VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP152/2014

CATCHWORDS

Proceeding between co-owners of land pursuant to Part IV *Property Law Act* 1958 resolved save as to costs associated with the proceeding. Division 8 *Victorian Civil and Administrative Tribunal Act* 1998. Applicant's and respondent's claim for costs dismissed. Applicant's further application for payment of commission under section 77 of the *Trustee Act* 1958 struck out.

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	7 March 2016
DATE OF ORDER	23 March 2016
CITATION	Bills-Thompson v Bills-Thompson (Building and Property) [2016] VCAT 438

ORDERS

1 The applicant's application for costs is dismissed.

2 Subject to order 4 below, the respondent's application for costs is dismissed.

3 The applicant's application for commission pursuant to section 77 of the *Trustee Act 1958* is struck out.

4 The respondent's costs in relation to the applicant's application for commission pursuant to section 77 of the *Trustee Act* 1958 are reserved. Any application by the respondent in respect of such costs must be filed and served by 22 April 2016, failing which there will be no order as to costs in respect of the applicant's application for commission pursuant to section 77 of the *Trustee Act* 1958.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant	Mr R Lane, solicitor
For Respondents	Mr N Jones of Counsel

REASONS

1 The applicant ("**John**") and the respondent ("**David**") are brothers. In 1997 their father passed away and John and David became owners, as joint tenants, of a home in Port Fairy, Victoria ("**the property**").

2 In July 2014, John made application to this Tribunal for orders pursuant to Part IV of the *Property Law Act* 1958 that the property be sold and the proceeds of sale be distributed between himself and David. David was living in the property at the time.

3 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 consent orders made that day 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 October 2014 orders**")

4. At the time of the October 2014 orders, the parties had obtained one valuation on the property ("**the PRP valuation**") which valued the property at $1,000,000.

5 Seven months later, David was frustrated that the property had not been sold. He considered the reason the property had not sold was because John had set the "asking" sale price too high at $1,300,000, which was considerably higher than the PRP valuation and considerably higher again than the agreed lowest sale price of $800,000 as set out in order number 3 of the October 2014 orders.

6 In May 2015, David obtained appraisals from two real estate agents which estimated the value of the property at between $780,000 and $869,000. On 17 June 2015 David obtained a valuation of the property from Opteon Property Group which valued the property at $875,000.

7 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 ("**the June 2015 application**"). Following a directions hearing, David filed and served Points of Claim and John filed and served Points of Defence and Counterclaim.

8 At a compulsory conference on 14 September 2015, John and David were unable to resolve their differences and orders were made for the file and service of witness statements, expert reports and a tribunal book of documents, and the matter was listed for hearing to commence on 9 February 2016 with four days allocated.

9 In December 2015, the property was sold for $1,000,000, and settlement of the sale occurred on 15 January 2016.

10 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.

11 The orders made at the directions hearing provided for the file and service of submissions ahead of the hearing listed for 7 March 2016.

12 On 12 February 2016, John's lawyers gave notice to the Tribunal and David's lawyers that at the hearing John intended to apply for further orders that:

i. John be entitled to a trustee's commission of 2.5% pursuant to section 77 of the *Trustee Act* 1958;

ii. David provide to John a list of all outgoings on the property between 11 August 2011 and November 2014. John says the list of outgoings is required to enable him to calculate his Capital Gains Tax liability on the sale of the property.

13 By orders made at a directions hearing on 3 March 2016, John's application for the above further orders was directed to be heard as part of the hearing on 7 March 2016.

THE HEARING

14 I heard the matter on 7 March 2016. Mr Lane, solicitor, represented John. Mr Jones of counsel represented David. John's lawyer provided to the Tribunal a folder of documents containing a copy of pleadings, relevant documents and witness statements.

15 John and David each gave very brief oral evidence for the purpose of confirming their respective witness statements. Neither of them was cross-examined.

16 Consent orders were made for the service of lists of certain documents relevant to their respective potential Capital Gains Tax liability.

COSTS

17 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("**the Act**") provides that each party is to bear its own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

18 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

> i. The prima facie rule is that each party should bear their own costs of the proceeding;
>
> ii. The Tribunal should make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order;

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[1] [2007] VSC 117 at [20]

iii. In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s109(3).

19 David seeks an order that his costs of and incidental to the proceeding incurred after the October 2014 orders be paid by John.

20 John seeks an order that his costs of and incidental to the June 2015 application be paid by David. He says such costs should be paid on an *indemnity* basis from 15 April 2015, and he says such costs should be deducted from David's share of the proceeds of sale of the property.

David's submissions

21 David says that John failed to meet his obligations under the October 2014 orders. The alleged failures, set out in David's Amended Points of Claim dated 14 August 2015, include:

(a) unreasonably delaying putting the property up for sale;

(b) setting an unachievable and unrealistic sale price of $1,300,000;

(c) failing to provide to David email monthly updates on the progress of the sale, as was agreed in order 12 of the October 2014 orders;

(d) failing, in his capacity as trustee, to take proper protection and security measures for the home (there was an incident where squatters entered the vacant property);

22 David says also that John, by John's counterclaim dated 21 August 2015, sought, without any justification, variations to the October 2014 orders. The variations sought included:

(a) that order number 11 in the 2014 orders be amended such that the agreed sum of $12,500 payable by John be paid immediately, rather than out of David's share of the proceeds of sale;

(b) that David pay rent for the final period that he lived at the property, 1 August 2014 to 30 November 2014 at a rate of $1800 per week, a total of $31,371;

(c) that David pay 50% of the expenses being incurred in the sale of the property as they accrue, notwithstanding that order number 5 of the October 2014 orders provides for such expenses to be met out of the proceeds of sale of the property.

23 David says that John's failure to comply with, and attempts to vary, the October 2014 orders amounts to a failure to comply with the Tribunal's orders (the Tribunal's orders being the October 2014 orders), thereby attracting a cost order having regard to section 109 (3)(a)(i) of the Act. In a general sense, David says that John's actions are, under section109 (3)(e) of the Act, relevant matters the Tribunal should consider.

John's submissions

24 John says that the June 2015 application filed by David was unwarranted because John was, contrary to David's allegations, fulfilling his obligations under the October 2014 orders. In particular, John says that his decision to set the sale price for the property at $1,300,000 was aimed at achieving an actual sale price of around the $1,000,000. He says also that he set the sale price after discussions with the selling agent. He says his conduct in this regard did not constitute a failure to comply with the October 2014 orders, particularly having regard to the fact that he had discretion, as trustee for the purpose of the sale, to make arrangements for the sale.

25 John submits that David has acted vexatiously in bringing the unfounded allegations as to John's conduct in respect of alleged delay, failure to provide monthly email updates and failure to provide adequate protection/security for the property.

26 John submits that a cost order in his favour is warranted having regard to:

(a) section 109(3)(a)(vi) of the Act - alleged vexatious conduct of David;

(b) section 109 (3)(c) of the Act - relative strengths of claims; and

(c) section 109 (3)(e) of the Act - John says that David's unjustified allegations as to John's alleged non-compliance with the October 2014 orders is a relevant matter to consider.

Findings

27 Having considered the evidence before me, including the witness statements of John and David, the correspondence between the parties lawyers after October 2014 and the email communications between the parties after October 2014, I am not satisfied that it would be fair to depart from the prima facie rule that each party bear their own costs. My reasons are set out below.

28 In my view, David's concern as to the $1,300,000 sale price set by John was well founded. I accept that John had notified David that the asking sale price was negotiable.[2] However, having regard to the following matters, I consider David's concern was well founded:

(a) at the time of the October 2014 orders, and up to May 2015, the parties had only one valuation report, the PRP valuation, which estimated the property's value at $1,000,000;

(b) the order number 3 of the October 2014 orders provides that John was not to sell the property for less than $800,000. In my view this was, in effect, an agreed "reserve" selling price;

[2] See document B16 in tribunal book of documents provided by John's lawyers at the hearing – letter dated 11 May 2015 from John's lawyers to David's lawyers with attached email from selling agent.

(c) real estate agent appraisals obtained by David in May 2015 estimated the value of the property at between $780,000 and $869,000.

29 While John had discretion as to arrangements for the sale, and while I accept that he was endeavouring to obtain the best price possible for the benefit of both himself and David, it is not difficult to appreciate David's concern that the property remained unsold in the circumstance where John was setting the sale price much higher than the effective agreed "reserve" price, the PRP valuation estimate and other real estate agent appraisal estimates.

30 David had further reason for concern. Correspondence from John's lawyers to David's lawyers dated 1 May 2015[3] provided a brief update of the property sale campaign at that time. The letter includes the following statement:

> As the property has not sold and it appears that sale is unlikely to occur in the near future, we believe that further orders are required to ensure that the Trustee is promptly reimbursed in respect of his expenses associated with the property. We therefore enclose a Minute of Proposed Consent Orders for your consideration.

31 The attached proposed consent orders provide, amongst other things, that:

(a) David pay John the sum of $12,500 (being the sum referred to in order number 11 of the October 2014 orders) within 30 days; and

(b) David to pay 50% of any costs incurred by John arising out of or in connection with the property and/or the proposed sale of the property, the payment to be made within seven days of receipt of notice from John; and

(c) the above payments to accrue interest in the event David fails to pay them when due.

32 John's proposal to amend the October 2014 orders was reiterated in a further letter to David's lawyers from John's lawyers dated 18 May 2015.[4] Under the heading "Future conduct" on the last page of the letter, the letter states:

> As your client remains co-owner of the property, we believe it is only fair and reasonable that he contribute 50% to the ongoing costs being incurred by our client in his capacity as Trustee. We also believe it is appropriate that, in circumstances where the property has not sold during the summer campaign, your client should now pay to our client the sum of $12,500, being the sum specified in order 11 of the orders dated 17 October 2014.
>
> We therefore remain of the opinion that the Minutes of Proposed Consent Orders provided under cover of our email letter dated 1 May 2015 remain appropriate.

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[3] document B14 in the Tribunal book of documents provided by John's lawyers at the hearing
[4] document B18 in the Tribunal book of documents provided by John's lawyers at the hearing

33 In my view David had sound reason to be concerned that, not only was the property not sold, but he was also being asked to change the agreement he reached with John as set out in the 2014 orders, and the proposed changes would have a financial impact on him.

34 It is also apparent that John was concerned at the accruing costs and expenses associated with the sale. John's concern in this regard is understandable. Although the October 2014 orders provide for such cost and expenses to be met from the proceeds of sale, John carried the burden of meeting accrued costs and expenses which had to be paid before a sale was effected.

35 The agreement confirmed in the October 2014 orders contemplates that the parties may have need to return to the Tribunal for further orders. This intent is found in the order number 13, by which the proceeding was referred to an administrative mention, and the order number 14 which gave the parties "liberty to apply".

36 Having regard to David's concerns as set out above, and having regard also to John's concern as to the accruing costs and expenses, it is not surprising in my view that the matter returned to the Tribunal for further orders. That its return to the Tribunal was triggered by the June 2015 application filed by David is, in my view, not particularly significant. It would have made little, if any, difference had the matter returned to the Tribunal by application filed by John.

37 It seems to me that the areas of disagreement between John and David might well have been resolved by a few further consent orders as to a reserve selling price, a time period for the sale and the method of payment of accruing costs and expenses associated with the sale. Unfortunately David and John were unable to reach agreement and each pursued their claims, including claims for legal costs, as set out in their respective pleadings.

38 Fortunately, the property was sold prior to the hearing and John and David were, at least initially, able to agree that apart from their claims for legal costs, the proceeds of sale should be distributed in accordance with the October 2014 orders.

39 I say "initially" because John has since made a very late application for an order that he receive, as a priority distribution from the proceeds of sale of the property, a trustee commission payment pursuant to section 77 of the *Trustee Act* 1958, calculated as 2.5% of the sale price of the property. For reasons discussed later in these reasons, I decline to make any such order.

40 As to costs, in all the circumstances I am not persuaded that it is fair to depart from the prima facie rule and make an order for costs in favour of either John or David.

41 It may be that John was being overly optimistic in setting a sale price of $1,300,000. It may be that when the parties agreed to the October 2014 orders they did not contemplate the burden of the accruing costs and expenses in the circumstance where it would take a long time to effect a sale. It may be that communications between David and John as to the progress of the sale campaign could have been better. However, subject to my consideration as to offers of settlement made by the parties (discussed below), I am not persuaded that either John or David has a particularly strong case relative to the other or that either conducted himself in a way that would make it fair to depart from the prima facie rule that each party bear their own costs.

Settlement offers

42 An unreasonable rejection of an offer to settle a proceeding is a matter that the Tribunal may take into account under section 109(3)(e) of the Act as part of its consideration as to whether the Tribunal should depart from the prima facie rule and make a costs order in favour of one of the parties.

43 Section 112 of the Act also makes special provision in respect of the making of a cost order in circumstances where a party has rejected a settlement offer made by another party:

> **112 Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if—
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
>
> (b) the other party does not accept the offer within the time the offer is open; and
>
> (c) the offer complies with sections 113 and 114; and
>
> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
>
> (2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in subsection (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.
>
> (3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal—
>
> (a) must take into account any costs it would have ordered on the date the offer was made; and
>
> (b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

44 John and David each refer to settlement offers made by them. For the purpose of section 112(3)(a), it may be presumed, for the reasons discussed above, that an order for costs would not have been made on the date of any of the settlement offers. That is the "starting point" for assessment of the offers. If a settlement offer is not at least as favourable to the offeree as the "starting point", then in my view it cannot be said, unless there are exceptional circumstances, that the offeree acted unreasonably in rejecting the offer.

45 In a letter from John's lawyers to David's lawyers dated 8 October 2015, John offered to settle the proceeding on various terms, including the term that David pay John $20,000 in respect of John's costs of the proceeding incurred after 15 April 2015. As the offer is considerably less favourable to David than the "starting point", that there be no order as to costs, I am satisfied that David's rejection of the offer was not unreasonable.

46 In around November 2015, John notified David that John had received an offer for the purchase of the property at a price of $1,000,000. David responded in a letter from his lawyers to John's lawyers dated 26 November 2015. In that letter David offered to settle the proceeding on the basis that:

a) within 21 days John enter an unconditional contract, or a contract which becomes unconditional within 21 days, for the sale of the property at a price of $1,000,000 with a settlement date of 90 days or less; and

b) the proceeding be discontinued with each party bearing their own legal costs.

47 The offer was open for a period of 21 days.

48 There is no evidence before me as to how the offer of $1,000,000 was made to John and whether the offer was subject to any special conditions or a proposed settlement date in excess of 90 days. The fact that John had received an "offer" of $1,000,000 does not mean that the offeror was willing and able to enter the unconditional contract as proposed by David. There is no evidence before me as to whether there were any other interested potential purchasers of the property who might have been considering making a superior offer. I cannot be satisfied that John acted unreasonably in rejecting the settlement offer put by David. In my view this offer of settlement made by David has no bearing on the question of costs.

49 The property was ultimately sold for $1,000,000. As at 14 December 2015, the purchaser had signed the sale contract and the contract was being returned to John's lawyers. This is confirmed in a letter from John's lawyers to David's lawyers dated 14 December 2015.

50 David's lawyers responded with a letter to John's lawyers dated 16 December 2015. By that letter, David offered to settle the proceeding on the following terms:

a) That each party do all acts and things necessary to strike out the proceeding with a right of reinstatement.

b) That the proceeds from the said sale be disbursed according to the terms of the Orders made by VCAT on the 17 October 2014 [the October 2014 orders].

c) That upon completion of the said Contract of Sale and upon the completion of the distribution of the proceeds from the sale according to paragraph (a) herein that both parties do all such acts and things as may be necessary to strike out the proceeding without any right of reinstatement with no Order as to costs.

d) That subject to compliance with these terms, the parties mutually release the other from any liability, claim, suit or demand with respect to the proceedings and the subject matter of the proceedings.

e) That each party shall bear their own legal costs and disbursements arising from the proceeding.

51 The letter went on to say:

> …Our client pursuant to the terms of his offer, also forgoes his claim to remove any obligation to pay to your client the sum of $12,500 referred to in paragraph 11 of the Orders made on 17th October 2014 as well as forgoing his claim to discharge, vary or revoke the potential liability to our client arising from paragraphs 8 and 9 of the Orders made on the 17 October 2014
>
> This offer will remain open for a period of 21 days from the date of this letter

52 While the offer appears to be no less favourable to John than the "starting point", namely that each party bear their own costs, I am not satisfied that it was unreasonable on the part of John to not accept the offer.

53 First, the offer is not clear in its terms.

54 The offer proposes that the parties do all acts and things necessary to strike out the proceeding with a right of reinstatement, and that the parties subsequently, after the completion of the contract of sale and distribution of proceeds, do all acts and things as may be necessary to strike out the proceeding without any right of reinstatement with no order as to costs. This is confusing to say the least.

55 In my view it is also unclear as to what is meant by *"forgoing his claim to discharge, vary or revoke the potential liability to our client arising from paragraphs 8 and 9 of the Orders made on the 17th October 2014"*.

56 The offer proposes mutual releases *"subject to compliance with these terms"*. Does that mean that there would be no releases in the event each party did not do all acts and things necessary to firstly strike out the proceeding with the right of reinstatement and then to subsequently strike out the proceeding without any right of reinstatement ?

57 Second, the offer does not address an issue raised by John's lawyers in their letter to David's lawyers dated 14 December 2015, namely John's request for a list of outgoings paid by David in the period 11 August 2011 to 30 November 2014. John sought such information to assist him in assessing his potential capital gains tax liability. Ultimately, I made orders for the service of lists of documents relevant to the parties' potential capital gains tax liability. Had John accepted the settlement offer, the release clause in the offer may have prevented John from pursuing this issue and obtaining the orders that were ultimately made.

58 For the above reasons, I am satisfied that it was not unreasonable for John to reject David's settlement offer of 16 December 2015. It is not unreasonable for a party to reject an offer that is poorly drafted and unclear as to its terms.

59 For the above reasons, I am satisfied that none of the offers of settlement made by David or John are sufficient to warrant a departure from the prima facie rule that each party bear their own costs of the proceeding.

TRUSTEE COMMISSION

60 Section 77 of the *Trustee Act* 1958 provides:

> **Commission allowable to trustee of a settlement**
>
> It shall be lawful for the Court or an Associate Judge of the Court to allow out of the trust funds to the trustee of a settlement such commission or percentage not exceeding five per centum for his pains and trouble as is just and reasonable.

61 John says that, pursuant to this section, he is entitled to seek an order from this Tribunal that, for his pains and trouble in arranging the sale of the property, he be paid a commission on the sale. He seeks a commission calculated as 2.5% of the $1,000,000 sale price. ("**John's application pursuant to section 77 of the *Trustee Act*** ")

62 There is no dispute that the reference to "Court" in section 77 of the *Trustee Act* is a reference to the Supreme Court and, subject to its jurisdictional limit, the County Court. It does not include this Tribunal. For this reason, David submits that this Tribunal has no jurisdiction to make the order sought by John.

63 John submits that "commission" is a form of "remuneration" and that this Tribunal has, under section 231 of the *Property Law Act*, the power to order the payment of remuneration to a trustee. Section 231 provides:

> **231 VCAT may order appointment of trustees**
>
> (1) In any proceeding under this Division, if VCAT thinks that the appointment or removal of trustees is necessary or desirable, it may order—
>
> (a) the appointment of trustees; or
>
> (b) the removal of trustees.

(2) In an order appointing trustees for the purposes of the sale of land or goods, VCAT may—

(a) direct the trustees as to the terms and conditions on which any sale is to be carried out;

(b) direct the distribution of any proceeds of the sale in any manner specified by VCAT.

(3) In an order appointing trustees for the purposes of a physical division of land or goods, VCAT may direct the trustees as to the manner in which the division is to be carried out.

(4) An order under this section may provide for the remuneration of the trustees appointed under the order and—

(a) if trustees are appointed for the purposes referred to in subsection (2), the order may provide that the remuneration of the trustees be paid from the proceeds of sale; and

(b) if the trustees are appointed for the purposes referred to in subsection (3), the order may provide that the remuneration of the trustees be paid by such parties to the proceeding as VCAT considers just and fair in the circumstances.

64 John submits that he was appointed trustee by order of the tribunal - that order being the order number 2 in the October 2014 orders - and that pursuant to section 231(2) of the *Property Law Act*, the Tribunal may order the payment of remuneration to the trustee from the proceeds of sale. He submits that as "commission" is a form of "remuneration", the Tribunal may use its power under section 231 of the *Property Law Act* to make an order for payment of commission pursuant to section 77 of the *Trustee Act.*

65 In my view, the submission is flawed.

66 The Tribunal's powers under section 231 of the *Property Law Act* are, as noted in section 231(1), available in any proceeding under Division 2 of Part IV of the Act which deals with applications by co-owners of property for sale and/or division of the property.

67 There is no provision under Part IV of the *Property Law Act*, or under the *Trustee Act*, which expressly allows the Tribunal to make an order pursuant to section 77 of the *Trustee Act.* It is very clear from its language that the *Trustee Act* limits such power to the Supreme Court and the County Court, and in my view it is not open to the Tribunal to assume the power via interpretation of the word "remuneration".

68 In my view, David's counsel is correct in submitting that this Tribunal does not have power to make an order pursuant to section 77 of the *Trustee Act*. Accordingly I will order that John's application pursuant to section 77 of the *Trustee Act* be struck out.

69 If I am wrong and the Tribunal has the power, I would in any event decline to make such order as I am satisfied that there should be no order for the payment of "remuneration" to John, whatever form that remuneration might take.

70 While the October 2014 orders are orders of the Tribunal, they are *consent* orders made to give effect to an agreement reached by David and John on 17 October 2014. The agreement appoints John as trustee for the purpose of arranging a sale of the property, and the agreement provides that the costs and expenses associated with the sale are to be met from the proceeds of sale. There is nothing in the agreement to suggest that John would be paid remuneration for his actions as the trustee. He has simply been nominated as the person to take control of arrangements for the sale. On the evidence before me, there is nothing that persuades me to go beyond that agreement and order that John be paid remuneration.

71 I will reserve David's costs in respect of John's application pursuant to section 77 of the *Trustee Act*, and in so doing I draw attention to the general principles as to costs in this Tribunal as discussed above in these reasons.

CONCLUSION

72 I will order that John's application for costs be dismissed. I will order that John's application pursuant to section 77 of the *Trustee Act* be struck out.

73 I will order that David's application for costs be dismissed, save for his costs associated with John's application pursuant to section 77 of the *Trustee Act*. Any application by David for costs in respect of John's application pursuant to section 77 of the *Trustee Act* must be filed and served by 22 April 2016, failing which there will be no order as to costs in respect of John's application pursuant to section 77 of the *Trustee Act*.

SENIOR MEMBER M. FARRELLY