

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP152/2014

CATCHWORDS

Co-owned property. *Property Law Act* 1958. Jurisdiction of VCAT. Consent orders between the applicant and the respondent (brothers) in October 2014 as to sale and distribution of proceeds of sale of a co-owned property in Port Fairy, the property included in the estate of the parties' deceased father. Previous claims by each of them for costs of the proceeding dismissed by decision handed down 23 March 2016. The respondent brings a further claim alleging breach by the applicant of the 2014 consent orders in respect of allowances made by the applicant out of proceeds of sale for legal conveyancing costs and outgoings adjustment, and in respect of alleged unreasonable delay in distributing the balance proceeds of sale. Finding that the Tribunal has no jurisdiction to entertain a claim as to alleged breach of duties owed by the applicant in his capacity as testamentary trustee. Otherwise, the respondent's claim dismissed.

APPLICANT	Mr Leonard John Bills-Thompson
RESPONDENT	Mr David George Bills-Thompson
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2017
DATE OF ORDER	7 March 2017
CITATION	Bills-Thompson v Bills-Thompson (Building and Property) [2017] VCAT 341

ORDERS

1. The respondent's claims against the applicant as set out in the respondent's 'Particulars of Claim' dated 12 August 2016 and the 'Further and Better Particulars of Claim' dated 16 December 2016 are:
 - (a) to the extent they allege a breach of the order 5(c) made 17 October 2014 and / or a breach of the applicant's duties as executor and trustee of the estate of the late George Bills-Thompson, struck out for want of jurisdiction; and
 - (b) otherwise dismissed.

2. Costs reserved with liberty to apply. Any application for costs is to be listed for hearing before Senior Member Farrelly with a half day allocated.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant

Mr S Pitt of Counsel

For Respondent

Mr N Jones of Counsel

REASONS

Background

- 1 This proceeding has a long history. The applicant (“**John**”) and his brother, the respondent (“**David**”), have been unable to finally resolve their disputes over the sale and distribution of the proceeds of sale of a property in Port Fairy, Victoria (“**the property**”) which they inherited from their father.
- 2 John and David’s father died in December 1996. John and David were, under their father’s will, appointed as trustees and executors of their father’s estate. After their mother and sister died in 1999, John and David became proprietors of the Port Fairy property as tenants in common.
- 3 The brothers fell into dispute. On 30 July 2014 John commenced this proceeding seeking orders, under the *Property Law Act 1958*, for the sale of the property and distribution of the proceeds of sale.
- 4 At a Compulsory Conference on 17 October 2014, John and David reached agreement for the sale of the property and distribution of sale proceeds. The agreement was confirmed in orders made that day, by consent, as follows:
 1. The land situated at 57-59 Gipps Street, Port Fairy being the land described in Certificate of Title Volume 2269 Folio 672 (“**the Land**”) is to be sold.
 2. The Applicant, Leonard John Bills-Thompson, is appointed as trustee of the Land and is authorised and has unfettered discretion to engage Solicitors, Real Estate Agent and/or other Agents to arrange and conduct the sale of the Land and to make all decisions in relation to the sale of the Land.
 3. The applicant shall not sell the Land for a price less than \$800,000.
 4. The parties may make offers or expressions of interest to purchase the Land.
 5. The cash proceeds of the sale are to be applied in the following priority:
 - (a) First, the expenses and costs of the sale;
 - (b) Second, \$6,500 to the Applicant, being a debt owed to him by the Estate of the late George Bills-Thompson deceased; and
 - (c) Third, the balance to the Applicant in his capacity as Executor and Trustee of the Estate to be distributed in accordance with his Will dated 15 November 1971 subject to the adjustments required by Orders 8 and 11 hereof.

6. The Respondent shall provide vacant possession of the Land no later than 30 November 2014 and shall have the Land prepared ready for sale and inspection by 31 October 2014 and shall allow agents and prospective purchasers to inspect the Land on two hours notice.
7. The Respondent shall pay all expenses and liabilities in relation to the Land, including all apportionable rates, taxes and outgoings of whatsoever nature or kind, up to the date on which he gives up vacant possession of the Land ("**the expenses and liabilities**").
8. If any of the expenses and liabilities are unpaid at the date of vacating the Land, the amount of those unpaid expenses and liabilities shall be adjusted against the Respondent and deducted from the amount which he would otherwise have received from the net proceeds of the sale and paid to the Applicant.
9. The Respondent shall indemnify the Applicant against any liability whatsoever arising out of or in connection with the expenses and liabilities.
10. The Respondent, in his capacity as legal personal representative of the Estate and in his own right, shall do all such acts and things and sign all such documents as required to complete the sale of the Land.
11. The Respondent agrees to pay to the Applicant an amount of \$12,500.00, such amount to be deducted from the amount of the Respondent's share of the proceeds of the sale of the Land and paid to the Applicant.
12. The Applicant shall give to the Respondent by email monthly updates on the progress of the sale.
13. This proceeding is referred to an administrative mention on 16 April 2015 at which time the parties must advise the principal registrar in writing of their recommendations for its further conduct. If neither party has confirmed they wish to proceed it will be struck out with a right to apply for reinstatement.

NOTE:

You should respond to the administrative mention in writing (by fax or letter) by the above date advising the current status of the proceeding. You are not required to attend the Tribunal on this date.

14. Liberty to apply.

(“**the 2014 consent orders**”)

4. It took a considerable time for the property to sell. David became frustrated at what he perceived to be John’s poor handling of the sale process. On 24 June 2015, David filed an application seeking orders to the effect that he replace John as trustee for the sale of the property. After a range of interlocutory procedures, the application was listed for hearing to commence on 9 February 2016 with four days allocated.

- 5 In December 2015, the property was sold for \$1,000,000 to a third party. Settlement of the sale occurred on 15 January 2016. The sale of the property resolved some, but not all, of the disputes between John and David. David and John each considered that they were entitled to an adjustment on the proceeds of sale in their favour in respect of costs expended on the proceeding in this Tribunal.
- 6 The parties attended a directions hearing before me on 22 January 2016. After some discussion with the parties' lawyers, the parties agreed that orders made that day would include the following preliminary "Note" which confirmed the status of the dispute between them:
- The subject property has been sold. Both parties agree that the proceeds of sale should be distributed in accordance with the consent order made 17 October 2014, save that each party seeks a further adjustment in their favour in respect of legal costs. The proceeding will be listed for hearing for one day on the issue as to whether any further adjustment for costs should be made.
- 7 On 7 March 2016, I conducted the hearing to determine each of John's and David's application for an order for costs of the proceeding. On 23 March I handed down my decision whereby I dismissed both applications.
- 8 But the dispute did not end there.

David's new claims

- 9 Under the 2014 consent orders, John was appointed as trustee of the property for the purpose of its sale and, as such, he received the proceeds of sale at settlement.
- 10 Pursuant to order 5 in the 2014 consent orders, the proceeds of sale of the property were to be applied :
- (a) first, to the expenses and costs of the sale ;
 - (b) second, \$6500 to be paid to John in satisfaction of a debt owed to him by the father's estate;
 - (c) third, the balance to be paid to John in his capacity as executor and trustee of "*the Estate*" to be distributed in accordance with "*his Will*", subject to the further adjustments required by the orders 8 and 11.
- 11 David and John agree that the reference to '*the Estate*' and '*his Will*' in the order 5 (c) is a reference to their father's estate and their father's will.
- 12 The 2014 consent orders also provided for adjustment for outgoings and expenses related to the property (order 8), and an adjustment of \$12,500 in favour of John (order 11).
- 13 David says that John wrongly attempted to allocate an unreasonable and exorbitant sum, to be reimbursed to John, as expenses and costs associated with the sale. David says further that, partly because of the protracted dispute as to a fair allocation for the expenses and costs of the sale, John

unreasonably delayed distributing to David his share of the proceeds of sale.

- 14 In April 2016 David requested that the Tribunal relist the proceeding for directions hearing.
- 15 A directions hearing was held on 26 May 2016. As it appeared that the parties might yet resolve their dispute, the matter was referred to an administrative mention in late June 2016.
- 16 Resolution was not achieved and, pursuant to orders made at further directions hearings, David filed and served 'Particulars of Claim' dated 12 August 2016, and 'Further and Better Particulars of Claim' dated 16 December 2016. John filed and served 'Particulars of Defence'. Both parties exchanged lists of documents.
- 17 In essence, David claims that under the 2014 consent orders, John had a positive duty to disburse the proceeds of sale of the property in a timely manner in accordance with the orders, and that he failed to do so. David claims that John's failure in this regard amounts to a breach of the 2014 consent orders and a breach of John's duties as trustee. The relief David claims is made up of:
 - (a) Reimbursement of his legal costs in a sum of \$24,548.87. David distinguishes these legal costs from the legal costs forming the subject matter of his prior costs application which was dismissed by my decision handed down 23 March 2016. Most of the legal costs now claimed by David have been incurred after the date of that decision. Although it is by no means clear, it appears that this new claim for costs is characterised as damages arising from John's alleged breach of the 2014 consent orders and/or breach of John's duties as trustee. In the alternative, they are claimed as costs of the proceeding under section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998.
 - (b) Damages, for the loss of use of money, for the alleged delay on the part of John in distributing to David his total share of the sale proceeds. An initial distribution payment of \$337,500 was paid to David on 18 February 2016. A further distribution payment of \$130,032.27 was paid to David on 22 July 2016. David says the first distribution payment should have been made on around 22 January 2016 (one week after settlement of the sale of the property), and the second distribution payment should have been made by around 19 February 2016. David seeks damages measured as interest on the distribution payment sums for the period of delay, that is, the period between the dates when each of the payments should have been made (according to David) and the dates when the payments were actually made. David claims interest at the rate fixed pursuant to section 2 of the *Penalty Interest Rates Act* 1983, that rate being 9.5% for the relevant periods. The total sum claimed is approximately \$8,556.

- (c) David questions the allowances made by John, deducted from the proceeds of sale of the property, for:
- (i) \$3000 allowed by John as the legal conveyancing costs for the sale of the property (“**the legal conveyancing costs**”);
 - (ii) \$749.60 allowed by John as an adjustment in his favour for outgoing expenses in respect of the property (“**the outgoing adjustment**”);
 - (iii) \$1500 allocated and held back as the estimated cost for the preparation and filing of a tax return for the father’s estate. John says his accountant advised that the tax return was necessary. The tax return has not yet been completed. John says that if the cost turns out to be less than \$1500, an appropriate adjustment and distribution will be made. David questions the necessity of the tax return.

- 18 In respect of the retention of \$1500 as the estimated cost of the tax return, David’s counsel confirmed at the hearing before me on 15 February 2017 that David no longer pursues a claim in respect of this item.
- 19 As to the legal conveyancing costs, David says the sum allowed is unreasonable, but he does not specify an alternative sum. Nor does David specify any alternative sum in respect of the outgoing adjustment. Rather, David says that John has failed to properly account for both of these allowances, and on a proper accounting some further adjustment may be warranted.
- 20 John submits that this Tribunal has no jurisdiction to entertain a claim alleging a breach of John’s duties as trustee of the estate of his father. And, as the allegation that John breached order 5 (c) in the 2014 consent orders amounts to the same thing, that is, it amounts to an allegation that John breached his duties as trustee of his father’s estate, John says that the Tribunal has no jurisdiction to entertain such claim.
- 21 Even if the Tribunal had jurisdiction, John says David’s claims must fail.
- 22 John says that the allowances he made for the legal conveyancing costs and the outgoing adjustment are reasonable and have been properly accounted for.
- 23 As to alleged delay in making the distribution payments, John says that the first distribution payment, \$337,500 paid to David on 18 February 2016, was made in a timely manner, within five weeks of the sale. He says the second distribution payment, \$130,032.27 paid to David on 22 July 2016, was also made in a timely manner having regard to the dispute between the parties as to appropriate allowances for the legal conveyancing costs and the outgoing adjustment. In any event, says John, the 2014 consent orders do not specify any time for the distribution of proceeds of sale.

The Hearing

- 24 The matter came for hearing before me on 15 February 2017. David was represented by Mr Jones of Counsel, and John was represented by Mr Pitt of Counsel.
- 25 David gave brief evidence at the hearing. David's solicitor, Mr Hume, also gave evidence.
- 26 No one was called to give evidence on behalf of John.
- 27 Correspondence between the parties and their lawyers was tendered by both parties without objection.

Tribunal's jurisdiction

- 28 Save perhaps for the claims in respect of the allowances made by John for the legal conveyancing costs and the outgoings adjustment, I accept John's submission that the Tribunal has no jurisdiction to entertain David's claims.
- 29 This Tribunal is empowered to hear a wide range of disputes. However, that power is not unlimited. Unlike the Supreme Court of Victoria, which has inherent jurisdiction, this Tribunal is a creature of statute and has only those powers expressly conferred upon it by the *Victorian Civil and Administrative Tribunal Act* 1998 and by other enabling Acts.
- 30 Under Part IV of the *Property Law Act* 1958, the Tribunal has a limited jurisdiction to hear and determine disputes between co-owners of land or goods in respect of the co-owned land or goods. Under section 231 of that Act, the Tribunal's powers include certain powers as to the appointment or removal of trustees in respect of the co-owned land or goods. But the tribunal is not empowered under the *Property Law Act*, or any other Act, to make orders directing executors and trustees of testamentary trusts as to how they must exercise their duties as executors and trustees of the testamentary trusts. Such power resides in the Supreme Court, not this Tribunal.
- 31 As such, the Tribunal has no power to make orders in respect of the allegation that John breached his obligations and duties as executor and trustee of the father's estate. And in my view, an allegation that John breached order 5(c) of the 2014 consent orders amounts to the same thing, because order 5(c) requires John, in his capacity as executor and trustee of his father's estate, to distribute the balance proceeds of sale of the property in accordance with his father's Will.

Claims fail in any event

- 32 If I am wrong, and the Tribunal does have jurisdiction to hear claims as to alleged breach by John of his duties as trustee and executor of his father's estate, I would in any event dismiss David's claims.

- 33 It is not difficult to understand David's frustration. Although the initial distribution of \$337,500 was paid to David relatively soon after settlement of the sale of the property, it took many months before the second distribution payment was made.
- 34 One of the reasons for the delay was John's initial proposed allocation of \$90,000 in respect of costs allegedly incurred by John in his capacity as trustee for the purpose of the sale. The proposed allocation was confirmed in correspondence dated 30 and 31 March 2016 from John's lawyers to David's lawyers. David objected to the proposed allocation.
- 35 In my view, the attempt by John, through his lawyers, to deduct \$90,000 from the proceeds of sale as alleged legal costs associated with the sale of the property was, having regard to my decision on costs handed down on 23 March 2016, not justifiable. The attempt might well be viewed as an attempt to recover costs which, by my decision of 23 March 2016, were not recoverable. David was justified in raising his objection.
- 36 But the unjustified proposal put by John, and David's justified objection to it, do not make or validate the claim for loss and damage now brought by David.

The allocation for the legal conveyancing costs

- 37 Following David's objection to the proposed \$90,000 deduction, the parties corresponded further and, ultimately, John allocated a far more modest sum of \$3,000.
- 38 Before John settled on a figure of \$3,000, John's lawyers proposed to David's lawyers an allowance of \$7319.18 for the legal conveyancing costs. To validate the proposed allowance, John's lawyers provided to David's lawyers:
- a copy of an invoice to John dated 29 May 2015 in the sum of \$7,319.18 (inclusive of GST) for costs and disbursements in respect of the sale of the property. The invoice includes an amount of \$6,180 (not including GST) for professional fees; and
 - a document headed '*ACCOUNT DETAILS*' which itemises the professional fees totalling \$6,180.
- 39 David disputes that all of the items listed in the *ACCOUNT DETAILS* are professional fees relevant to the legal conveyancing costs. It is clear to me that at least some of the items listed are questionable. For example, one item listed is '*23 Apr 15 Telephone attendance on you re the allegations and evidence*'. This item would surely be included in the costs of the proceeding covered by my decision of 23 March 2016, and not part of the legal conveyancing costs payable from the proceeds of sale of the property.
- 40 In any event, as noted above, John ultimately allocated a sum of \$3,000 for the legal conveyancing costs. John has received no specific invoice from his lawyers for this sum. Rather, it represents a sum which John, and

presumably his lawyers, ultimately determined to be a fair and reasonable allocation. This is borne out by the following statements:

My solicitors have advised that their costs and disbursements relating solely to the conveyancing costs are approximately \$3000. They note that two Section 32 Statements were required, as well as special correspondence associated with the signing of various documents in Port Fairy by yourself and by the purchaser and two lots of Certificates for the Section 32 Statements. (Excerpt from an email from John to David dated 11 June 2016); and

Please note that we have not provided a separate estimate solely in relation to the conveyancing as we believed that the work in relation to the conveyancing would form part of the overall resolution of the issues between the parties, including the VCAT Orders. (Excerpt from a letter from John's lawyers to David's lawyers dated 28 July 2016).

- 41 In my view, John's eventual allocation of \$3,000 for the legal conveyancing costs was both reasonable and reasonably accounted for.
- 42 In the circumstance where John's lawyers were, in addition to preparing the sale contracts and associated conveyancing tasks, representing John in protracted litigation in respect of the sale of the property, I accept that it might have been difficult at times to distinguish conveyancing fees from other professional fees.
- 43 There is no evidence before me that John has received any invoice from his lawyers in respect of the legal conveyancing costs, other than the above-mentioned invoice dated 29 May 2015. Having regard to this, and accepting also that John's allocation of \$3,000 for the legal conveyancing costs is based on advice from his lawyers, I am satisfied that the allocation is reasonable. And I am also satisfied that, given the information available to him, John properly accounted for the sum and advised David accordingly.

The outgoings adjustment

- 44 In his email to David dated 11 June 2016, referred to above, John also refers to the [outgoings] adjustment of \$749.60 he intended to make in his favour, that being the difference between outgoings expenses paid by John and outgoings expenses paid by David. Attached to the email is a statement setting out, amongst other things, the sums paid by each of John and David in respect of the outgoing expenses of electricity, insurance, land tax, maintenance, shire rates and water. The total paid by John in respect of these expenses is noted as \$4,279.87, and the total paid by David is noted as \$3,530.27. The difference between the figures, \$749.60, is the adjustment John proposed in his email to David. It is not clear what period of time the outgoings expenses cover. However, having regard to the amounts identified, it appears to me that they are probably the outgoings expenses in respect of the property outstanding as at, or incurred after, the 2014 consent orders.

- 45 What is clear is that John explained the basis upon which he intended to make the adjustment of \$749.60. And I note that in the course of this proceeding, John filed and served a list of documents dated 11 April 2016 listing the tax invoices and statements in his possession as to outgoings and expenses in respect of the property incurred after 30 November 2014. A copy of the invoices and statements was provided to David's lawyers.
- 46 There is no evidence before me upon which I might find that John's adjustment calculation is erroneous.
- 47 On the evidence before me, I am satisfied that John's allowance for the outgoings adjustment was properly accounted for, and there is no basis upon which I might find that the allowance was unreasonable.

Delay and costs

- 48 There is little evidence before me as to the arrangements or instructions as between John, his lawyers and the relevant estate agent as to the sale of the property, the collection and banking of the sale proceeds, and the payment of expenses associated with the sale.
- 49 As noted above, a substantial distribution payment of \$337,500 was paid to David on 18 February 2016, just short of five weeks after settlement of the sale. In my view this is not an unreasonable delay.
- 50 The second distribution payment, \$130,032.27, was paid to David some considerable time later on 22 July 2016.
- 51 However, there is nothing in the 2014 consent orders as to *when* the proceeds of sale were to be distributed. And there is no evidence before me that John materially benefited from the delay. The evidence, such as there is, is that the delay was at least partly attributable to the dispute between John and David as to appropriate allowances for the legal conveyancing costs, the outgoings adjustment and whether or not allowance should be made for a tax return for the estate. In the end, John made the decision to make a second distribution payment to David before these issues were resolved and, in reaching that decision, John substantially reduced the allowance for the legal conveyancing costs to a sum which, as I have found above, was reasonable.
- 52 On the evidence before me, I am not satisfied that the alleged delay on the part of John in making either of the distribution payments to David amounts to a breach of the 2014 consent orders on the part of John.
- 53 As I am satisfied that John has not breached the 2014 consent orders, David's claim for legal costs also fails. And in this regard it makes no difference whether the legal costs are characterised as damages arising from an alleged breach of the 2014 consent orders, or as costs associated with the proceeding. With a finding of no breach on the part of John, David's claim in respect of legal costs fails.

54 For the above reasons, I find that to the extent the tribunal has jurisdiction to hear the claims brought by David, such claims are dismissed.

Conclusion

55 I will order that, to the extent David's claims allege a breach of John's duties as executor and trustee of his father's estate, or a breach of order 5 (c) of the 2014 consent orders, the claims be struck out for want of jurisdiction. David's claims, otherwise, will be dismissed.

56 I will reserve costs with liberty to apply, and in so doing I draw the parties' attention to Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER M. FARRELLY