VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP152/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Costs application. Finding that an offer of settlement which encompassed matters beyond the matters in the VCAT proceeding, and beyond the jurisdiction of the Tribunal, could not attract the operation of section 112 of the *Victorian Civil and Administrative Tribunal Act* 1998. Further finding of insufficient grounds to depart from the prima facie rule under section 109 of the Act that each party bear its own costs.

APPLICANT	Mr Leonard John Bills - Thompson
RESPONDENT	Mr David George Bills - Thompson
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Costs Hearing
DATE OF HEARING	15 August 2017
DATE OF ORDER	30 August 2017
CITATION	Bills – Thompson v Bills – Thompson (Building and Property) [2017] VCAT 1375

ORDER

1. The applicant's application for costs is dismissed.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr S Pitt of Counsel
For the Respondent	Mr N Jones of Counsel

REASONS

1 On 15 February 2017, I heard the application of the respondent ("**David**") seeking relief in respect of the alleged breach by the applicant ("**John**") of previous consent orders and/or the alleged breach by John of his duties as trustee of the estate of the late George Bills – Thompson. By my decision handed down on 7 March 2017, David's application was, in the main, struck out for want of jurisdiction, and the application was otherwise dismissed. John now brings an application seeking an order for costs in respect of David's unsuccessful application.

2 The proceeding has a long history. For convenience, I reproduce below the brief history of the proceeding and the issues in David's recent application as set out in my decision of 7 March 2017:

> 1. 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**")

5. 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.
6. 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.
7. 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.

8. 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.
9. But the dispute did not end there.

David's new claims

10. 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.
11. 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.

12. 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.

13. 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).

14. 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.

15. In April 2016 David requested that the Tribunal relist the proceeding for directions hearing.

16. 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.

17. 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.

18. 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 outgoings expenses in respect of the property ("**the outgoings 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.

19. 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.

20. 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 outgoings 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.

21. 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.

22. Even if the Tribunal had jurisdiction, John says David's claims must fail.

23. John says that the allowances he made for the legal conveyancing costs and the outgoings adjustment are reasonable and have been properly accounted for.

24. 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 outgoings adjustment. In any event, says John, the 2014 consent orders do not specify any time for the distribution of proceeds of sale.

3. As set out in my decision of 7 March 2017, I found that to the extent David brought claims alleging breach of order 5(c) in the 2014 consent orders and/or a breach of John's duties as executor or and trustee of the estate of the late George Bills – Thompson, such claims were struck out for want of jurisdiction. Otherwise the claims brought by David were dismissed.

4. John now brings an application seeking orders that David pay John's costs of and associated with David's unsuccessful application.

COSTS

5. 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.

6. 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;

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).

7 Section 112 of the Act 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.

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

(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.

Level of costs

8 Under section 111 of the Act, where the Tribunal is minded to make an order for costs, the Tribunal may fix the amount of costs itself or it may order that the costs be assessed by the Victorian Costs Court. The Tribunal will usually identify the basis and scale upon which any assessment of the costs should proceed.

9 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis generally includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher "indemnity" basis generally includes all costs actually incurred save in so far as they are of an unreasonable amount or have been unreasonably incurred.

10 As to the *scale* of costs, the Tribunal will usually identify a scale operative within the Magistrates Court, the County Court or the Supreme Court. If the Tribunal does not nominate any particular scale, the applicable scale will, by virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, be the County Court scale.

11 David seeks an order for costs on an indemnity basis. Alternatively David seeks costs on any other basis that the Tribunal considers appropriate.

Offers of settlement – section 112 of the Act

12 The parties agree that David's application, although foreshadowed in around April 2016 when David requested a directions hearing, can be taken to have commenced on 12 August 2016 when David filed the "Particulars of Claim". The Particulars of Claim were filed and served in accordance with orders made at a directions hearing on 29 July 2016.

13 John served several offers of settlement after the directions hearing on 29 July 2016. The first, dated 3 August 2016, states amongst other things:

> … In an attempt to resolve all items remaining in dispute, to avoid the costs associated with the preparation of Submissions and to avoid any further unnecessary costs associated with the Proceeding, John offers to settle David's claims and the Proceeding on the following terms and conditions:

1. John shall pay to David the sum of $2,000 ("**the settlement sum**") in full and final settlement of all of David's claims arising out of the sale of the property and the Proceeding;

2. Subject to the payment of the settlement sum, David for himself, his heirs, successors and legal personal representatives releases and forever discharges John and his heirs, successors and legal personal representatives from all claims, demands, proceedings, accounts or actions arising out of or in connection with the Estate [the estate of the late George Bills – Thompson], the administration of the Estate and/or the trust arising from the VCAT orders [the 2014 consent orders] …

14 The offer was expressed to be open for acceptance until 17 August 2016. The offer, although it did not make specific mention of section 112 of the Act, expressly states:

> If this offer is not accepted and the Tribunal makes an award of compensation in favour of David which is no more favourable than this offer, John will rely on this letter on the question of costs and seek an order for indemnity costs or, alternatively, solicitor/client costs from the date of this letter.

15 The offer also made it clear that it was also made in reliance upon the well known principles expressed in cases including *Calderbank v Calderbank* [1975] All ER 333 and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority* (No 2) [2005] 13 VR 435.

16 There appears to have been no response to the offer from David. Certainly the offer was not accepted.

17 On 2 November 2016, John made a further offer of settlement in a sum of $3,000. The terms of the offer, including the proposed 'release', were similar to the terms of the offer made 3 August 2016, save that this offer was open for acceptance for a period of only 8 days, whereas the 3 August offer had been open for acceptance for a period of 14 days.

18 By letter dated 11 November 2016, David rejected the offer dated 2 November 2016. In the letter, David made reference to the release clause proposed in the offer as being unreasonable as it was "*extremely broad*" and extended to matters and things "*far outside … the subject matter of the current application*". David asserted also that the Tribunal has no power or authority to make an order including any such release clause. In this letter David counter offered to accept the sum offered by John, $3000, in settlement of the VCAT proceeding but without the release clause proposed in John's offer.

19 John did not accept the counter offer. Instead, John subsequently served a further offer of settlement dated 1 December 2016, offering a sum of $2,500. The terms of the offer were, save for the sum offered, similar to terms of the offer dated 3 August 2016, including the proposed release

clause referred to above. The offer was open for a period of 14 days. David did not accept this offer.

20 John submits that because the orders I made on 7 March 2017 are not more favourable to David than the settlement offer made by John dated 3 August 2016, section 112(2) of the Act is enlivened such that John is entitled to an order that David pay John's costs incurred after the offer. John submits that the same rationale applies to his further offers dated 2 November 2016 and 1 December 2016.

21 I do not accept John's submission.

22 First, I note that section 112 of the Act cannot be enlivened in respect of John's second offer dated 2 November 2016 because that offer was open for acceptance for a period of only 8 days. Section 112 requires offers to comply with sections 113 and 114 of the Act. Section 114 requires offers to be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period of not less than 14 days. The offer did not meet this requirement.

23 In my view each of the offers dated 3 August 2016 and 1 December 2016 cannot attract the operation of section 112(2) of the Act because, having regard to the terms of the offer, in particular the inclusion of the required broad release clause, it cannot be said that the orders made on 7 March 2017 are not more favourable to David than the offer. The same can also be said in respect of the second offer dated 2 November 2016.

24 Each of the offers was put in an attempt to resolve "*all items remaining in dispute*". Each offer was also put on the basis that, subject to payment of the settlement sum, David releases John, not only from liability in respect of the claims in VCAT proceeding, but also *from all claims, demands, accounts or actions arising out of or in connection with the Estate* [of the late George Bills-Thompson], *the administration of that estate* and the trust arising from the 2014 consent orders.

25 The Tribunal cannot, indeed should not, assess whether an offer of settlement is more favourable than the Tribunal's orders in a proceeding in circumstances where the settlement offer encompasses matters - significant matters including John's general duties as trustee of the estate of his late father- which are beyond the scope of the proceeding in the Tribunal.

26 I appreciate the desire of John to bring finality to all disputes between himself and David. However, the offers of settlement discussed above will not assist John in his application for costs under section 112 of the Act.

27 For the above reasons, I find that John's application for a costs order in reliance on section 112 of the Act must fail.

Section 109 of the Act

The offers of settlement

28 An offer of settlement that does not attract the operation of section 112 of the Act may nevertheless be a matter the Tribunal may take into consideration when exercising its discretion under section 109 of the Act. An offer of settlement, in this sense, may be "*any other matter the Tribunal considers relevant"* pursuant to section 109(3)(e).

29 However, I consider the above discussed offers of settlement made by John should be disregarded when exercising my discretion under section 109 of the Act. As discussed above, the offers encompass matters beyond the scope of the proceeding in the Tribunal, and beyond the jurisdiction of the Tribunal. As such, in my view I am in no position to assess the reasonableness of the offers, and David's rejection of them, within the context of the VCAT proceeding and section 109 of the Act.

Relative strengths of the claims – section 109(3) of the Act

30 John submits that the claims in David's application had no tenable basis in law, or, if they were tenable at all, were very weak. John submits the claims were doomed to fail, as indeed they did, and it is accordingly fair to depart from the prima facie rule on costs and make a costs order in his favour.

31 I do not accept the submission.

32 In my decision of 7 March 2017, I note David's justified frustration at John's attempt, through his lawyers, to deduct $90,000 from the proceeds of sale of the Port Fairy property as alleged legal costs associated with the sale. As I noted in the decision, John's attempt in this regard "*might well be viewed as an attempt to recover costs which, by my decision of 23 March 2016, were not recoverable"*.[2]

33 It is understandable that David considered he had a reasonable claim against John born out of the delay on the part of John in distributing the proceeds of sale of the property.

34 David's claim ultimately failed for the reasons set out in my decision of 7 March 2017. But that does not mean that the claim was clearly untenable at law. In my view it was not plainly obvious or inarguable that the Tribunal lacked jurisdiction to entertain a claim alleging breach of John's duties as trustee. I reached my decision on the issue following due consideration of helpful submissions from the counsel for each of David and John.

35 Issues as to the Tribunal's jurisdiction are often not uncommon, and not always straightforward matters. John himself would be well aware of this having regard to his past unsuccessful application in this proceeding whereby he sought orders confirming his entitlement under the *Trustee Act* 1958 to receive, out of the proceeds of sale of the property, payment

[2] Paragraph 35 in my decision in this proceeding dated 7 March 2017.

characterised as "trustee's commission"[3]. I found that the Tribunal had no power to make the order sought.

36 I note also that David's application did not solely involve the claim alleging breach of trustee's obligations. David's claim included consideration of the allowances made by John, and his accounting to David for such allowances, for legal conveyancing costs, outgoings expenses and retention of $1500 as the estimated cost of a tax return in respect of their father's estate. I found the allowances made by John were reasonable and properly accounted for, but that does not mean that David's claims in respect of these allowances were without any real prospect of success.

37 For the above reasons, I am not satisfied that the strength of the claims brought by David in his application, relative to John's response to those claims, warrants a departure from the prima facie rule that each party bear their own costs.

Vexatious conduct of the proceeding - section 109(3)(a)(vi) of the Act.

38 At or around the commencement of David's application, and throughout the progress of the application, John's lawyers communicated to David's lawyers their view that David's claims were misconceived and would fail. As it turned out, David's claims did fail.

39 As I understand it, John now submits that David's dogged pursuit of his application, having regard to the communications between the lawyers, amounts to vexatious conduct of the proceeding.

40 I do not accept the submission.

41 In my view, David has not conducted the proceeding (his application) vexatiously. As discussed above, it is understandable that David considered he had a viable claim born out of John's delay in distributing the proceeds of sale of the property. Although the jurisdictional issue raised by John proved to be decisive, that does not mean that David's claims were hopeless with no tenable basis in law.

42 A failed claim does not equate to vexatious conduct of the proceeding. I see nothing in David's conduct of the proceeding that might be considered vexatious.

Nature and complexity of the proceeding - section 109(3)(d) of the Act.

43 Although not specifically raised in John's submissions, I have considered whether the nature and complexity of the application brought by David warrants a departure from the prima facie rule on costs.

44 I accept that the proceeding involved a jurisdictional issue of some legal complexity. However, having regard to the nature of the application, the reason why it was brought by David, and the conduct of both parties

[3] See my previous decision in this proceeding dated 23 March 2016.

throughout the course of the proceeding, I am not satisfied that the complexity of the issue makes it fair to depart from the prima facie rule that each party bear their own costs.

Conclusion

45 For the reasons discussed above, I will order that John's application for costs be dismissed.

SENIOR MEMBER M. FARRELLY