

Partitioning – When Tenancy in Common is Not Working

It is not uncommon for co-owners to have disputes over property. When these disputes occur, a co-owner may apply to the Supreme Court for the property to be held on the statutory trust for sale or partition. Part 4, Division 6 of the Conveyancing Act 1919 (the “Act”) outlines the relevant provisions for this application. The Court usually makes this order unless special circumstances exist. This article focuses on the statutory trust for sale.

Pursuant to section 66F(1) of the Act, “co-ownership” means ownership whether at law or in equity in possession by two or more persons as joint tenants or tenants in common, and a “co-owner” has a corresponding meaning and includes an incumbrancer of the interest of a joint tenant or tenant in common.

Pursuant to section 66F(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,
- (b) where:
 - (i) an undivided share is subject to a settlement; and
 - (ii) the settlement remains subsisting in respect of other property; and
 - (iii) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trust for sale includes a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held for and to go to the same persons successively in the same manner and for and on the same estates, interests, and trusts as the undivided share would if not disposed of have been held and have gone under the settlement.

Section 66G of the Act allows an owner, even a minority of the owners, to approach the Court and ask for orders to sell the property as a whole, where a trustee will be appointed. The property will

vest in the trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by the trustee of the statutory trust for sale.

Where the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives shall, unless the Court otherwise determines, be appointed trustees on either of such statutory trusts, but subject, in the case of personal representatives, to their rights and powers for the purposes of administration.

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

Pursuant to section 66G(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.

Section 66G(6) provides that 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. This section does not grant the Court a broad discretion to make such alterations to the property interests of the parties determined by principles of law and equity as the Court considers just and equitable: *Ross v Ross* [2010] NSWCA 301 at [31].

Pursuant to section 66G(7), where the property becomes subject to such statutory trust for sale, the land shall be deemed to be converted upon appointment of trustees for sale unless the Court otherwise directs.

Pursuant to section 66H, 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.

The Court has discretion to make orders for the partition of the property if it deems partition would be “more beneficial” for the co-owners than sale: *Hayward & Ors v Skinner & Ors* (1981) 1 NSWLR 590.

Special circumstances

An order to appoint trustees for sale will only be refused in special circumstances. These special circumstances include:

- Where there is a co-owner's agreement and this agreement provides some machinery relating to sale or partition which they agree to observe before any application may be made under section 66G: *Stephens v Debney* (1960) SR (NSW) 468 at 470.
- Where the co-owners contractually agree not to part with or deal with the property except with the unanimous consent of all the parties or by a majority decision: In *Re Buchanan-Wollaston's Conveyance* (1939) Ch 738.
- Where there is "some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent": *Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068; *Williams v Legg & Anor* (1993) NSW ConvR [55]-[670].

The sale of the property and the trustees obligations

The case of *Spathis v Nanon* [2008] NSWSC 418 confirms that the method for sale is a matter for the trustees subject to their obligations under section 66H and otherwise, where the trustee may decide that sale by auction is the most appropriate course at which a co-owner may bid in accordance with leave being granted under section 66I of the Act, which is outlined below. The trustees for sale are not entitled to sell the property except for the best price reasonably attainable: *Buttle v Saunders* (1950) 2 ER 193. The usual course is that the property is sold at public auction for market value.

The trustees should act impartially and hold the scales evenly between the co-owners and if there are more than one trustee, they are obliged to act jointly. The trustees have a mandatory statutory obligation to consult with the co-owners aged 18 years or upwards who are not subject to disability.

When proceeding to market the property, the trustee(s) have an obligation to ensure that the property is properly advertised and marketed and that an adequate reserve is set. Failure to comply may result in the sale being set aside: *George v McDonald & Ors* (1992) ANZ ConvR 396.

How a co-owner can purchase the property

Section 66I of the Act provides for the rights of co-owners to bid at sale under the statutory power of sale. Section 66I(1) notes that on any sale under a statutory trust for sale the Court may allow any of the co-owners of the property to purchase whether at auction or otherwise on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters as to the Court seems reasonable.

Pursuant to section 66I(2), a co-owner, with a right to purchase shall not, without the leave of the Court, be entitled to act as trustee in connection with the sale.

If a co-owner desires to purchase the property, the Court's leave must be obtained. Frequently, all co-owners have that leave and bid for the property against each other at the auction sale.

As an applicant of the section 66G order, you may seek orders that you be permitted to purchase the property, whether at auction or by private treaty, without payment of a deposit, with your interest in the property set-off against the proceeds of sale of the property and possibly for a certain amount to be set-off from the other co-owners share of the proceeds of sale on account of improvements made by you to the property: *Thomson v Sweeney & Ors* [2013] NSWSC 1383.

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