VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **W32/203**

CATCHWORDS

Property Law Act 1958 – co-owned property – s.233 - adjustment of rights of co-owners – relevant considerations – discretion to order sale – considerations – form of order

APPLICANT	John Bornyan
FIRST RESPONDENT	Jack Bornyan
SECOND RESPONDENT	George Bornyan
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	30 July – 1 August 2014
DATE OF ORDER	27 August 2014
CITATION	Bornyan v Bornyan (Building and Property) [2014] VCAT 1103

1. Pursuant to s233 of the *Property Law Ac* 1958 ("the Act") the Tribunal orders that an adjustment be made to the one third undivided interests of each of the parties as tenants in common of an estate in fee simple in the land and improvements situated at and known as 30 Egan Road, Dandenong 3175, being the land comprised in Certificate of Title Volume 9544 Folio 795 ("the Property") so that:

   (a) of the moneys secured by the registered first mortgage T862096R over the Property to Westpac Banking Corporation, the sum of $45,000 is secured solely over the Applicant's undivided one third interest; and

   (b) of the moneys secured by the registered second mortgage AK610302Y over the Property to Peter and Mary Bornyan, the sum of $105,000 is secured solely over the Applicant's undivided one third interest.

2. Pursuant to s.228 of the Act, order that the Property be sold in accordance with the terms of this order.

3. The parties shall jointly and irrevocably appoint an agent ("the Agent") in writing to market the Property and conduct the sale in accordance with this order and the provisions of the *Estate Agents Act* 1980. If the parties have not so appointed an agent within 21 days of the date of this order, the Agent shall be a person or firm appointed by the Principal Registrar who shall first

request each of the parties to nominate up to three local agents. The Principal Registrar shall not be bound by any such nomination and may if he thinks fit appoint an agent nominated by only one party or not nominated by any party.

4. The parties shall jointly and irrevocably instruct a solicitor ("the Solicitor") to:

   (a) prepare a contract of sale and the statement required by s32 of the *Sale of Land Act* 1962;

   (b) execute on behalf of any party, as if such authority to do so had been given in writing signed by him, a Section 32 statement prepared by the Solicitor for the sale of the Property, if such party should refuse or fail to sign it within twenty-four hours of its delivery to him;

   (c) fix the date of any auction of the Property after consultation with the Agent;

   (d) pay the deposit received on sale of the Property into an interest bearing trust account;

   (e) act as solicitor for the parties in the conveyance of the Property upon its sale;

   (f) do all things reasonable and necessary and in the usual course of conveyancing practise to transfer the Property to any purchaser;

   (g) act as the solicitor for the parties in the settlement of the sale of the Property; and

   (h) receive the deposit and the balance of purchase price pursuant to the contract of sale and apply such sums in accordance with this order.

5. If the parties are unable to agree upon the appointment of a solicitor then the solicitor shall be a person or firm appointed by the Principal Registrar who shall first request each of the parties to nominate up to three local solicitors. The Principal Registrar shall not be bound by any such nomination and may if he thinks fit appoint a solicitor nominated by only one party or not nominated by any party.

6. Unless otherwise agreed in writing between the parties (any such agreement must be provided to the Solicitor or the Agent) any contract of sale entered into by a purchaser shall:

   (a) provide that a deposit of 10% of the purchase price is to be paid on the signing of the contract by the purchaser;

   (b) provide that the deposit paid shall be held by the Agent or the Solicitor as stakeholder or otherwise as required by law;

   (c) provide that the balance of the purchase price be paid within not less than 60 days or otherwise as may be agreed between the parties;

(d) contain such other special conditions as the Solicitor shall determine are reasonable and necessary for the protection of the parties as vendors;

(e) be otherwise in the terms of the Law Institute of Victoria pro-forma contract of sale;

7. The reserve price shall be set or varied as agreed in writing between the parties. Where the parties have not agreed in writing to set or vary the reserve within seven days of being requested in writing to do so by the Agent, the Agent, at the cost of the parties, to be shared equally between them, shall obtain a sworn valuation of the Property from a licensed valuer and the value assessed by such valuer shall be the reserve price unless and until the parties agree in writing to some other figure.

8. Either the Applicant or the Respondents or either of them may deliver to the Agent an offer to purchase the Property at or above the reserve price provided that the party or parties making such offer holds or hold a written approval from a financial institution for at least the reserve price and such pre-approval accompanies the offer. Upon receipt of any such offer the Agent must inform the other party or the other parties (as the case may be) of the details of the offer and invite that other party or those other parties to submit a higher offer, which higher offer must be accompanied by a written pre-approval as aforesaid. If such higher offer is received, the Agent must inform the other party or the other parties (as the case may be) of the details of the higher offer and invite that other party or those other parties to submit an even higher offer, accompanied by a written pre-approval as aforesaid, and so continue until no party is not willing to exceed the current offer made, at which time the highest offer shall be accepted by the Agent for and on behalf of all parties and the Property shall be sold to the party or parties making that offer.

9. If the sale proceeds to auction:

(a) any party may bid at the auction provided he holds a written pre-approval from a financial institution for at least the reserve selling price and such pre-approval has been shown to the Agent and the Solicitor not less than 48 hours before the auction.

(b) the Solicitor shall request each of the parties to sign the form of Contract of Sale no later than two working days before the date fixed for the auction. If any party has not signed the contract by 24 hours before the time fixed for the auction the Solicitor shall sign the Contract of sale in the name and on behalf of such party and such execution shall be a valid and effective execution of the Contract of Sale by such party.

10. The parties must forthwith upon request to do so by the Solicitor, do all things and sign all documents the Solicitor considers necessary or appropriate to transfer the Property to any purchaser, including executing a

transfer of land of the Property from the First Applicant and the First Respondent to the purchaser;

11. The Property shall be advertised for sale for such period, in such periodicals and in such other fashion as the parties may agree in writing or, in default of agreement as the Solicitor shall determine following discussion with the Agent.

12. As soon as practicable after receipt of the balance of the purchase price the Solicitor shall apply the proceeds of sale as follows:

    (a) Pay to the Agent any commission, advertising, auctioneer's fees and other disbursements owing to him for the marketing and sale of the Property;

    (b) Pay to the Solicitor any costs and disbursements for the conveyance of the Property and anything done by him pursuant to this order;

    (c) Insofar as they can be discharged, discharge the registered mortgages secured over the Property, on the basis that the first $45,000 of the amount secured by the First Mortgage and the first $105,000 of the amount secured by the Second Mortgage are secured solely over the share of the Applicant.

    (a) divide any balance equally between the [parties.

13. Each of the parties must sign any document that, in the opinion of the Solicitor, is necessary or convenient for the sale and transfer of the Property within seven days of being requested to do so in writing by the Solicitor. If any of them fails to do so then the document in question may be signed in his name and on his behalf by the Principal Registrar. An affidavit or statutory declaration of the Solicitor of such default shall be conclusive evidence to the Principal Registrar of the default.

14. Liberty is reserved to each of the parties to apply with respect to the terms and conditions of the sale of the Property and any question that might arise in connection with the sale or the execution of any document relating thereto including varying the orders hereby made.

15. Reserve costs.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	In person
For the Respondents:	Mr N. Andreou of Counsel

REASONS

Background

1 The Applicant and the Respondents are the registered proprietors as tenants in common in equal shares of a factory situated at 30 Egan Road Dandenong ("the Property").

2 The parties, together with the Applicant's brother in law, purchased the Property in 1987. They all contributed to the deposit and the balance of the purchase money was borrowed from a bank.

3 At the time of the purchase the Respondents were carrying on business in partnership ("the Business") converting motor vehicles to run on LPG gas and also performing automotive repairs. The Property was purchased in order to provide the Respondents with premises in which to conduct the Business.

4 Until 1995, all expenses in relation to the Property together with all mortgage repayments to the bank were paid by the Respondents. Thereafter they were paid by All-Tek Automotives Pty Ltd (ACN 068 383 415) ("All-Tek"). These payments were treated as rent.

5 In 1994 the Applicant approached the Respondents with a view to joining the partnership. The following year they bought out the brother in law's share in the Property and incorporated a company to take over the business, which was All-Tek.

6 The Applicant and the Respondents were and still are the directors and equal shareholders of All-Tek.

7 An overdraft facility was obtained from Westpac Banking Corporation ("the Bank") in 1995 with a limit of $80,000.00. This was secured by a mortgage over the Property.

8 After joining the partnership, the Applicant, who was a panel beater, suggested to his brothers that they expand the Business by purchasing, repairing and reselling damaged luxury motor vehicles. That was agreed and to this end they set up a further company A.S.E. Auto spares European Pty (ACN 080 841 658) ("A.S.E.") of which they were equal shareholders and directors.

9 All three brothers were employed by the two companies although the precise nature of this employment does not appear from the evidence. They received salaries, the use of motor vehicles and various benefits.

10 The two Respondents were mainly occupied in the business of All-Tek and the Applicant and the Second Respondent conducted the business of A.S.E.

11 In about September 2001 All-Tek obtained a business loan of $70,000.00 from the Bank which the three brothers guaranteed. Their liability under the guarantee is secured by a registered first mortgage T862096R to the Bank

("the First Mortgage") over the title to the Property. There is also a registered second mortgage AK610302Y ("the Second Mortgage") to the parties parents, Peter and Mary Bornyan ("the Parents").

12 In March 2012 the Applicant left the Business and now claims to have been excluded by the Respondents from any participation in its affairs. He complains that they are both employed by All-Tek receiving salaries and various benefits whereas he receives nothing.

This application

13 On 27 February 2013 the Applicant commenced this application, seeking the sale of the Property. By Amended Points of Claim filed on 14 May 2014 he sought detailed orders as to the manner in which the sale should be conducted and also orders that the two mortgages be discharged entirely from the Respondents' shares.

14 By their Points of Defence the Respondents denied any liability to indemnify the Applicant with respect to the amounts secured by the two mortgages. They also say that those amounts exceed the value of the Property and that, after discharging the mortgages, there would be no surplus available if it were sold.

The Hearing

15 The proceeding came before me for hearing on 30 July 2014 with three days allocated. The Applicant appeared in person and the Respondents were represented by Mr N. Andreou of Counsel.

16 Affidavits by the Applicant and the Second Respondent had been filed and they were both cross-examined.

17 At the outset, the Applicant called upon two Summonses to Witness he had served upon All-Tek and A.S.E., Mr Andreou announced an appearance for those witnesses and sought to have the summonses set aside.

18 After hearing submissions and examining the summonses I set aside both summonses for reasons given orally at the time, which I will restate briefly.

19 Each summons sought the production of virtually every financial record the company had over a given period. It seemed to me from what the Applicant said that the principal reason he wanted these documents was to investigate how his brothers were conducting the affairs of each company in order to support his claim that he was being excluded.

20 That is not something that I should deal with. My function is to consider and determine this application in regard to the Property. Nevertheless, for that purpose the documents he sought in regard to All-Tek did have some relevance.

21 The relevance of those documents was that the financial performance of the All-Tek is directly related to the amounts owed to Westpac Bank, which are secured by the First Mortgage. Insofar as the activities of the Respondents

in conducting the affairs of All-Tek might have wrongfully caused the debt to the bank to increase, the equity in the Property would have been correspondingly reduced. That would support the Applicant's claim that the debts secured over the land be satisfied wholly out of the Respondents' shares.

22 However the documents on their own were useless to demonstrate that allegation without expert evidence from a forensic accountant as to the significance of the various documents and entries and what they demonstrate. Simply looking at financial records would have been insufficient. I am not an accountant.

23 In addition, the breadth of the description of documents in the summons in each case was oppressive. It called for virtually every piece of paper received or generated in the course of the Company's business during the period in question, the majority of which would probably have no relevance at all. Also, the summonses were served upon the companies only a few days before the hearing.

24 Following my ruling the Applicant sought an adjournment so that he could obtain the documents and have them examined by a forensic accountant. That course was opposed by the Respondents and after hearing further submissions I refused to adjourn the matter. This tribunal is not the appropriate forum in which to conduct an audit into the affairs of All-Tek, or A.S.E., nor does it have jurisdiction to determine the Applicant's claim that he is oppressed as a minority shareholder or assess any damages that he claims to have suffered as a result. It was apparent from what he said that, apart from some minor matters that he referred to while cross-examining the Second Respondent, he has nothing more than a suspicion that the Respondents might have misused their position as directors.

25 If a party wants to raise such matters in an application like this he should establish and quantify his claim in the appropriate forum and then argue that the resulting loss should be compensated by an adjustment of rights under s.233 of the Act.

The Evidence

26 The evidence in the case was largely directed to how All-Tek came to owe the Bank and the Parents the several amounts that are secured over the Property.

27 The amounts borrowed to purchase the Property were repaid when All-Tek was incorporated. According to the Second Respondent, the debts secured by the two mortgages were as follows:

(a) The First Mortgage secures an overdraft and loan facility with a limit of $200,000.00 for All-Tek and also a business loan facility owed by A.S.E. with a limit of $100,000.00 that the parties guaranteed. As at 7 July 2014, the balance owed to the Bank under the overdraft and loan facility was $161,216.40 and the debt owed by A.S.E. was

$98,380.01, making a total of $259,596.41 secured by the First Mortgage.

(b) The Second Mortgage to the Parents secures $300,000 which the parties acknowledged in writing they owed to the Parents. The debt relates to the proceeds of the sale of their house in Chadstone ("the Chadstone House").

28 The present indebtedness under both mortgages arises largely from a debt that All-Tek incurred to the Australian Tax Office ("the Tax Office").

The Tax Office debt

29 In about September 2000 the Tax Office mistakenly paid $180,000.00 into All-Tek's bank account.

30 Rather than refund the money the parties caused All-Tek to retain it for over a year until the mistake was discovered by the Tax Office. They were then called upon to repay the amount and threatened with legal action if they did not do so.

31 The parties had used the money in the meantime to speculate on the Stock Exchange and, as a result of the global financial crisis, had lost much of it. All-Tek repaid the Australian Tax Office what it had left of the money, which was $60,000.00, but was unable to pay the balance, which, with interest and charges, was $136,650.80.

The Parents' loan

32 At that time the Parents, who lived in Chadstone, wished to move to Queensland. An agreement was reached with the Parents whereby they would sell the Chadstone House, that the sum of $136,650.80 would be paid from the proceeds of sale to the Tax Office on All-Tek's behalf in order to satisfy the rest of the money that it owed and the parties would repay this amount to the Parents. The balance of the proceeds of sale was to be used to purchase a house for the Parents in Queensland. The extra funds needed for that purchase would be borrowed and All-Tek would make the necessary loan repayments.

33 The sale of the Chadstone House was arranged by the Applicant. After the payment to the Tax Office of $136,650.80, the balance of the proceeds of sale, amounting to $152,472.74, was paid to a company that the Applicant controlled called "Infinitely Successful Enterprises Pty Ltd" ("the Applicant's Company"). From this sum the Applicant expended various amounts for:

(a) airfares for himself and the Parents to Queensland;

(b) rental for accommodation for the Parents in Queensland;

(c) the purchase of a car for the Parents; and

(d) the cost of moving their furniture to Queensland.

34 According to the Applicant's evidence, these amounts totalled $33,071.00. If that is deducted from the balance of proceeds of sale of the Chadstone House, that leaves a balance of $119,401.76. From that he says that he advanced the sum of $10,000.00 to A.S.E., leaving $109,401.76 remaining. He then paid $67,743.08 as a deposit on a house in Queensland ("the Queensland House") to accommodate the Parents. The Queensland House was purchased in the name of the Applicant's company and was registered in its name. When I asked him what became of the balance of the proceeds of sale of the Chadstone House, which even on his figures is $41,658.68, he suggested that that was "his share". He did not say that the Parents had given this money to him but it is clear from the evidence that he has never accounted for it and has kept it for himself.

35 Thereafter instalments on the mortgage over the Queensland House were paid by All-Tek from its bank account. The payments were made by All-Tek to the mortgage broker that obtained the finance for the purchase. The Applicant described these amounts as being "rent" that his Parents were paying to the Applicant's Company for the Queensland House, even though it was the Parents' own money that paid the deposit on the Queensland House. In any event, it was All-Tech that paid the mortgage instalments and not the Applicant.

36 According to the evidence of the Second Respondent, which I do not understand is disputed by the Applicant but which in any case I accept, the three brothers agreed that they owed their Parents $150,000.00 in regard to the monies paid by them to the Tax Office. It appears that they regarded the difference between that sum and the amount of $136,650.80 that the Parents paid on their behalf as interest.

Repayments to the Parents

37 In September 2008 the Applicant asked his brothers to make a payment of $50,000.00 to him on account of the debt owed to the Parents. The payment of that amount was made by All-Tek by electronic transfer on 1 September 2008 and went into the account of the Applicant.

38 Another payment for a further $50,000.00, again made at the Applicant's request, was transferred into the Applicant's bank account on 15 December 2008 again, by electronic transfer.

39 In September 2011 the Applicant demanded the further sum of $50,000.00 but his brothers would only agree to pay $5,000.00 due to the financial position of All-Tek. That amount is described as "FMC principal payment". It is apparent from the evidence that FMC was the mortgage broker that had provided the funds for the purchase of the Queensland House.

40 The Respondents agreed to these payments, on the basis that the Applicant would apply the money in reduction of the mortgage over the Queensland House. He did not do so.

41 No accounting has been given by the Applicant for any of this money. Although he denied in cross-examination that he had asked the payments to be made in reduction of the money owed to the Parents I am unclear what he claimed the payments were for.

42 In the meantime, in November 2002 the three brothers and the Parents signed a loan agreement in which the brothers acknowledged they owed the Parents $300,000.00 which they agreed to pay "in due course". According to the Second Respondent, the Applicant told them that the debt had grown to that figure but that he did not explain why. It was not satisfactorily explained to me why it was that the Applicant wanted to increase their acknowledged debt to the Parents from $150,000 to $300,000 and I do not understand why the Respondents agreed to it. In the same document, which the Applicant prepared, they also acknowledged that they were obliged to provide accommodation for the Parents until the full amount was repaid and that all expenses were to be shared evenly between the three brothers.

Sale of the Queensland House

43 In June 2013 the Queensland House was sold by the Applicant's company for approximately $365,000.00. The Applicant has not accounted for this sum. He claimed that there was very little of the proceeds of sale of the Queensland Property. In view of the substantial deposit that had been paid from the proceeds of sale of the Chadstone House and the regular payments made by All-Tek to the mortgagee, that appears unlikely. He said that he did not pay the balance of the proceeds of sale to the Parents because "it did not belong to him. He said that he had retained it.

44 According to the evidence of the Second Respondent, which is supported by documentation from the sale, the sale price of the Queensland House, less the estimated sale expenses and the balance owed on the mortgage at the time of the sale, amounted to $298,000.00. I prefer the evidence of the Second Respondent as to the amount received. Whatever the precise amount received from the sale was, the Applicant has not accounted for it and will not account for it.

45 The Parents are now living in rented accommodation. Although it appears that the Applicant paid the rent for the Parents in 2010 when they moved back to Melbourne, All-Tek started paying the rent from 15 August 2012 and has paid it since.

The departure of the Applicant from the Business

46 In 2011 there was a falling out between the Applicant and the Respondents. The Respondents offered the Applicant $1,200.00 per week for 80 weeks plus $45,000.00. Under the terms of this offer the Applicant was not required to do any work for All-Tek during that 80 week period and was free to seek employment elsewhere. The Applicant rejected the offer.

47 Thereafter the Applicant requested that he be given four weeks wages in advance and offered to repay the advance by foregoing wages every other

week. The Respondents agreed and paid him the money but the same day he had an argument with an employee and the Respondents and left the Property.

The taking of the money

48 On 31 March 2012 the Applicant entered the office of All-Tek without informing the Respondents and completed and signed two cheques drawn on All-Tek's account with the Bank, one for $45,000.00 and the other for $550.00. He backdated the cheque forms to the previous day and wrote "Please pay cash" on each of them. The cheques were made payable to the Applicant's company. They were banked on the same day, 31 March 2012, and the proceeds were received by the Applicant's company. After discovering what had occurred the Respondents attempted to stop them from being processed but they were unsuccessful.

49 When I asked the Applicant what the two amounts were for, he said that the smaller cheque was for medical expenses he had incurred which he claimed All-Tek ought to pay and the larger amount of $45,000.00 was with respect to some money he had lent to a third company called A.S.E. Holdings ("Holdings") some years earlier which was secured by debenture.

50 The loan to Holdings was made by all three brothers in unequal proportions. The Applicant's share of the debt was $29,250.00. It was secured by a debenture, which is in evidence, in favour of all three brothers and the proportion of the loan advanced by the Applicant is said in the documents to have been $29,250.00. He said that the balance of the $45,000.00 was interest. He does not dispute the Respondents' assertion that this money was taken without authority, nor does he suggest that All-Tek had any legal responsibility to pay the debts of Holdings.

51 The Second Respondent said in cross-examination that the Applicant had never said that the $45,000 related to the debenture and that the Respondents had assumed that it was the balance of the third amount of $50,000 the Applicant had asked for. Only $5,000 of it was paid to him.

The value of the Property

52 The following valuations of the Property have been obtained and are in evidence:

Date	Valuer	Amount	Obtained by
3 October 2012	Richardson Industrial	$360,000 - $380,000	All-Tek
2 October 2013	Opteon	$350,000	The Bank

The first of these was an appraisal with a view to sale. The second was a formal valuation.

53 It is clear that, if the Property were to be sold, the proceeds of sale would be insufficient to discharge the debts secured by the two registered mortgages. Unless the Parents are willing to provide a discharge of the Second

Mortgage upon receipt of whatever funds might be left after the Bank is paid, title could not be provided to a purchaser.

54 The alternative would be for the Bank to exercise its power of sale.

The claim, for an adjustment of rights

55 The Applicant seeks an order that the mortgages be discharged solely from the Respondents' share in the Property.

56 An adjustment of rights can be ordered pursuant to s.233 of the Act. That provides (where relevant) as follows:

> "Orders as to compensation and accounting
>
> (1) In any proceeding under this Division, VCAT may order—
>
> (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
>
> (b) that one or more co-owners account to the other co-owners in accordance with section 28A;
>
> (c) that an adjustment be made to a co-owner's interest in the land … to take account of amounts payable by co-owners to each other during the period of the co-ownership.
>
> (2) In determining whether to make an order under subsection (1), VCAT must take into account the following—
>
> (a) any amount that a co-owner has reasonably spent in improving the land …;
>
> (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land …;
>
> (c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land … for which all the co-owners are liable;
>
> (d) damage caused by the unreasonable use of the land … by a co-owner;
>
> (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
>
> (3) VCAT must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—
>
> (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or
>
> (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or

(c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner."

57. In the case *of Sutherland and anor v Corkill* [2011] VCAT 709, I said as to the application of this section (at paras 20 to 22):

> "20. The very wide powers in sub-section (1) must be considered in the light of the matters referred to in sub-section (2).
>
> The amounts to be taken into account in determining compensation or reimbursement or an adjustment of the interest of one co-owner must be of a nature whereby it is appropriate to make an adjustment to the interest of one party or the other. A mere debt unrelated to the Property would not be in that category. To take an unrelated debt into account would have the effect of elevating the person to whom that debt was owed to the position of a secured creditor, the security being over the interest of the debtor in the co-owned land. This might have significance for other unsecured creditors of the debtor.
>
> Section 228(1) provides that the tribunal may make any order that it thinks fit to ensure that a just and fair sale or division of land or goods occurs. Before making an order under s.233 the Tribunal should be satisfied that the making of the order will ensure a just and fair division of the proceeds of sale. The purpose of the legislation is to effect a just and fair division of jointly owned Property and so the exercise of the powers should be confined to achieving that purpose. This is a statutory tribunal and only has the powers that Parliament has given it. It was not the intention of Parliament to confer upon the tribunal by this legislation a power to secure over co-owned property debts that are not directly related to that property. "

58. In that case I refused to adjust rights in regard to debts that related, not to the co-owned land, but to a farming business that was conducted upon it. This case is different in that, any increase or reduction in the amount secured over the land by either mortgage will directly affect the value of the equity of the co-owners. It was on that basis that I considered that the financial documents of All-Tek might have some relevance.

59. The effect that the parties' actions had upon the present indebtedness secured over the Property by each mortgage should be considered separately.

The First Mortgage

60 The debt owed by A.S.E. of $98,380.01 relates to the business operations of that company which were unsuccessful but have now ceased. Although the business that it formerly carried on was suggested and largely conducted by the Applicant, all of the parties agreed to the venture. On the evidence before me, the resulting loss cannot be laid at the feet of any particular party.

61 The overdraft and loan facility, which was $161,216.40 as at 7 July 2014 but has probably fluctuated since then, includes All-Tek's day to day

banking. As such, its balance will necessarily reflect any amounts drawn from the account. Transactions in the usual and ordinary course of business are not only expected but are the very purpose for which the account is intended to be used.

62 The mortgage instalments paid with respect to the Queensland House were not in the usual and ordinary course of business but all three parties agreed to them and so it would be neither unjust nor unfair for their equity in the Property to be correspondingly reduced as a consequence of those payments.

63 In contrast, by taking $45,000 from All-Tek's account, the Applicant has correspondingly reduced the equity that he and his two co-owners have in the Property. The withdrawal was without the authority of the directors as a whole and was for his own benefit and not that of All-Tek. Since this relates directly to any equity to be divided following any sale, it is a factor that should be brought to account in any adjustment of rights under s.233 if a just and fair division is to be made.

The Second Mortgage

64 The mortgage to the Parents secures an amount of $300,000. However the Applicant received the three sums totalling $105,000 from All-Tek which he was to apply to reduce that debt. Instead of using it for that purpose he has taken the money and used it for his own purposes and the debt remains unreduced. Had he not done so the debt secured by the Second Mortgage would now be only $195,000 and the parties' equity in the Property would have been correspondingly more.

65 That is also a factor that should be brought to account in any adjustment of rights under s.233 if a just and fair division is to be made.

The conduct of the Respondents

66 The Applicant cross-examined the Second Respondent about various benefits that he and the First Respondent had received as directors and employees of All-Tek. He asked him about some debits made to the Second Respondent's company credit card which appear to have been personal expenses. The amounts were not substantial and the Second Respondent claimed that he treated them as drawings. It appears that the First Respondent has had the use of a car and a mobile phone. The Second Respondent defended that on the basis of what the First Respondent does in the business of All-Tek. All-Tek also purchased a motor for a boat. The Second Respondent said that it was used in development work although it was the Second Respondent's boat.

67 Whether and to what extent there has been mismanagement of the affairs of All-Tek is impossible for me to assess on the evidence. In any case, these claims are not directly related to the Property or the parties' equity in it. An overall los reflected in the current bank balance is not established. The

Applicant has not demonstrated that any act or omission by the Respondents has inflated the mortgage debt over the Property.

Should there be an adjustment of rights?

68 The Applicant seeks an order that the Respondents be solely responsible for discharging the First and Second Mortgages. The ground for that application was his assertion that he was not personally responsible for the debt to the Bank. That is not borne out by the documents. They are all equally liable under the guarantees they have signed.

69 Apart from a general assertion that he has been excluded from the affairs of All-Tek and that the Respondents have misused their position, there was no other ground suggested for the order the Applicant seeks. No basis for an adjustment of rights in favour of the Applicant is established.

70 On the other hand. the Applicant admitted having taken the sum of $45,000 from the bank account of All-Tech. Had he not done so the debit balance would have been $45,000 less. There was no colour of entitlement to this sum. The claim that a related company owed some lesser sum to him was not a justification to take money that was not his. In order to make a fair division of the proceeds of sale the extent to which the equity in the land has been reduced by his wrongful action should be taken into account. That logic formed one of the bases of his own claim. In the division, the sum of $45,000 should come off his share.

71 Similarly, he was paid money to reduce the amount owed under the Second Mortgage. Instead he took the money for himself. Of the $300,000 secured by the Second Mortgage, the sum of $105,000 should be paid from his share if a fair division of the proceeds of sale is to be achieved.

The discretion to order a sale

72 The Respondents oppose an order for sale. The evidence of the Second Respondent was that a sale would cause substantial loss to All-Tek because of the cost of re-locating its business, the difficulty of finding suitable alternate premises and the potential loss of custom arising from the loss of any locational goodwill. These are matters that impact upon the occupant of the Property rather than the co-owners.

73 As to the discretion to order a sale, in the case of *JLJ Dynamic Developers Pty Ltd v Deverall* [2011] VCAT 867 I said (at para 17):

> "Sub-section (2) provides that the Tribunal may order the sale of the land. The word "may" is generally permissive which would suggest that an order for the sale of land is not automatic. Circumstances might exist in a particular case rendering an order for sale inappropriate. For example, a sale might breach some agreement the parties had as to what would become of the property or what was to be done with it. A sale might breach some fiduciary or other obligation of the party requesting it. It is inappropriate to attempt a comprehensive list of circumstances in which the exercise of the Tribunal's discretion to order a sale would be

inappropriate. In each case the circumstances should be examined to see whether the Tribunal's discretion should be exercised.

74. The discretion was also extensively discussed in *Yeo v. Brassil* [2010] VSC 344 where Judd J said (at para 21 et seq.)

> "21. The appellant conceded that there may be circumstances in which a court may refuse to exercise the power of sale or division notwithstanding the existence of the jurisdictional foundation. He submitted, however, that hardship or general unfairness did not justify a refusal of an application. While there are no decided cases dealing with the relevant sections of the Victorian legislation, the New South Wales Supreme Court and Court of Appeal, when dealing with corresponding powers of sale, recognised there may be circumstances in which an order may be refused, although the circumstances are limited. In *McNamara, Re & Conveyancing Act* (1961) 78 WN 1068 Myers J held,
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> "As I have previously said I do not consider that there is an absolute duty in the Court to make an order merely because the parties are co-owners and although I adhere to my refusal to attempt to define the nature of the matters which would be a bar to the application, what I had in mind was some proprietary right, or some contractual or fiduciary obligation with which an order for sale would be inconsistent. I see no reasons for reconsidering the view I previously took, and I am still of the opinion that the Court has no general discretion which would enable it to refuse an application on such grounds as hardship or unfairness."
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> 22 In Hogan v Baseden 1997) 8 BPR 15,723 at 15,726-727 the New South Wales Court of Appeal held,
>
> "It would not be a proper exercise of the power to decline relief under s 66G of the Conveyancing Act to refuse an application on grounds of hardship or general unfairness: See *Re McNamara and the Conveyancing Act (1961) 78 WN (NSW) 1068; Ngatoa v Ford (1990) 19 NSWLR 72 at 75.* It follows that in the unhappy event that the parties are unable to settle their differences then the making of an order appointing trustees for sale seems inevitable unless the respondent could establish a legally binding agreement not to put her out of occupation of her home, or circumstances that would ground some estoppel to similar effect."
>
> 23 I would respectfully adopt the general principles applied by the Supreme Court of New South Wales and the New South Wales Court of Appeal as providing appropriate boundaries to the circumstances in which a court may properly decline to exercise the power to order a sale or division of property when it has jurisdiction to do so. The court has no general discretion which would enable it to refuse an application on grounds of hardship or unfairness.
>
> 24 The evidence before the tribunal and this court did not disclose the existence of a legal or equitable right with which the making of an order for sale would be inconsistent. An existing contract of sale

> would, no doubt, constitute such a right, but a mortgage, charge or other form of security would not. Section 225(3) required notice to be given to the holder of a security interest over the land. There was no suggestion that notice was not given to the bank and there was no evidence that the bank had itself taken any step inconsistent with the making of the order sought."

75. From this discussion it is apparent that the mere hardship of which the Respondents complain is no reason not to order a sale, nor is the likelihood that there will be no net proceeds to distribute.

76. There is no recent valuation of the Property but whatever it sells for it may be to the benefit of the Applicant to have the proceeds paid towards the discharge of the Mortgages that he has signed. How the burden of that discharge is to be dealt with is a separate matter.

77. It was not suggested that a sale would be in breach of any agreement between the parties or any fiduciary obligation that they have. In those circumstances I think that I should order a sale.

Other orders

78. The Applicant seeks an order that the Respondents cause All-Tek to vacate the Property to facilitate the sale. No evidence was given as to why that was necessary or desirable. I do not believe that such an order would be in the interests of the parties because while All-Tek is in possession it is meeting the obligations to the Bank under the First Mortgage. The Applicant said in evidence that he has no money and so would be unable to pay his share of any interest commitment if All-Tek ceased paying. If there were to be default under the First Mortgage the Bank might well take the sale out of the parties' hands and sell as mortgagee.

79. Although it is common to order sales to be by auction there is no reason on the evidence why the Property should not be sold privately at a price fixed by valuation. A private sale would have the advantage that, before executing a contract of sale the parties could ensure that the co-operation of the mortgagees would be forthcoming so that the title could be transferred to the purchaser. It is unlikely that the proceeds of sale will be sufficient to satisfy the amounts secured by both mortgages.

80. It is also commonly ordered that any of the parties have the opportunity to purchase the Property. If such purchase were by private sale it would have to be at or above the reserve.

Form of order

81. For the reasons given there will be an adjustment of the rights of the parties pursuant to s.233 of the Act, so that the Applicant is solely responsible for $45,000 of the amount secured by the First Mortgage and $105,000 of the amount secured by the Second Mortgage.

82. The order for sale shall be in the usual terms.

83. Costs will be reserved because I have heard no argument about costs. However the parties should be made aware that the Tribunal does not usually make orders for costs in proceedings of this nature.

SENIOR MEMBER R. WALKER