

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. W16/2014

CATCHWORDS

CO-OWNERSHIP: Proceeding initiated for an order under Part IV of the *Property Law Act 1958*; orders made for sale of property; agreement reached by parties as to manner in which the proceeds of sale are to be distributed; issues arising as to enforceability and meaning of agreement; agreement confirmed; claim by respondent for interest rejected; costs reserved.

FIRST APPLICANT	Mrs Nicole Helen Addamo
SECOND APPLICANT	Mr Richard Michael Newbury
RESPONDENT	Ms Renee Newbury
WHERE HELD	Melbourne
BEFORE	C Edquist, Member
HEARING TYPE	In chambers
LAST SUBMISSION RECEIVED FROM ANY PARTY	6 December 2017
DATE OF ORDER	14 December 2017
CITATION	Addamo v Newbury (Building and Property) [2017] VCAT 2093

ORDER

- 1 By 4.00 pm on 18 December 2017** the parties must instruct Lempriere Lawyers to disburse the Trust Sum as follows:
 - a to the first applicant: \$80,577.00;
 - b to the second applicant: \$84,517.23;
 - c to the respondent; \$93,695.83 (rounded up by \$0.01)**TOTAL \$258,790.06.**
- 2** In order to give effect to Order 1 of these orders, the parties must send by email to: lemplaw@westnet.com.au marked to the attention of Mr Jeff Lempriere a direction to disburse the Trust Sum in accordance with these orders.

- 3 **The Principal Registrar directed to serve a copy of these orders to Lempriere Lawyers by email to: lemplaw@westnet.com.au marked to the attention of Mr Jeff Lempriere.**
- 4 Lempriere Lawyers are requested to advise the Principal Registrar in writing in the event they do not receive instructions from each of the parties in accordance with Order 1 above **by 5.00 pm on 19 December 2017.**
- 5 Lempriere Lawyers are requested to advise the Principal Registrar independently in writing when they have disbursed money from the Trust Sum in accordance with these orders.
- 6 If it is not possible for Lempriere Lawyers to disburse money promptly from the Trust Sum in accordance with Order 1 above, or if disbursing money in accordance with Order 1 will not completely exhaust the Trust Sum, Lempriere Lawyers are requested to immediately notify the Principal Registrar in writing with recommendations as to any further orders which might be made by the Tribunal in Chambers.
- 7 Lempriere Lawyers should send to the parties simultaneously any correspondence sent to the Tribunal.
- 8 **By 4.00 pm on 18 December 2017** the parties must advise the Principal Registrar whether the real estate agent acting on the sale (“the Real Estate Agent”) has disbursed the deposit monies less expenses to the parties on a one third/one third/one third basis.
- 9 There is liberty to apply on the issue of costs, provided such liberty is exercised **by 9 February 2018.**
- 10 **The Principal Registrar is directed to serve a copy of these orders to the parties by email.**

Notes:

The Tribunal will retain a supervisory role until payment from the Trust Sum has been effected in accordance with these orders and the Tribunal has been satisfied that the Real Estate Agent has disbursed the deposit monies on the basis referred to above.

The attention of the parties is drawn to s 133 of the Victorian Civil and Administrative Tribunal Act 1998 which makes it an offence for a person to fail to comply with non-monetary order of the Tribunal.

C Edquist
Member

REASONS

BACKGROUND

- 1 The applicants began this proceeding (“the Proceeding”) in 2014 seeking an order for sale under the *Property Law Act 1958* of the property known as Lot 5, 1-5 Steele Street, Cowes, in the State of Victoria, described in Certificate of Title Volume 10719, Folio 376 (“the Property”).
- 2 When they initiated the Proceeding the applicants incurred an application fee of \$428.90. (“the Application Fee”).
- 3 On 24 July 2017 Orders were made which had the effect of facilitating the sale of the Property at a reserve price of \$290,000.
- 4 On 11 August 2017 at a Directions Hearing in the Proceeding the parties reached an agreement as to the manner in which the net proceeds of the sale of the Property were to be disbursed.
- 5 The terms of that disbursement agreement were set out in Order 3 of the Tribunal’s Orders dated 11 August 2017.
- 6 Order 4 of the Tribunal’s Orders dated 11 August 2017 directed the parties, if they considered that the agreement reached by the parties set out in Order 3 in the orders dated 11 August 2017 did not accurately reflect the settlement reached by the parties, to immediately advise the Tribunal.
- 7 No party immediately advised the Tribunal that they considered the orders set out in Order 3 in the Orders dated 11 August 2017 did not reflect the agreement reached between the parties.
- 8 The Tribunal was informed that the Property would be sold on 15 September 2017.
- 9 On 14 September 2017, the Tribunal in Chambers made Orders including the following:
 1. The proceeding is listed for a directions hearing at 3.15pm on Thursday 21 September 2017 for the purposes of arranging a hearing to determine the manner of the distribution of the net proceeds of the sale. By that time the parties should be in a position to confirm that they have sent to each other party the documentation in their possession or power evidencing payments they have made in respect of the Property since the parties went on title (“the Expenses”), including without limitation:
 - a) maintenance expenses;
 - b) council rates;
 - c) water rates;
 - d) insurance;
 - e) land tax;
 - f) the cost of obtaining the valuation report.

...

3. If the Real Estate Agent is holding a deposit, then the Real Estate Agent may, after settlement of the sale of land (which the Tribunal understands will occur on Friday, 15 September 2017) disburse to each of the parties on a one third, one third, one third basis that deposit, after retaining the Real Estate Agent's fees and disbursements.
- 10 The Tribunal has been informed that the balance of the sale proceeds of the sale of the Property is held by the solicitor who acted for the sale, Lempriere Legal Lawyers ("the Solicitor").
- 11 According to a distribution statement prepared by the Solicitor, issued on 26 September 2017, the sales proceeds then held by the Solicitor was \$258,970.06 ("the Trust Sum").
- 12 The first applicant advised the Tribunal by email dated 18 September 2017 that she seeks no reimbursement in respect of accounts paid by her, or by her mother on her account. She contends that maintenance bills for mowing incurred by the second applicant are to be taken into account, together with the land valuation paid for by the respondent.
- 13 On 20 September 2017 the second applicant and the respondent signed a "Claim for Reimbursement of Allowable Expenses" under which the respondent agreed to pay to the second applicant council rates, land tax and water rates for the years 2015/2016 in the sum of \$1,195.73, council rates and water rates for 2017 in the sum of \$1,351.00, and mowing and maintenance for the period 1 September 2015-1 August 2017 in the sum of \$464.50, a total of \$3,011.23.
- 14 On 20 September 2017 the second applicant and the respondent signed a "Claim for Reimbursement of Allowable Expenses" under which the second applicant agreed to pay to the respondent one third of the property valuation of \$880 calculated at \$293.35.
- 15 The respondent in a statutory declaration sworn 15 November 2017 deposed that the second applicant and she have:

reached full agreement with respect to expenses as outlined in the claim forms. We have both agreed not to file any other claims against each other and want the matter settled. This was reached the private negotiation which did not include Applicant 1. Applicant 2 is to pay me the sum of at least \$5,000 of his share of the property net sale proceeds and the \$293.35 property valuation. I've agreed to pay Applicant 1 the sum of \$3,011.23 only.
- 16 The respondent in that statutory declaration also deposed that she obtained a sworn property valuation on 23 June 2015 and paid Westernport Property Consultants \$800 plus GST in respect of that valuation. This is not disputed by either of the applicants.

- 17 The respondent in a “Claim for Reimbursement of Allowable Expenses” sent on 20 September 2017 claims from the first applicant one third of the cost of the property valuation, calculated at \$293.35, together with interest payments respectively of \$46.45 and \$16.99.
- 18 The first applicant disputes her liability to pay the respondent interest. By email dated 21 September 2017 the first applicant indicated that she would pay one third of the property evaluation fee of \$880 claimed by the respondent provided she was not charged for interest, and also pay a share of the second applicant’s gardening and maintenance expenses calculated at \$464.50.
- 19 On 21 September 2017 the first applicant also advised that she would be “pulling out of giving [the respondent] \$5,000 from my settlement” if the respondent asked for more money and interest. She has subsequently confirmed this intention.
- 20 In submissions dated 2 October 2017 the respondent, amongst other things, contended that she was not liable to pay part of the Application Fee as it was not part of the negotiated agreement. The respondent also said that “the current agreement cannot take effect” until the first applicant had finalised a claim she had initiated in the Magistrates’ Court of Victoria against the respondent.
- 21 By email dated 15 October 2017 the first applicant, amongst other things, nominated her husband Paul Addamo to represent her interests in the litigation, and confirmed that intention in an email addressed to the Tribunal dated 19 October 2017.
- 22 By letter addressed to the Tribunal dated 19 October 2017 the respondent indicated that she would be seeking full costs from the first applicant should the matter continue. The respondent also disputed the entitlement of Paul Addamo to take on the first applicant’s rights and responsibilities in this matter. He also asserted “complete distribution to Applicant 1 cannot be made until all costs and/or damages are realized.”
- 23 On 1 November 2017, the Tribunal made Orders in Chambers as follows:
 1. **By 4.00 p.m. on 16 November 2017**, the parties must file with the Tribunal and send to each other any written submissions going to the question of how the net proceeds of sale are to be distributed between the parties.
 2. If a party intends to rely on the settlement agreement noted in the Tribunal’s orders dated 11 August 2017, that party should state what orders he or she seeks regarding the distribution of the net proceeds of the sale, having regard to that party’s understanding of that settlement agreement.
 3. If a party contends that the parties are not bound by the settlement agreement noted in the Tribunal’s orders dated 11 August 2017, that party must set out the basis upon which they contend that the parties are not so bound, and must also set out the orders they seek regarding the

distribution of the net proceeds of the sale.

- 24 By email addressed to the Tribunal dated 3 November 2017, the respondent advised that she opposed the Tribunal determining how the net proceeds of sale are to be distributed between the parties. She submitted that she has not consented to the Tribunal determining how the net proceeds of sale are to be distributed. However, she also said the negotiated settlement “is protected under the established legal principle of Estoppel.”
- 25 In her statutory declaration sworn 15 November 2017 the respondent states at paragraph 27 that the Tribunal is bound to consider the negotiated settlement, and again referred to the principle of Estoppel.
- 26 On 15 November 2017 Paul Addamo on behalf of the first applicant wrote to the Tribunal contending that the statutory declaration of the respondent was irrelevant as the matter at hand was “the distribution of net proceeds from the sale of the land 1/3 each plus bills”. The email stated the matter needed to be resolved.
- 27 On 22 November 2017 the respondent submitted an invoice from Duffy & Simon Lawyers in the sum of \$214.50 inclusive of GST for the Tribunal’s consideration.
- 28 On 30 November 2017 the second applicant sent an email to the Tribunal requesting advice as to the status of the proceeding, and suggested an interim retention of 10% of the “property funds in the trust account” with the remaining 90% to be divided all up equally “until it is resolved”.
- 29 By email dated 1 December 2017 the respondent again insisted on receiving at least \$5,000 for each applicant’s final proceeds of sale. She also demanded that the first applicant pay her \$125 in costs for the Magistrates’ Court matter and subsequent legal costs of \$214.50.
- 30 On 5 December 2017 the respondent emailed the Tribunal advising she did not “support any pre-settlement release of funds”. She demanded “full interest” on the Property valuation, additional costs of \$125 and \$214 for legal expenses.
- 31 On 6 December 2017 the first applicant, by email, confirmed to the Tribunal that she supported the second respondent’s proposal to distribute 90% of the “proceedings” and to withhold 10%. The first applicant also contended the Magistrates’ Court matter remains separate.

FINDINGS

- 32 As recorded in the Orders dated 11 August 2017, on that date the parties reached an agreement (“the Disbursement Agreement”) as to the manner in which the net proceeds (“the Settlement Sum”) of the sale of the Property were to be disbursed.
- 33 The terms of that disbursement agreement were set out in Order 3 in the Orders dated 11 August 2017 and are as follows:

- 3 At any hearing held to determine the distribution of the net proceeds of sale the presiding member shall be bound to take into account the following agreement which was reached today by the parties (in the absence of Member Edquist):
- (a) Out of her one third share of the net proceeds of the sale at a price of \$290,000, the first applicant is to pay the sum of \$5,000 to the respondent.
 - (b) Out of his one third share of the net proceeds of the sale at a price of \$290,000, the second applicant is to pay the sum of \$5,000 to the respondent.
 - (c) Each party is to send to each other party the documentation in their possession or power evidencing payments they have made in respect of the Property since the parties went on the title ("the Expenses"), including without limitation:
 - (i) maintenance expenses;
 - (ii) council rates;
 - (iii) water rates;
 - (iv) insurance;
 - (v) land tax;
 - (vi) the cost of obtaining the Valuation Report.
 - (d) The parties are to share the Expenses on a 1/3, /1/3, /1/3 basis.
 - (e) The parties are to share on a 1/3, /1/3, /1/3 basis the following further expenses:
 - (i) The Solicitor's fees and disbursements;
 - (ii) The Real Estate Agent's fees and disbursements;
 - (iii) The filing fee paid when the application in this proceeding was issued.
 - (f) The respondent may, subject to approval of the proposed purchaser of the Property who has offered \$290,000, take possession of the Erewon sign erected at the Property.

34 Because no party immediately advised the Tribunal that they considered that the orders set out in Order 3 in the Orders dated 11 August 2017 did not reflect the agreement reached between the parties, Order 3 of those orders sets out the terms of the Disbursement Agreement.

35 Consequently, the parties are bound by the terms of the Disbursement Agreement. There has been no suggestion made by any party that they did not enter into the Disbursement Agreement freely, and the Property was sold on the basis that the Disbursement Agreement had been made.

36 For the reasons that follow there is no need to make a partial distribution of 90% of the proceeds, as suggested by the second applicant and supported by the first applicant.

37 The applicants incurred an application fee of \$428.90 ("the Application Fee") when they initiated the Proceeding.

- 38 The respondent paid Westernport Property Consultants \$800 plus GST in respect of that valuation, a total of \$880.
- 39 Since the Disbursement Agreement was made, disputes have arisen between the parties including:
- a whether the first applicant can be represented by her husband Mr Paul Addamo in the proceeding;
 - b whether the respondent can charge the first applicant interest;
 - c whether the first applicant can withdraw from the agreement to pay the respondent \$5,000 from her share of the proceeds of sale;
 - d whether the respondent is obligated to reimburse to the applicants one third of the Application Fee;
 - e whether the Disbursement Agreement can take effect until the Magistrates' Court matter has been finalised;
 - f whether the respondent is entitled to an Order for costs against the first applicant; and
 - g whether the distribution of funds should be stayed until the respondent's entitlement to "all costs and/or damages" as against the first applicant has been determined.
- 40 The first applicant is not seeking to have Mr Paul Addamo substituted in her place, but merely to have Mr Addamo represent her. This is permissible.
- 41 The first applicant is not obligated under the terms of the Disbursement Agreement to pay interest on any sum to the respondent. There is no provision in the Disbursement Agreement referring to payment of interest. Furthermore, I do not consider it fair to order the first applicant to pay interest to the respondent.
- 42 The first applicant is bound by the terms of the Disbursement Agreement and cannot resile from her agreement to pay the respondent \$5,000 from her share of the sale proceeds.
- 43 The respondent is obligated under the terms of the Disbursement Agreement to reimburse to the applicants one third of the Application Fee of \$428.90, i.e. to reimburse to the applicants the sum of \$142.97. The respondent accordingly must reimburse to each applicant the sum of \$71.48.
- 44 The Disbursement Agreement can take effect before the Magistrates' Court proceeding is finalised, as they are separate matters.
- 45 Any party is entitled to make an application for costs of the proceeding, but the attention of the parties is drawn to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 46 The Tribunal has no jurisdiction to order any costs which relate to Magistrates' Court proceedings.

- 47 There is no basis to stay the distribution of the Trust Sum until the respondent's entitlement to "all costs and/or damages" as against the first applicant had been determined, as the distribution of the Trust Sum is governed by the Disbursement Agreement which has been in place since 11 August 2017. Furthermore, none of the relevant legal issues relating to this application have been addressed by the respondent.
- 48 On the basis that the Trust Fund is \$258,790.06, each of the first applicant, the second applicant and the respondent are notionally entitled to one third of that sum, namely \$86,263.35.
- 49 Under the terms of the Disbursement Agreement, the first applicant must pay to the respondent out of her entitlement to one third of the Trust Sum, the sum of \$5,000. This adjustment will decrease the first applicant's entitlement to \$81,263.35, and increase respondent's entitlement to \$91,263.35.
- 50 Under the terms of the Disbursement Agreement, the second applicant must pay to the respondent out of his entitlement to one third of the Trust Sum the sum of \$5,000. This adjustment will decrease the second applicant's entitlement to \$81,263.35, and increase the respondent's entitlement (adjusted pursuant to Finding 11) to \$96,263.35.
- 51 Under the terms of the Disbursement Agreement, the first applicant must pay to the respondent out of her entitlement to one third of the Trust Sum one third of the fee of \$880 (inclusive of GST) paid by the respondent in respect of the evaluation of the Property, calculated by the Tribunal as \$293.33. This adjustment will decrease the first applicant's adjusted entitlement to 80,970.02, and increase the respondent's adjusted entitlement to \$96,556.68.
- 52 Under the terms of the Disbursement Agreement, the second applicant must pay to the respondent out of his entitlement to one third of the Trust Sum one third of the fee of \$880 (inclusive of GST) paid by the respondent in respect of the evaluation of the Property, namely: \$293.33. This adjustment will decrease the second applicant's adjusted entitlement to 80,970.02, and increase the respondent's adjusted entitlement to \$96,850.01.
- 53 Under the terms of the Disbursement Agreement, the respondent must pay to the first applicant half of one third of the Application Fee, namely \$71.48. This adjustment will increase the first applicant's adjusted entitlement to \$81,041.50 and will decrease the respondent's adjusted entitlement to \$96,778.53
- 54 Under the terms of the Disbursement Agreement, the respondent must pay to the second applicant half of one third of the Application Fee, namely \$71.48. This adjustment will increase the second applicant's adjusted entitlement to \$81,041.50 and will decrease the respondent's adjusted entitlement to \$96,707.05.

- 55 The first applicant has agreed to reimburse to the second applicant mowing expenses of \$464.50. This adjustment will decrease the first applicant's adjusted entitlement to \$80,577.00 and increase the second applicant's adjusted entitlement to \$81,506.00.
- 56 The respondent has agreed to reimburse to the second applicant council rates land tax, water rates, and mowing and maintenance expenses totalling \$3,011.23. This adjustment will increase the second applicant's adjusted entitlement to \$84,517.23 and decrease the respondent's adjusted entitlement to \$93,695.82.
- 57 I will make orders to reflect these findings, and make ancillary orders to expedite finalisation of the proceeding. Costs will be reserved, on the basis that any party seeking costs must apply by 9 February 2018.

C Edquist
Member