(3) (a) Where the entirety of the property is vested at law in co-owners the court may appoint a trust corporation either alone or with one or two individuals (whether or not being co-owners), or two or more individuals, not exceeding four (whether or not including one or more of the co-owners), to be trustees of the property on either of such statutory trusts.

(b) On such appointment the property shall, subject to the provisions of section 78 of the Trustee Act 1925, vest in the trustees.

(4) If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may, with the consent of the incumbrancers of the entirety (if any), appoint trustees of the property on the statutory trust for partition, or as to part of the property on the statutory trust for sale, and as to part on the statutory trust for partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

(5) (a) When such trustees for partition have prepared a scheme of partition they shall serve notice in writing thereof on all the co-owners of the age of eighteen years or upwards, and any of such co-owners dissatisfied with the scheme may, within one month after service upon him or her of such notice, apply to the court for a variation of the same.

...

(6) In relation to the sale or partition of property held in co-ownership, the court may alter such statutory trusts, and the trust so altered shall be deemed to be the statutory trust in relation to that property.

(7) Where property becomes subject to such statutory trust for sale:

(a) in the case of joint tenancy, a sale under the trust shall not of itself effect a severance of that tenancy,

(b) in any case land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs.

... "

The meanings of "statutory trust for sale" and "statutory trust for partition" are given in 66F(2)(a) and (3), as follows:

"(2) (a) Property held upon the "statutory trust for sale" shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners."

"(3) Property held upon the "statutory trust for partition" shall be held upon trust:

(a) with the consent of the incumbrancer of the entirety (if any) to partition the property and to provide (by way of mortgage or otherwise) for the payment of any equality money, and

(b) upon such partition being made to give effect thereto by assuring the property so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given."

Sec 66 H provides:

"So far as practicable trustees on the statutory trust for sale, or on the statutory trust for partition, shall consult the persons of the age of eighteen years or upwards and not subject to disability for the time being beneficially entitled to the income of the property until sale or partition, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, *of the majority (according to the value of their combined interests)* of such persons, but a purchaser shall not be concerned to see that the provisions of this section have been complied with."

QUEENSLAND LEGISLATION

16. An application can be made pursuant to s 38(1) and s 41(2)(a) of the *Property Law Act 1974* (Qld) for the appointment of trustees of real property *and of chattels* to vest in the trustees to be held on statutory trust for sale.

Case ref: *Fleming v Fleming & Anor* [2016] QSC 215

GENERAL COMMENTARY ON THE NSW POSITION

17. The Victorian Law Reform Commission ² summarised the law as follows:

² Authored by Professor Marcia Neave AO, Jamie Walvisch, Padma Raman Cathy, Sara Charlesworth, Stephen Farrow, Michelle Fisher, Ailsa Goodwin

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“4.15 If trustees for sale are appointed, their primary obligation is to sell the property. When the property is sold, the proceeds are held on trust for the co- owners, and can be distributed among them. The trustees are required to consult the beneficiaries and act according to their wishes as far as is practicable and consistent with the general interests of the trust. If trustees for partition are appointed, the trustees are required to transfer the property to the co-owners and to make a payment of money to equalise the shares.

Advantages and disadvantages of the New South Wales approach

4.16 By making trustees responsible for administering the sale or physical division of the property, they may reduce disputes between co-owners about matters of detail. For example, the trustees can oversee the advertising of the property and decide when the sale should occur. They can also ensure that any proceeds of sale are properly distributed.

4.17 The disadvantage of these provisions is that they establish a complex process for sale or division of the property which will often be unnecessary. It may be useful to have trustees appointed to oversee the sale or division in some situations. For example, if the relationship between the co-owners has disintegrated so that they cannot agree on details, or if some of the co-owners are minors who cannot manage their own assets, it may be advantageous to have trustees involved. However, it is not clear why the legislation requires the appointment of trustees in every case of partition and sale. When co-owned land is sold or divided under the *Family Law Act 1975* (Cth) or under Part IX of the *Property Law Act 1958*, the court generally orders a sale without appointing trustees, though it has power to appoint trustees in appropriate circumstances. In addition to being unnecessary in some cases, the appointment of trustees may sometimes delay realisation of property.

Although the insertion of section 66G of the *Conveyancing Act 1919* (NSW) altered the law as it related to sale and partition of land (giving the court the power to appoint trustees for sale and partition), it did not alter the traditional rules which govern the other remedies available to co-owners. Thus, although judges have discretion to order sale and partition, they have to revert to the common law principles to examine the issue of compensation or accounting between co-owners: *Forgeard v Shanahan* (1994) 35 NSWLR 206. This approach was strongly criticised by Kirby P: (1994) 35 NSWLR 206, 211-12.

18. As noted in the Victorian Law Reform report (ibid), in *Forgeard v Shanahan* (1994) 35 NSWLR 206, 224, Justice Kirby, then President of the New South

Wales Court of Appeal, criticised the rule that a co-owner in exclusive possession of land does not have to pay rent to the other co-owners unless they are excluded from the land or the occupying co-owner claims compensation for improvements.

He said that it was absurd to treat a co-owner, not actually ousted or excluded from the property, as a person who has “chosen not to exercise his legal right to occupy the land”; and opined that such a rule failed to take into account that one co-owner might withdraw from land held in co-ownership after the breakdown of the personal relationship which led to the co-ownership in the first place.

IS SALE THE PREFERRED REMEDY?

19. It might have been thought that sale is preferred over partition. However, both the primary judge and court of appeal in *Segal v Barel* [2013] NSWCA 92 put glosses on this traditional line of thought, as follows:

The learned primary judge did not think that it is entirely accurate to say that the legislation makes sale the 'preferred' remedy, emphasizing that s 66G(1) contemplated either sale or partition as alternative remedies, so that "a judge does not start with a predisposition towards sale simply because it is cleaner, simpler and more straightforward. The choice of sale or partition will depend on the particular facts and careful consideration of the discretionary factors."

20. The NSWCA said this, as to the way Sec 66 G works.

“[25] ...If one co-owner applies for partition and there is no counter-claim for sale, the only question the court will have occasion to consider is whether or not there should be partition. No question of sale will arise; nor will any question of "preferred remedy". Likewise, if one owner seeks the appointment of trustees for sale and is not met by a counter-claim for partition, the question of termination of co-ownership by sale will be the only question to be decided and there will be no issue of "preferred remedy". *If, however, there are competing claims - one for the appointment of trustees for sale and the other for the appointment of trustees for partition - the position will be that, having regard to s 66G(4), the claim for partition will not succeed unless the person pressing that claim satisfies the court that partition is, in the sense referred to in s 66G(4), "more beneficial" than sale.* The co-owner who advances the competing claim for sale, by contrast, is not called upon to show that that remedy is "more beneficial" than partition.

[26] If the co-owner claiming partition does not satisfy the court that partition is

more beneficial than sale, the only remaining alternative would be sale of the property. *This does not mean that sale is the "preferred remedy", only that once the court is not satisfied that partition is the more beneficial remedy, sale of the property remains as the only remedy available.*

[27] If, however, the co-owner claiming partition does satisfy the court that partition is more beneficial than sale, it does not follow that the court must order partition. The court still retains discretion to choose the remedy of partition over sale.

[28] Because of the additional onus that an applicant for the appointment of trustees for partition must always discharge when pitted against an applicant for the appointment of trustees for sale, the situation is not in truth one of choice between two equally available alternatives.

[29] Once that onus is discharged, however, the court is in a position to choose between the two outcomes according to the justice of the case. It is only after the s 66G(4) condition is satisfied that any notion of equally available alternatives comes into play."

MORE BENEFICIAL

21. In *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 the Master of the Rolls (Jessel MR) said at 533 that the "more beneficial" criterion is to be approached "in a pecuniary sense" and that the court "cannot go into questions of sentiment" and "must look merely to the monetary results".

In *Cryer v Ossher* [1997] NSWSC 613; (1997) 8 BPR 15,831, Young J endorsed of Jessel MR's statement (at BPR 15,832), disapproving of the snippets in some judicial statements that emotional factors, (e.g. attachment to land) , are relevant in this context.

22. After surveying the cases, the NSWCA in *Segal's* case accepted that what Young J had held in *Cryer* was correct; and noted that *Drinkwater v Ratcliffe* has been approved in several other jurisdictions where a "more beneficial" test is employed in a similar statutory context,

Jabs Construction Ltd v Callahan [1992] 1 WWR 748; *Nevin v The Beneficiaries of The Peppermint Beach Estate Trust* [2002] WASC 300; *Wong Chun Kei Johnny v Poon Vai Ching* [2005] HKCFI 19.

23. The NSWCA observed that the focus is on what is "more beneficial for" some only of the co-owners unless, (as in *Segal*) there are only two and they are equally entitled. In that event, the question is whether partition is "more beneficial" for *both* the co-owners than sale.

THE NATURE OF PARTITION

24. "[30] Under s 66G(3)(a), the function of trustees for partition is "to partition the property". The legislation makes no attempt to define "partition". The expression must therefore be given the meaning it has had at least since 1539 and 1540"

Halsbury's Laws of England gives the following explanations and examples:

"The legal term 'partition' is applied to the division of lands, tenements and hereditaments belonging to co-owners and the allotment among them of the parts, so as to put an end to community of ownership between some or all of them."

25. The following examples are provided by Halsbury's

[I]f three persons are co-owners, tenants in fee simple of Blackacre, Whiteacre, and Greenacre the transaction by which one of them becomes sole owner tenant in fee simple of Blackacre, another of Whiteacre, and the third of Greenacre, is a partition."

[A] transaction by which one person becomes sole owner of Blackacre, while, the other two remain co-owners of Whiteacre and Greenacre, is a good partition This can only be by agreement of those persons between whom a community of ownership is left subsisting.

26. The above statement and examples were cited with apparent approval by the NSWCA in *Segal v Barel*, and the CA then added the following commentary by reference to some quaint English law involving chimneys:

"[35] Where, as in this case, there are two co-owners, partition of their land entails the division of it into two parts followed by action causing each person to become the sole owner of one of those parts. If possible, the two parts must conform, as to value, to the proportions in which the parties hold in co-ownership. In some cases of enforced partition, inconvenience arising from physical features of the land cannot be avoided.

27. In *Turner v Morgan* [1803] EngR 481; (1803) 8 Ves 143; 32 ER 307, for example, Lord Eldon confessed himself unable to make a better partition for parties holding a house in the proportions two-thirds to one-third than one that saw one take a part containing all the chimneys and fireplaces and the only staircase while the other took the remainder of the building devoid of such facilities. Where division reflecting, as to value, the parties' proportionate co-ownership is impracticable, financial adjustment will be necessary.

.....

[37]The twofold message here is that the trustees can transfer only to the co-owners ("the persons entitled under the partition") and that those persons are to take the partitioned property "in severalty", that is, with each person taking his or her distinct part to the exclusion of the other person or persons.

COSTS

Where partition ordered

28. Where partition is ordered, it is common practice to proceed by way of analogy with dissolution of partnership, so that there is no order for costs: *Official Trustee in Bankruptcy v Ritchie (No 2)* (unreported, Powell J, 25 November 1988).

Where sale ordered

29. Similarly, where the order made is for sale, the analogy with partnership disputes applies in full form, such that the costs of the parties ought come from the proceeds of the assets: *Segal v Barel (No 2)* [2013] NSWCA 148, para [13]; *Fleming v Fleming* [2016] QSC 215 para [33] (this case canvassed in some detail the rule as to costs in Sec 66 G applications and their analog with the dissolution of a partnership; and also the exceptions to the rule).

EQUALITY MONEY

30. Section 66F(3)(a) empowers trustees for partition:

"... to provide (by way of mortgage or otherwise) for the payment of any *equality money*".

“Equality money is an amount that may be ordered to be paid to one party when land is partitioned in unequal shares.Its purpose is, of course, to prevent injustice.” Per Pembroke J at para [22] of the 2nd judgment.

Pembroke J gave the example of *T S Swaminatha v Official Receiver of West Tanjore* (1957) AIR 577, a decision of the Supreme Court of India.

The CA noted that the principle extended more widely than that, giving the following two examples of relatively recent UK examples of judgments of Briggs J.

Hopper v Hopper [2008] EWHC 228 (Ch) at [125], Briggs J referred to "the equality money necessary to avoid partition causing any beneficial advantage to one party or the other".

Ellison v Cleghorn [2013] EWHC 5 (Ch) Briggs J approached the matter of equality money by way of a detailed examination of the actions of the parties to a co-ownership venture similar to that in this case and, in particular, whether the actions of one of them had had an adverse effect on the development value of the property.

WHERE THE PROPERTY OF ONE CO-OWNER ONLY IS SUBJECT TO A MORTGAGE

31. The issue arose in *Christopher Mel Chamberlain trading in his capacity as liquidator of Gerard Cassegrain & Co Pty Ltd (in liq) (ACN 000342174) v Felicity Cassegrain* [2015] NSWSC 1838. One party's interest was registered and subject to a mortgage; the other party's interest was unregistered and not subject to a mortgage.

OCCUPATION FEE

32. *Foregard v Shanahan* (1995) 35 NSWLR 206 (at 223):

"As far as equity is concerned, an occupation fee will be exacted in at least two circumstances: *first, in a partition suit (or related litigation): if there has been an exclusion, the tenant in occupation will be charged with an occupation fee* (see, e.g. *Pascoe v Swan* [1859] EngR 961; (1859) 27 Beav 508; 54 ER 201); this is an example of equity following the law: and *secondly, if the owner in occupation claims an allowance in respect of improvements effected by him, equity will permit such an allowance only on terms that he is accountable for an occupation fee* - this is an

example of he who comes to equity having to do equity: see *Teasdale v Sanderson*[1864] EngR 349; (1864) 33 Beav 534; 55 ER 476.”

TAKING OF ACCOUNTS

33. “Wherethere is no relationship attracting a presumption of advancement, the respective contributions of co-owners to the acquisition of co-owned property (with jointly borrowed purchase money being regarded as provided in equal shares) are presumed to indicate the proportionate equitable interests of persons who, at law, are equal co-owners: see, for example, *Calverley v Green* [1984] HCA 81; (1984) 155 CLR 242 at 245.”

It may be appropriate to refer the taking of accounts to a court appointed referee or joint expert. These are tactical questions that ought be weighed on the facts of each case.

PRECEDENT FORMS OF ORDERS

34. Cases canvassed in this paper e.g. *Segal v Barel* and *Fleming v Fleming*, have detailed forms of order than can be tweaked to cover many situations.

TRUSTEE IN BANKRUPTCY

35. The trustee in bankruptcy, even before the legal title is registered in in his/ her name, is a co-owner for the purposes of s 66G. This is because the definition of co-owner in s 66F(1) of the *Conveyancing Act* includes ownership “whether at law or *in equity in possession*.”: *Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450 para [127] to [128].

Coshott followed *Commonwealth Bank of Australia v MacDonald* [2000] NSWSC 553; (2000) 10 BPR 18,111 at [36] where Young J (as HH then was) held that it is sufficient for the co-owner to have *ownership in equity in possession* and therefore if “each co-owner is as of right as much entitled to possession of any part of the property as the others.”

In *Kelly v Kelly* [2007] NSWSC 1076 at [23] Austin J considered that: this is so even in the case of a beneficiary of a property in a *solvent estate*.

CASE STUDY

36. *Segal's* case provides good material for a case study, as views differed between the learned trial judge and the Court of Appeal on quite a few matters.

In *Segal*, the parties were the registered proprietors of a parcel of land held as tenants in common in equal shares. The trial judge ordered there be a partition (i.e. not a sale), and the appeal succeeded on two grounds, as set out below.

The learned trial judge ordered the appointment of trustees *to partition the land* and to convey one lot to each of the applicant and the respondent. The partition was to occur via strata title sub division in accordance with a draft strata plan. That plan provides for the creation of two strata lots, Lots 1 and 2.

Each lot included a multi-level dwelling over 5 levels.

By and large, each level incorporated one or more parts of each lot. The driveway was shown on the draft strata property as common property: for part of its length, it was within a tunnel one wall of which is a natural rock face while the other is made of bricks.

The trial judge's orders were:

1. Order, pursuant to Section 66G(1) of the Conveyancing Act 1919 that:

(a) Margaret Colleen Hole of Level 7, 9 Barrack Street, Sydney and Michael Osborne of Level 14, 6 O'Connell Street, Sydney be appointed trustees of the land situated at XXXX Street, North Bondi (also referred to as Dover Heights) in the State of New South Wales being the whole of the land the subject of folio identifier 152/740177.

(b) the said lands be vested in such trustees, subject to any incumbrances affecting the entirety, but free from any encumbrances affecting any undivided shares, to be held by them by the trusts referred to in orders 2 and 3."

2. Contingent upon and subject to the grant of subdivision approval by Waverley Council, the trustees shall:

(a) partition the said lands generally in accordance with the plan of strata subdivision to which Waverley Council has already given in-principle approval as stated in its letter to the plaintiff dated 29 May 2012;

(b) convey and assure Lot 1 in the said plan of strata subdivision when partitioned to the plaintiff (subject to any encumbrances); and

(c) convey and assure Lot 2 in the said plan of strata subdivision when partitioned to the defendant (subject to any encumbrances).

3. Direct the trustees, before submitting a plan of subdivision to Waverley Council, to prepare a scheme of partition in accordance with Section 66G(5) of the *Conveyancing Act* 1919 and in so doing consult the plaintiff and the defendant and entertain such submissions from them as the trustees see fit on the three planning matters referred to in paragraphs [17]-[21] of the Court's reasons for judgment dated 21 September 2012."

The learned trial judge refused to award equality money. He handed down 3 judgments, as follows:

Barel v Segal [2011] NSWSC 1181 dealt with whether there ought partition or sale and HH inclined in favour of *partition*, subject to further submissions.

The taking of accounts was referred to a referee for inquiry and report.

Barel v Segal (No 2) [2012] NSWSC 1054: the report of the referee was considered, & partition confirmed

Barel v Segal (No 3) [2012] NSWSC 1319 settled the form of orders.

37. The NSWCA differed from the learned trial judge, who had felt that the common property would be minimal. NSWCA held the tunnel was far from minimal, and held as follows:

[85] The strata titles legislation compels the conclusion that, as the appellant contends, implementation of the judge's order will not bring about partition in the sense relevant to s 66G of the *Conveyancing Act*; and this will be so whatever adjustments or refinements the trustees might impose as part of a scheme of partition. The parties will remain, in equity, tenants in common in equal shares of such parts of the original land as become the common property of the strata scheme. *While that result may see the original bond of co-ownership dissolved, that bond will be immediately replaced in the eyes of equity by a like bond in respect of the strata scheme common property.* There will be no assuring of the whole of the property the subject of the strata subdivision in severalty only to the appellant and respondent and to no other person, as required by a "statutory trust for partition" in s 66F(3)(b) (see [37] above).

.....

[87] Another aspect of the draft strata plan should be noted. Its schedule of unit entitlements ascribes an entitlement of five to each lot, so that the aggregate unit entitlement is ten. The *Strata Schemes Management Act* requires certain matters concerning a strata scheme to be determined by a general meeting of the owners corporation. In a case where there are only two owners, the quorum for such a meeting is two (Schedule 2, clause 12(2)). Motions put to a meeting are to be determined by the votes of owners on the basis of one vote per lot except in the case of a poll or special resolution, in which event voting is according to unit entitlement (Schedule 2, clause 18). The chairperson does not have any casting vote if the votes are equal (Schedule 2, clause 15(3)). Under Part 2 of Chapter 3, the owners corporation has certain duties and powers in relation to the common property.

[88] These provisions about meetings and voting show that, if the parties become lot owners in the strata scheme, the potential for dispute and deadlock between them will continue and there will exist no ready means of breaking such deadlock. The aspect of partition that sees each owner freed altogether from the tie that comes from co-ownership and the need to co-operate accordingly will be denied if the strata subdivision is implemented.

38. On appeal, the NSWCA set aside the learned primary judge's orders and in their place, ordered the appointment of trustees *for sale*.

A significant factor in the learned trial judge's decision that partition would, *for both parties*, be "more beneficial" than sale was that it was probable that on a strata subdivision, the value of the lots would exceed the value of the total parcel.

The NSWCA held that that factor, being of a financial nature, *was properly taken into account*. However, that did not get the plaintiff very far, because whilst there was evidence of the respective values of the parts, *there was no evidence of the value of the undivided whole*.

As such, the CA upheld the appellant's contention that "the judge's finding was unavailable because there was no evidence to support it."

39. Further, as to the "more beneficial" question, the learned trial judge had taken into account a number of factors of a non financial nature, which the CA at para [70] held was not a permissible approach e.g.

--partition would enable the respondent to remain in the house where he and his family had lived since 2005;

--the respondent had "invested considerable monetary and emotional capital, not to mention fifteen years of his life, in the project";

--"for both the plaintiff and the defendant partition will involve certainty and security of title in accordance with their original objective."

"[72] The appellant also identifies factors which, he says, were relevant to the proper assessment of what was "more beneficial" for the co-owners but were not taken into account, namely:

- (a) the legislation aims to provide a simple and inexpensive method of terminating co-ownership;
- (b) partition on the basis the judge ordered would not be either simple or inexpensive when compared to sale;
- (c) the appellant was not under any legal obligation to proceed with a strata subdivision;
- (d) the appellant was entitled to choose not to cooperate with the respondent;
- (e) it was for the respondent to satisfy the court that partition would be more beneficial for the co-owners than sale;
- (f) transfer of the proposed lot 1 to the respondent without the payment of equality money would not be more beneficial to the appellant.

[73] I accept that these are, by and large, factors of a financial kind relevant to the s 66G(4) assessment".

Occupation Fee

40. The learned trial judge declined to order that the respondent pay an "occupation fee" to the applicant. His Honour observed, in reasons dated 21 September 2012, that although the respondent and his family had lived in a house on the land for some years, there had been *no relevant exclusion of the applicant to warrant the payment of such a fee.*

The Court of Appeal upheld Pembroke J's decision to reject the applicant's claim to an occupation fee. *The applicant did not challenge Pembroke J's factual finding that there had been no relevant exclusion of the applicant. He instead argued that his claim was supported by the principle that an occupation fee is payable in circumstances where a co-owner in occupation claims an allowance for improvements – a principle not addressed by Pembroke J.*

Barrett JA, with whom McColl JA and Preston CJ of LEC agreed, held that the applicant should not be permitted to advance an argument that was not raised in the pleadings or during the proceedings below.

The applicant sought special leave to appeal to press arguments concerning his claim to an occupation fee. Dismissing the application [2013] HCASL 211 the HC noted that the no factual basis was identified for this claim, the parties were bound by the conduct of the litigation and no question of principle arose for determination.

Taking of accounts

41. In the taking of accounts, allowances were made to the parties as follows:

One party was allowed close to \$90,000, for electrical work done (he was an electrician).

The parties obtained construction finance from a bank. The taking of the account proceeded on the footing that each was responsible for one-half of all moneys owing to the bank.

CO-OWNED GOODS

42. "Where the dispute involves co-owned goods, a co-owner may apply for a division of the goods under section 187 of the *Property Law Act 1958*. Section 187 only applies to co-owners who have an interest of half or more in goods. It does not apply to other forms of personal property. Although the section does not explicitly give a court power to order sale, in New South Wales it has been determined that the equivalent provision permits an order of sale to be made." Per Victorian Law Reform Commission Paper (ibid).

In certain situations, goods which are affixed to land are treated for legal purposes as if they are part of the land. *Conveyancing Act 1919* (NSW) s 36A.

Ferrari v Beccaris [1979] 2 NSWLR 181.

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