

DISTRICT COURT

CIVIL JURISDICTION

JUDGE ROBIN QC

No 1263 of 2012

TERRY GRANT VAN DER VELDE and
JASON SHANE CRONAN

Applicants

and

JOANNE PAMELA DUNSTAN

Respondent

BRISBANE

..DATE 16/04/2012

ORDER

CATCHWORDS

Property Law Act 1974 s 38

Application by trustees of a bankrupt for appointment of two chartered accountants as trustees for sale - respondent joint tenant (with bankrupt) not extending full cooperation, apparently on basis of currently depressed state of property market - sale should be ordered - consideration of ways of limiting expenses of achieving sale and what costs the respondent should bear

application and sale and particularly that those come out of
her share of the proceeds of sale.

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HIS HONOUR: There should be a change to (a). I think we'll
say after "sale of the land", "except for costs that would in
the usual case be shared by co-owners such as agents'
commission and conveyancing costs, as to which her liability
is limited one-half".

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The change of ground in respect of costs is what one would
expect, the fifty-fifty arrangement being appropriate in the
event of a co-operative sale where there's no meritorious
defence available to court proceedings rendered necessary by
the respondent's lack of co-operation. A serious question
arises whether or not she ought not to have to pay the costs
rendered necessary by what must be counted an obstructive
attitude.

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The respondent has been given fair warning that if the
application became necessary, as it has become necessary,
costs would be sought to be recouped at her expense. An
amendment has been made to the draft order to make clear and
express what was probably always implied, namely that those
costs which ordinarily would be equally borne, such as real
estate agent's fees and conveyancing fees, continue to be
borne equally and stand outside the court's costs order.

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Mr Shaw's written submissions collect some authorities which confirm that there really is now no answer to an application of this kind. There are none of the special circumstances, such as contractual arrangements, which might deny or modify the entitlement to sell present here. It appears that all the respondent has to support her is the poor state of the market at the moment.

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The court's satisfied that the market is depressed, one indication of which is the dramatic decline in Valuer-General valuations of properties in South-East Queensland. It's understandable that the respondent might wish to hold on in the hope that the market will rise. Perhaps the creditors have a similar interest.

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Considerations of that kind, on the authorities, must not be allowed to stand in the way of the court giving effect to the right of any co-owner to have the property sold. An amendment has been made by me to the order proposed to make it clear that whether the sale is by public auction or private treaty, the respondent may be the purchaser. If she can arrange the finance in that regard, a negotiated outcome which sees her buy in the outstanding equity in the property may be the best that can be hoped for.

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There's little reason to be sanguine about what a forced sale now may achieve. The court's told that there's a mortgagee whose payout figure is something like \$259,000. The mortgagee hasn't been served with the proceeding; that is sometimes

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done. The reality, however, is that unless it can be paid its
entitlement there's not going to be a sale without its
positive co-operation.

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The range of values indicated by two real estate agents who've
been asked for opinions is \$295,000 to \$380,000. The costs
are beginning to loom very large. One particular aspect,
about which I've made some comment, is that the appointment of
two chartered accountants, jointly and severally as statutory
trustees for the sale, is proposed. They will be charging at
ordinary rates.

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I have inserted some words in the order to make express what
Mr Shaw indicated was the understanding, that the point of
there being two trustees is simply so that in the event of an
inability of one, the other may act. It would plainly be most
undesirable to have two professional trustees both acting and
charging for their individual time for work that could have
been done by one alone. I'm not suggesting there was
intention to do that but words have been inserted in the order
to encourage the trustee' acting severally by one alone rather
than acting jointly where that would limit costs,

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The respondent has had notice of the applicants' intention to
engage the two gentlemen appointed in the court's order and
it's appropriate given her non-participation today to make an
order appointing them.

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In previous applications like the present, I have thought it

right for the court to go to some trouble to limit costs which obviously will inevitably be incurred if new players have to be brought into a scenario to open a file, consider what to do and then do it. I have always been amenable to proposals, indeed sometimes been the source of the proposals myself, to limit costs by appointing as trustee persons already au fait with a lot of the circumstances. For example, solicitors may be appointed as trustees for sale - which seems particularly appropriate in a context, of which the present is not one, where there is a solicitor on both sides to come in as a trustee for sale ensure fair play.

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Even in the case of a solicitor for one side only, in principle, it seems to me such an appointment could be made. Indeed, there are precedents, I think, for the appointment of an applicant in a proceeding such as the present to be trustee for sale. There's precedent for applicants being appointed receivers and managers. The present applicants are likely to be suitable persons to be trustees for sale. Obviously, if there had been no aspect of co-ownership, they would have sold this property already.

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I'm making comments at some length in this matter, given the alarming news from Mr Shaw that the present application may be the precursor of many. Indeed, he has another one in my list later in the week. I think it would be helpful to devise what might be called lean ways of proceeding in the interests of limiting the costs for all concerned and maximising realisations.

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So, orders as per initialled draft. Thanks, Mr Shaw.

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MR SHAW: Thank you, your Honour.

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