VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT Reference: BP1366/2015**

CATCHWORDS

Building and Property List – Co-ownership – 20% Interest of Applicant – Decision-making powers – Agreement between Agent and other Co-owners to the exclusion of the Applicant – Interpretation of s.233(2)(a) and (b) – *Property Law Act 1958* ss.225, 228, 233(2).

APPLICANT:	Ms Maria Sigal
FIRST RESPONDENT:	Mr Stanislav Astakhov
SECOND RESPONDENT:	Mrs Viktoria Astakhov
WHERE HELD:	Melbourne
BEFORE:	Senior Member Robert Davis
HEARING TYPE:	Hearing
DATES OF HEARING:	21 - 24 & 31 March 2017
DATE OF ORDER:	10 April 2017
CITATION:	Sigal v Astakhov (Building and Property) [2017] VCAT 456

ORDERS

1 On or before 30 June 2017, or such later date as the Principal Registrar may approve, the property at 300 Tucker Road, Ormond, Victoria (Vol. 10878 Fol. 785) (the **property**) be sold by public auction.

2 The sale be conducted by a licensed real estate agent selected by the Principal Registrar who shall to the exclusion of the parties be empowered to give necessary directions. Each party is at liberty to submit the name or names of a real estate agent to the Principal Registrar who shall consider such submissions but shall not be bound by them.

3 The parties be at liberty to bid at the auction provided he or she holds a written pre-approval from a financial institution for finance of the property for at least the reserve selling price referred to below or otherwise provides satisfactory evidence to the Principal Registrar of an ability to pay the purchase price.

4 A condition of sale will be that the purchase price shall be payable as to not less than 10 percent upon the signing of the contract with the residue to be payable within such time as the real estate agent determines.

5 The reserve selling price will be as the parties may agree upon or as determined by the real estate agent.

6 If the property is sold, the respondents will within 72 hours of a request by the Principal Registrar so to do, execute a transfer of land in respect of the property to the purchaser. If the respondents refuse or neglect to execute a transfer of land or if in the opinion of the Principal Registrar it is not practicable to make the necessary request of the respondent, the Principal Registrar may execute the transfer of land which shall in all respects be treated as execution by the respondent(s).

7 The Principal Registrar is empowered to give such directions and execute such documents as may in his opinion be necessary or desirable to give effect to these orders.

8 If the property is not sold, advertising costs of the auction as the Principal Registrar deems responsible will become a charge upon the property.

9 If the property is sold, the proceeds will be applied as follows:

(a) The agent's commission, advertising and other costs and expenses of the sale;

(b) The discharge of any registered encumbrance on the property; and

(c) The net balance to be paid to the parties in the following proportions:

(i) 20% less $12,665.03 to the applicant and 80% plus $12,665.03 to the respondents.

10 The parties have liberty to apply with respect to the auction and sale of the property.

11 Costs reserved.

Robert Davis
Senior Member

APPEARANCES:

For the Applicant:	Mr G. Mukherji of Counsel
For the First and Second Respondents:	Mr K. Boden, Solicitor

REASONS FOR DECISION

Application

1 The applicant and the first respondent were best of friends between 1996 and 2014. In the early hours of the morning of 1 January 2015, as a result of an incident involving the applicant's son and the respondents', the friendship came to an abrupt end.

2 During the friendship, somewhere between 2004 and 2006, the parties purchased a property together at Rosanna Street, Carnegie (the **Carnegie Property**).

3 The Carnegie Property was sold at a profit and the parties then purchased a house property at 300 Tucker Street, Ormond (the **Subject Property**). The subject property was purchased with the help of a mortgage for the Westpac Bank. Subsequently a further loan was taken out from the same bank. Currently $757,014.54 is owed to the bank.

4 As a result of the breakdown in the friendship, the applicant has applied to the Tribunal pursuant to the provisions of Part IV Division 2 (Sale and Division of Co-owned Land) of the *Property Law Act 1958* (the **Act**). The applicant has requested that the subject property be sold and the net proceeds be divided as to 80% to the respondents and 20% to herself. It is noted, that the Title shows that the applicant holds a 20% interest in common of the subject property with the respondents who hold an 80% interest. The applicant also seeks an order for 20% of the rent received by the respondents from the subject property between January to October 2015.

5 By counterclaim the respondents request that the applicant assign to them all her right, title and interest in the property. The basis of this request is that the respondents maintain that the applicant owes them money and has failed to meet obligations in relation to the subject property and thus her interest is extinguished by reason of the fact that she is indebted to them in the approximate sum of $191,066.26 which sum is continuing to accrue.

6 The basis of the indebtedness is set out in the respondents' counterclaim as follows:

Respondents' Counterclaim		**$**
A.	Outstanding loan repayments (continuing) (now 36,747.49)	25,915.68
B.	Lost Rental by reason of Applicant occupying room	12,000.00
C.	Applicant's share with respect to Rates/insurance (continuing)	1,800.00
D.	Real Estate agent cancellation fee incurred as a Result of Applicant's conduct	3,000.00
E.	Applicant's share with respect to Improvements	25,806.00

F.	Applicant's share of Maintenance Works (continuing)	3,680.00
G.	Return of Monies Advanced to Applicant	84,464.58
H.	Lost Rental Income by virtue of Applicant Conduct (continuing)	34,400.00
	SUB-TOTAL:	**$191,066.26**

Background and Overview

7 The applicant and respondents became good friends while studying Nursing at LaTrobe University. They both graduated with a degree in that course. Subsequent to the graduation, it became clear that the respondents were quite entrepreneurial. The first respondent was a naturopath, and the second respondent ran medical businesses which she owned. Prior to the purchase of the Carnegie property, the respondents had already purchased one property which they ran as a boarding house, with the assistance of an agent, Natalia Atsinova, (the **Agent**).

8 The respondents looked at the Carnegie property and decided they would like to purchase it, however they offered the applicant a 20% share in the property. At the time the applicant could not afford the full 20% interest: so she was lent some money by the respondents which she repaid to them. The Carnegie property was run as a boarding house, and managed by the agent. It generated enough income to pay outgoings, including loan repayments and return of profit each month. The profit was distributed by the agent on a 20% share to the applicant and 80% share to the respondents.

Decision-Making

9 There is dispute between the parties as to whether or not there was an agreement in relation to decision-making power. The second respondent stated that the decision-making power was agreed to be jointly between herself and the first respondent [her husband]. The first respondent had a somewhat different view, stating that as to the decision-making power he told the agent, in a meeting with the first respondent and the applicant, that, "*I am one man on top after you can talk to Viktoria* (second respondent) *or Maria* (applicant)." The first respondent further said, "*if Viktoria said something different, she is wrong, because she is a woman*". He also said that he told the agent at the meeting, "*the decision is mine if Viktoria disagrees she may eat my brain and I may change*".

10 The agent said at the meeting she was informed that the respondents had the decision-making power. The applicant denied discussion about decision-making power and said she did not agree to the respondents or either of them having decision-making power.

11 It is noteworthy, that in practice, the day-to-day decisions in relation to managing the Carnegie property, were made by the first respondent but anything important such as buying and selling and appointment of the agent was made jointly by them all. Therefore I have come to the conclusion that the decision-making power in relation to the Carnegie property rests with the first respondent, as to day-to-day matters, for example, whether to let the property to a particular tenant or perform a minor repair, but as to any major decision such as renovations, buying and selling and appointment of agents, were their joint decisions which were taken in meetings.

12 In about 2008, the parties decided to sell the Carnegie property which they did at a considerable profit. Soon after, the parties decided to purchase the subject property which was also to be run as a boarding house. Again, each of the respondents had a 40% share and the applicant had a 20% share, which share was shown on the Title. There is some dispute between the parties as to whether the applicant borrowed some of the extra money necessary from the respondents, to purchase the subject property, or whether she financed it with money from other sources including a loan from her mother. However, I do not believe anything turns on this matter except credit, as it is not suggested that the applicant owes the respondent monies in relation to the purchase of the subject property.

13 After the purchase of the subject property, the parties did renovations and alterations to the same, so it could be used for a boarding house. This work was done by the parties personally and with the help of some trades. Apparently, the parties had a licence to perform this work between the time of the signing of the contract of sale and the settlement of the subject property.

14 The agent was appointed to manage the property in a similar way to what she had managed the Carnegie property. The parties all agree that it was to be managed on the same terms and conditions with the same decision-making as the Carnegie property but they disagree on what the decision-making for the Carnegie property was. I should note that the agent agrees with the version given by the second respondent. However, like the Carnegie property, I have come to the view that the best way to determine the management of the property is to look at how it was actually managed and the decisions were made. That would again suggest that the important decisions were made by the three parties in a meeting together. I do not accept the evidence of the respondents or the agent that there was an agreement that the respondents would be the sole decision-makers. This evidence by them was self-serving. Also, the evidence of the agent, is somewhat tainted because she still manages a property for the respondents and has had a close business relationship with them for many years. Put a different way, "she is squarely in their court".

Loan Moneys

15 The respondents admit, that it was the practice of the parties to give each other loans. Around about 2010, the respondents wanted to borrow further money from the Westpac Bank, by way of another loan for $185,000 using the subject property as security. It should be noted that the subject property had a large loan on it already at the time for which the parties were responsible. The respondents withdrew their share of the $185,000 (80%) and left the applicant's share in the account. They paid interest on the money on that account. However, in 2011, they needed more money and, in order to finance the construction of their new family home. Therefore, they asked the applicant if they could use her share of the second mortgage to which she agreed. They withdrew approximately $36,000 and continued to cover the payments on their own. The $36,000 was returned to the applicant in due course.

16 The $84,464.58 referred in the counterclaim is based on two sums which the respondents say the applicant owes. One is $30,000 and the other is $54,464.58.

17 The respondents maintain that the $30,000 was lent to the applicant over a period of time in sums between $1,000 and $10,000 between 2012 and 2014. The first respondent produced bank statements showing cash withdrawals for $30,000, however there was no link whatsoever in those withdrawals to the money being paid to the applicant. It is further noted, that the statements also show other cash withdrawals. The applicant denies that this $30,000 was lent.

18 The respondents say that the sum of $54,464.58 was made up of four sums of $10,000 and one sum of $14,464.58. The applicant admits that these monies were paid to her but says that they were paid to her by way of wages owing from her work at the Night Clinic operated by the second respondent. The applicant states that in or about May 2012, Viktoria made a request for money to continue building work on the house she was building with the first respondent and to renovate business premises in Glenhuntly Road. The Glenhuntly Road business premises were used as a night clinic.

19 The applicant says that she did not have any cash available but she told the second respondent that she would continue working both at the day and night clinics and the second respondent could pay only for the work at the day clinic. The applicant alleges that the second respondent could then use the payments the applicant would have received from Medicare as a result of the applicant's work to pay for the building work on the house at Glenhuntly Road and those moneys would be repaid to the applicant within 12 months. The applicant said that she began this arrangement in or about July 2012.

20 It is alleged by the applicant that on 14 October 2014, the second respondent owed the applicant a sum of around $60,000. However, there

was what was called "a squaring off meeting" on that day where, the applicant says that she was still owed $49,929 for work she had done at the night clinic during July 2012 to June 2013. Apparently, the second respondent also owed the applicant $11,000 which the applicant had lent the second respondent in 2012. That loan was made up of $3,000 from the applicant herself and the sum of $8,000 paid by one Marina Rossinski who transferred $8,000 to the second respondent which Ms Rossinski owed her for professional fees and work done at her medical clinic. The applicant says that there was "squaring off meeting" between herself, the second respondent and Irina Batkhin (the second respondent's business manager). It is alleged by the applicant that the meeting took place on or around 14 October 2014. At paragraphs [24] and [25] of the applicant's witness statement, referring to the meeting, she states as follows:

> [24] At the meeting, Irina, Viktoria and I agreed that we would square-off the money owed. We held the Investment property together and I continued to provide services as a credentialed mental health nurse. Viktoria still owed the $49,920 for the work I had done at the Night Clinic during July 2012 to June 2013. Viktoria also owed me the $11,000 which I lent her in early 2012.
>
> [25] I said to Irina and Viktoria that I would be happy to accept $50,000 from Viktoria as a final settlement of all money owing to that point in time. Viktoria said that she agreed to this.

21 The respondents deny there was a "squaring off meeting".

22 Subsequent to the meeting, the first respondent paid the applicant $10,000 on each of the 10, 20, 29 and 31 October 2014 and the final sum of $14,465.58 on 3 December 2014 which included the applicant's fees of $4,465.58 for the month of November 2014. The applicant alleges that everything (including any mortgage payments made by the respondents) was squared-off as agreed at the earlier meeting.

Occupation by the Parties

23 The respondents initially made claim for rental for occupation of the subject property. That claim was abandoned at the time of final address.

Cancellation Fee

24 Some time on 1 January 2015, within some hours of the falling out between the applicant and the respondents, the agent was notified of the situation in regard to the falling out. As a result, on New Year's Day of 2015, the agent arrived with an authority to be signed by the parties. Authorities had always been previously signed by each of the parties. On this particular occasion, the applicant was not notified of the meeting of 1 January because she could not be contacted because her son was in hospital and she was attending to him. In any event, the two respondents signed an authority, which differed from the previous authorities in that it contained the words "*cancellation fee $3,000*". The two respondents signed this authority but

after some correspondence between the agent and the applicant, the applicant refused to sign the authority.

25 Subsequently, the applicant instructed a solicitor. The correspondence between the applicant and the applicant's solicitor, on the one hand, and the agent on the other hand, deals with the fact that the agent is withholding rent for renovations to be done to the property and that the applicant is demanding proper accounting for the rent and outgoings with supporting documentation. Following such correspondence, on 19 May 2015, the agent resigned from her position as the property manager and was paid $3,000 by the respondents for the cancellation of the agreement of 1 January 2015. They allege, that this occurred as a result of the wrongful conduct of the applicant. The applicant denies that she is responsible for the payment of this money.

Mortgage Payments and Maintenance

26 In relation to mortgage payments, it was the practice of the respondents to make the mortgage payments to the bank and the applicant to reimburse 20% of such payments. It is alleged, that at the time of the issue of the counterclaim, being 11 October 2016, the applicant's share of the loan repayment which she had not reimbursed the respondents was $25,915.68. It is noted, that from 1 January 2015, no rent was remitted to the applicant at all. The respondents also allege that the applicant should pay them the sum of $3,680 for maintenance in respect of the property. The first respondent says that he attended the property twice per day to make sure that it was secure and to throw balls back over the fence that had been thrown there from the neighbouring school. He claims the sum of $200 per week for this service. It is unclear how the first respondent calculates this figure and how he alleges he is so entitled.

Renovations

27 After the agent resigned from managing the property, the respondents allege that they had difficulty obtaining any other agent to manage the property and they attempted to do themselves. Because of the difficult nature of managing a boarding house, they were not very successful and, by approximately September or October of 2016, all the tenants had moved out. As a result, the respondents decided that the property was in urgent need of renovation and repair. The first respondent did a considerable amount of the work himself but hired tradesmen such as electricians and plumbers when required. He also bought materials from various places which he alleged cost $74,025.10 (including tradesmen he had hired), plus he charged out his labour at approximately $50 per hour, for which he charged $40,830. Thus it is alleged that the applicant's share of the maintenance and improvements was $25,806. The applicant never gave permission for these repairs to be performed. Further, it is noted, that the receipts for materials and sub-contractors, were not produced. The respondents said that they were with their former solicitor who was holding

a lien over them. The respondents called to give evidence a quantity surveyor, a Mr Berkowitz, at $129,030 and, a further $9,350 for works to be completed. It is noted, that Mr Berkowitz included a margin of $22,345 which was not in fact paid because the first respondent did the work himself. It is also noted, that a GST sum of 10% was put on all the work even though the applicant performed a large part of the work himself and did not charge GST.

28 The applicant says that she should not have to pay for any of this work performed by the first respondent or the materials or sub-contractors hired as the same was not "*reasonably spent*" pursuant to s.233(2) of the Act. In any event, the applicant says that the respondents have failed to prove this amount.

Loss of Rental

29 The respondents claim loss of rental income by virtue of the applicant's conduct of $34,400 and continuing. They say that, because the applicant caused the agent to resign, and has not co-operated, that there has been a loss of rental from the subject property which has been vacant since approximately September/October 2016. It is noted that the renovations and alterations which the first respondent commenced still have not been completed and no work has been done on the same since approximately September of 2016.

Valuations

30 It is also noted, that a valuation was supplied by a Mr Hooper who was engaged by the applicant to value the subject property, which he did as at 16 February 2017. The valuation being $1,450,000 at that date and, as at 15 January 2015, was $1,300,000.

31 The respondents engaged a Mr DeGillio to value the property, which he did on 4 August 2016. His valuation was $1,150,000 and, as at 15 January 2015, was $1,010,000. After Mr DeGillio had completed his evidence, at the commencement of the fifth day of hearing, the respondents tendered an email from Mr DeGillio, stating there had been an increase in the median house price for the Ormond area of 5.85% since he made his valuation. The increase equated to a valuation of $1,217,275.

32 Both valuers said that the improvement on the land of the subject property, namely the house, had no real value and the true value of the property was its land and any buyer would be likely to use it for development purposes. Mr Hooper, however, did say that there may be some increase in value of the land because a developer could let the premises while making arrangements for permits etc. to develop the property.

33 As stated, a quantity surveyor, Mr Berkowitz, made a report and gave evidence after inspecting the subject property and being provided with a scope of works by the first respondent, including GST and builders' margin and work performed personally by the first respondent.

Relevant Legislation

34 Property Law Act ss 225(1), 228, 229(1) and (2)(c), 233(2) and (3) and (4).

> **225 Application for order for sale or division of co-owned land or goods**
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> (1) A co-owner of land or goods may apply to VCAT for an order or orders under this Division to be made in respect of that land or those goods.
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> **228 What can VCAT order?**
>
> (1) In any proceeding under this Division, VCAT may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
>
> (2) Without limiting VCAT's powers, it may order—
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> (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or
>
> (b) the physical division of the land or goods among the co-owners; or
>
> (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
>
> **229 Sale and division of proceeds to be preferred**
>
> (1) If VCAT determines that an order should be made for the sale and division of land which is, or goods which are, the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).
>
> (2) Without limiting any matter which VCAT may consider, in determining whether an order under section 228(2)(b) or (c) would be more just and fair, VCAT must take into account the following—
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> …
>
> (c) any particular links with or attachment to the land or goods, including whether the land or the goods are unique or have a special value to one or more of the co-owners.
>
> **233 Orders as to compensation and accounting**
>
> (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 or goods;
>
> (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods;

(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 or goods for which all the co-owners are liable;

(d) damage caused by the unreasonable use of the land or goods 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;

(f) in the case of goods, whether or not a co-owner who has used the goods should pay an amount equivalent to rent to a co-owner who did not use the goods.

(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.

(4) VCAT must not make an order requiring a co-owner who has used goods to pay an amount equivalent to rent to a co-owner who did not use the goods unless—

(a) the co-owner who has used the goods is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has used the goods in relation to the goods; or

(b) the co-owner claiming an amount equivalent to rent has been excluded from using the goods; 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 use the goods with the other co-owner.

Evidence of Agent

35 The agent gave evidence, largely supporting, the second respondent's evidence. However, I found that the agent's evidence, by and large, was unconvincing.

36 It was extraordinary that an agent would, on New Year's Day, a matter of hours after the co-owners had had a falling out, come with an agreement for the respondents to sign, with the cancellation clause contained therein. The agent said that she was concerned about her position because she did not charge letting fees in relation to finding tenants. However, she did charge 15% commission on the rents collected. Further, the cancellation clause was written in the agreement in such a way as to not make very much sense. It did not say who had to pay the money on cancellation or define what an act of cancellation was. I find it difficult to accept that any qualified agent could or should take the view that her own resignation amounted to a cancellation by the applicant.

37 The speed at which this agreement was prepared by the agent and signed by the respondents, leads me to the conclusion that their dealings as agent and client were less than "*arms' length*" insofar as the applicant was concerned.

38 Further, I note, that the respondents have had a relationship with the agent in relation to another property, prior to the purchase of the Carnegie property and that relationship is still continuing to this day.

39 When being cross-examined, the agent tended to give long explanations to the questions asked and often not answer the questions at all. It became clear to me, that her position was one of arguing for the respondents' case rather than attempting to give independent evidence.

40 For these reasons, I have taken the view that I should not accept the agent's evidence and I put it to one side.

Determination of Monetary Claims made by the Parties

Claim by Applicant

For Rent between January – October 2015

41 The applicant claims that rent was received by the respondents between January 2015 and October 2015. The second respondent gave evidence that the total amount received from the subject property between January and October 2015 can be calculated by adding the figures found in the column entitled 'Cr' on page [242] and [243] of the respondents' Tribunal book. These figures total $24,287.28. It is common ground that the applicant was not paid rent during this period. Further, a simple calculation reveals that 20% of the rent collected during the period is $4,857.46.

42 However, the applicant admits liability to pay 20% of the outgoings and expenses incurred in relation to the subject property. The first respondent's evidence was that the total outgoings in relation to the property (including rates) was set out in the summary table which appears at the respondents' Tribunal book page [142].

43 The applicant's share of these outgoings will be 20% of the total sum paid, that is, $3,201.04. Therefore, the total amount which the applicant claims as her share of the unpaid rent, taking into account her share of the outgoings, is $1,656.42.

44 Mr Boden, solicitor for the respondents, did not address me on the fact that the applicant was entitled to her share of the rent in the period between January and October 2015. It is clear, that the applicant owned 20% of the property and therefore, is entitled to the rent during this period and was not paid the same. However, outgoings must be taken into account. Doing the calculation which I have set out above, it is apparent that the applicant should receive a credit from the respondents in the sum of $1,656.42.

Claims by the Respondents against the Applicant

Mortgage Payments

45 The respondents allege that the applicant did not directly contribute to the mortgage payments since November 2012 in respect of one mortgage and February 2012 in respect of the other.

46 On the other hand, the applicant claims that she made all her share of mortgage payments until January 2013. Her portion of the payments were made after she received the rental income from the subject property. The second respondent would tell the applicant what her share of the mortgage payments was and the applicant would make the payment of the relevant sum. Sometimes, an equivalent amount to the mortgage payment would be used to purchase something that the first respondent wanted from the applicant.

47 It is unclear, at what point the arrangement of the applicant repaying the mortgage loan to the second respondent stopped. As I have mentioned, the respondents state that it stopped in February 2012 and November 2012 in respect of two loans. On the other hand, the applicant says that this arrangement continued until January 2013. In light of the findings that I will make below, it will not make a great deal of difference as to which date is, in fact, correct.

48 The applicant gave evidence, that her share of the mortgage repayments for the period 2013 to 2014 inclusive, were covered by various loans provided by the applicant to the respondents at the request of the first respondent. These loans are:

(a) $3,000 was loaned to the first respondent by the applicant in early 2012; and

(b) $8,000 paid to the respondents on behalf of the applicant by Marina Rossinski.

The first respondent accepted that the $3,000 loan was provided and provided documentary evidence of its deposit in her account in early 2012. However, the second respondent stated that the $3,000 loan was repaid by her in two separate payments of $2,000 and $1,000 respectively. The second respondent stated, that the $3,000 loan had been repaid. A cheque butt, of the first respondent's business, was tendered in evidence in relation to $1,000 which cheque butt had the name of the applicant's landlord, Ms Rossinski (Marina Rossinski's niece), and the applicant's name. The

applicant stated, that this payment was made as part of her wages while she worked for the first respondent's company. The payment was made for rent because the applicant did not have a cheque book. She said it was nothing to do with the loan. It was further stated, by the second respondent, that the sum of $2,000 was paid to the applicant, thus completing the repayment of the loan of $3,000. The payment of the $2,000 was said to have been made in October 2012.

49 There is a clear conflict of evidence between the applicant and the second respondent in relation to whether the second respondent repaid the $3,000 loan or any part thereof.

50 The second respondent stated, that she kept "scribble" notes as to various loans made by the respondents to the applicant and the applicant to the respondents. The second respondent stated that she did not produce the notes to the Tribunal because she did not believe they were, in fact, real evidence. It is noteworthy that the first time that the second respondent mentioned about the notes was in cross-examination. It is surprising, that the respondents, who were always represented by a lawyer, did not make enquiries as to original documentation and produce that original documentation, as an exhibit to the second respondent's witness statements. In fact, even though the second respondent's evidence went over two days, those notes were not produced to the Tribunal at any time whatsoever. One would have thought, at the very least, they could have been produced on the morning of the second day of the second respondent's evidence. They were not.

51 The second respondent relied upon monies going in and out of her bank statements as proof of making and receiving loans. The difficulty is, that there was no identification as to how these monies were designated. In my view, the bank statements which the second respondent produced, by themselves were self-serving. This is particularly so as there were many withdrawals from the statements and one could not determine in fact which withdrawals or payments belong to whom or for what purpose. The reason for the withdrawal of money depended upon the second respondent's evidence.

52 The $3,000 loan was provided in April 2012. The second respondent, said that she made the $2,000 repayment in October 2012. This statement flies in the face of the second respondent's own evidence, that she made repayments promptly.

53 The applicant gave clear evidence, that the "$2,000" marked as having been paid to her by cheque, was not part of the payment of the $3,000 loan and that the $2,000 amount was a repayment by the applicant to the second respondent. These payments were made by way of a reduction in the wages that the applicant received from the second respondent's business for a short period at or about the same time.

54 There was many transactions between the applicant and the second respondent. On this basis, it is difficult to understand how the second respondent is able to identify particular sums in the bank statements, which I have previously mentioned.

55 Taking into account all the matters which I have referred to above, I have come to the view that I cannot be satisfied, on the balance of probabilities, that the respondents repaid the applicant the $3,000 which was loaned by the applicant to the respondents. On this basis, I accept the applicant's submission that the $3,000 which was loaned by the applicant to the respondents was not repaid and should be credited to mortgage instalments paid by the respondents.

56 The applicant gave evidence, that a sum of $8,000 was owed to her for work she performed for one Marina Rossinski. The applicant stated, that she instructed Marina Rossinski, to pay the said $8,000 for work which the applicant had performed, to the respondents because the second respondent had requested a loan from the applicant. The applicant gave evidence that the second respondent told her that she received the $8,000 from Marina Rossinski, the second respondent denied both that she received the said $8,000 or that she told the applicant she had received the same.

57 Unfortunately, Marina Rossinski has now disappeared and could not be found. Therefore, the applicant was unable to call her to give evidence.

58 In comparing the evidence of the applicant and the second respondent on this point, I prefer the evidence of the applicant. While, all the lay witnesses who gave evidence before me, tended to often give long speeches rather than answering the direct question that was put to them, I found that both the respondents tended to prevaricate about giving evidence, when, an answer was inconvenient to them. On the other hand, I found that the applicant was more inclined to behave in this manner because she was anxious to get her point across. Further, as I have previously stated, it would have been relatively easy for the second respondent to produce her notes showing that the $8,000 was not paid to her. She failed to produce those notes. Bearing all these matters in mind, I prefer the evidence of the applicant in this regard. Thus I find, that the $8,000 was in fact paid to the second respondent by Marina Rossinski, on behalf of the applicant, and the second respondent acknowledged such payment to the applicant.

59 Thus, I find that the sum of $3,000 plus $8,000 constitutes a mortgage repayment as a reduction to the applicant's liability for such repayments.

60 Mr Boden, submitted that this was unlikely because the applicant's mortgage liability around about October 2014 exceeded the sum of $11,000. He said at that time the applicant's liability for mortgage payments was around about $20,000.

61 The applicant maintains that, in in October 2014, there was a "squaring-off" meeting held between herself, the second respondent, and Irina Batkhin. Ms Batkhin is the second respondent's business manager. Ms Batkhin was

subpoenaed to give evidence by the respondents but failed to answer the subpoena, sending a medical certificate saying she was unfit for work. While Mr Boden said he intended to tender Ms Batkhin's statement he, in fact, failed to do so. In any event, in my view, Ms Batkhin's evidence is somewhat tainted. She is clearly in the employ of the second respondent and she was not able to be cross-examined by the applicant's Counsel. Thus, given those circumstances, I place no weight on the witness statement of Ms Batkhin saying that she did not attend a "square-off" meeting and other matters contained in the statement.

62 The applicant alleges, that the "square-off" meeting was not only in relation to mortgage payments but was in relation to money she was owed by the respondents. I will deal with the alleged money that was owed by the respondents to the applicant (approximately $50,000), below. The applicant said, that at the "square-off" meeting, it was inter alia agreed, that any mortgage payments which she may owe the respondents would be forgiven as a result of arrangements that were made at that meeting. The applicant gave extraordinary detail of the alleged "square-off" meeting that took place. While the second respondent denied that such a meeting was in fact held at all, I find it difficult to believe that the detail that the applicant gave of the meeting is likely to have been given if no meeting was held at all. Also, in spite of vigorous cross-examination by Mr Boden, the applicant was firm, in her evidence, that the meeting took place and the terms as she referred, which I have mentioned above, were in fact agreed. In light of the difference in the evidence that I have referred to above by the applicant and the second respondent, I am of the view, that it was more likely than not, on the balance of probabilities, that the "square-off" meeting took place. At that meeting, as I have previously said, it was agreed that any mortgage repayments, which the applicant had not made to the respondents, would be forgiven in consideration for the applicant foregoing other sums owed to her by the respondents. I accept the applicant's evidence in this regard. Thus, I find that there is no mortgage payments owed by the applicant to the respondents up until 1 January 2015. At that time, the mortgage payment owed as has been admitted by the applicant, is $14,321.45.

Alleged Cash Advances of $30,000 by the Respondents to the Applicant

63 The second respondent alleged that she drew a number of amounts from her bank account in cash and lent that money to the applicant. The total of these amounts is approximately $30,000. Various cash amounts were drawn from the second respondent's bank, varying from $1,000 to $7,000. These amounts were withdrawn between 19 November 2012 and 24 February 2014. It is noticeable, from the respondents' bank statements, that different amounts were sometimes withdrawn on the same day. For example, on 25 March 2013, an amount of $6,000 and $1,000 were withdrawn. On 5 April 2013, an amount of $1,000 and $5,000 were

withdrawn. It is also apparent that the respondents made a number of other cash withdrawals from their account.

64 The applicant denies that this money was paid to her or that any of these cash withdrawals constituted loans. The only documentary evidence, that was produced in relation to the withdrawal of these sums, were the respondents' bank statements. They do not identify where the cash money went. Again, the second respondent gave evidence that she kept notes in relation to the monies she paid the applicant. However, as I have previously mentioned, those notes were not produced in evidence. The only details, that the second respondent was able to give as to the reason that the applicant needed to borrow the money, was that insofar as the initial sum of $4,000 on 19 November was concerned, she said it related to the applicant needing the money because she had been evicted from her accommodation. However, it is apparent that the applicant then took up residence in the subject property after that time. So it is difficult to see why she would need money for this purpose.

65 The second respondent said that the remainder of the money was as a result of the applicant purchasing a Unit for herself to live in.

66 The difficulty with the second respondent's evidence, is that it is clear that the applicant's Unit was purchased in March 2013 and settled in approximately July of that year. All the alleged loan amounts except for November 2012 and 29 March 2013 were made after the date on which the deposit would have been required by the applicant to purchase a house.

67 In my view, it is likely that if the applicant asked the second respondent to lend her money for the purpose of purchasing her own Unit, she would have had the money paid in one lump sum by bank cheque so that the settlement could have taken place. It is unlikely, that the money would have been paid in "dribs and drabs" being cash sums. One asks the rhetorical question, "why would the applicant want to accumulate large amounts of cash money?" It is difficult to believe that she would. The respondents failed to produce any convincing records, which would go to show, that the cash monies that were withdrawn from their account were paid to the applicant.

68 For the above reasons, I accept the evidence of the applicant, that these cash monies although withdrawn from the respondents' bank account were not paid to the applicant. On the balance of probabilities, I do not accept that a loan of $30,000 would have been made in this manner, even between best friends, without some proper documentation. No documentation was produced to show that these amounts were paid to the applicant, even though the second respondent stated that she had made contemporaneous notes. If the second respondent had made such notes, they should have been produced to the Tribunal. They were not. Given these circumstances, I find that the sum of $30,000 alleged by the respondents to have been paid to the applicant was not in fact paid to the applicant.

69 The respondents allege that a further $54,465.58 was lent to the applicant between 10 October 2014 and 3 December 2014. The applicant says that after she had lent the $11,000 to which I have previously referred, the respondents still wanted to borrow more money from her. However, the applicant did not have any money available to lend the respondents, so she said to the second respondent that she (the applicant) would forego wages she was to receive for work done in the second respondent's night clinic business for a period of 12 months. These amounts came to almost $50,000. There was a further amount of $4,465, which was payable to the applicant for work which she had performed for the second respondent. It was agreed, that the respondents would be able to take the money paid by Medicare for the work done by the applicant and that would be a loan by the applicant to the respondents.

70 Thus, the applicant alleges that the $54,465.58 which was paid by the respondents to the applicant was not a loan as the applicant alleged, but repayment of wages for which the applicant had foregone because the respondents were short of money.

71 Mr Boden submitted, that I should infer from the applicant's tax return for the year ending 30 June 2015, that the applicant did not pay tax on the monies she alleges were wages, and therefore, it is unlikely that they were wages. He further states that the applicant in cross-examination stated that she did pay tax on these monies. While Mr Boden attempted to account for the monies declared in the applicant's tax return, as monies other than the $54,464.58, in my view, it was unclear from the applicant's tax return whether the sum was included in her taxable income for that year. Also, it is quite possible that the sum could have been included in previous years, when it was earned and not paid.

72 The applicant gave evidence, that she informed her accountant of the receipt of this money and the accountant made out the tax return. She is not an expert in these matters and she signed the return in good faith.

73 The second respondent produced her work ledgers for the year ending 30 June 2015. These ledgers she states did not show anything but the normal payments to the applicant. However, the second respondent failed to produce the ledgers going back to 2012 which would have shown these payments being received from Medicare. In any event, in my view, it would take an expert forensic accountant in order to interpret these documents. No such person was called. In fact, not even the accountant from the second respondent's business or book-keeper from that business were called to explain these items.

74 I note, that the sum paid to the applicant by the second respondent's business company, was paid, soon after the "squaring-off" meeting of October 2014. The four amounts of $10,000 each paid between 10 and 29 October 2014 and the final amount of $14,464.58 was paid on 3 December 2014. This is quite consistent with the applicant's account. It is, in fact, far

more consistent with the applicant's account than it is with the respondents account of the payment of the monies.

75 The second respondent, in her evidence, was unable to give any clear account of why the applicant would need to borrow this money from her. In her evidence-in-chief she went no further than to say that the applicant was having trouble with her son. When she was pressed by a question from me, as to the reason why the applicant would need this sum of money, she said no more than "the applicant's son had a drug habit." I made the point to her that that does not give a reason for applicant needing this type of money. However, the second respondent was unable to elaborate any further. I find it incredible that even a very good friend of the applicant would lend her in excess of $50,000 without knowing the reason why the applicant needed that money. Put a different way, the respondent's story does not make sense.

76 Thus I find, that the sum of $54,464.58 paid between 10 October 2014 and 3 December 2014, was remuneration for work which the applicant had performed for the second respondent's various businesses. It necessarily follows that I find that the sum was not a loan by the respondents to the applicant.

Claim for Maintenance of the Subject Property

77 The respondents claim the sum of $200 per week for maintaining the property. They claim that the applicant's 20% share of that sum is $3,680 which the applicant should pay to them. The claim is based on the fact that the first-named respondent allegedly attended the property twice per day. The first respondent said that while the tenants were in the property he did various repairs to the same and after they left, he attended to make sure everything was in good order and, to throw balls back to the neighbouring school, which came over the fence while the school was in session. The respondent initially also claimed that he did the garden including mowing the lawns. However, it became apparent from the evidence, that there were no lawns on the subject property. Eventually, it was conceded by the respondents, in their evidence, that the first respondent did not do the garden.

78 It is also noted, that apart from the first respondent attending the property, there was no evidence led as to any expenses that were actually incurred in maintaining the subject property.

79 I repeat s.233(2)(b) of the Act, which provides that, "…*VCAT must take into account… any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods*".

80 Mr Boden, said that the words "costs incurred" should be interpreted in the light of the words of s.228 of the Act, which state that, *"... VCAT may make any order it thinks fit to ensure that a just and fair sale or division of the land or goods occurs*." He stated that, because of the governing words of s.228(1)(i) of the Act, that it was fair that the respondents be compensated

for the work of the first respondent in maintaining the property even though no cost was expended in doing the same. Mr Boden was unable to provide me with any authority in support of this proposition.

81 In my view, the reading of s.228 as a whole, it is clear that the section is dealing with whether land should be sold or divided as between co-owners. It is not dealing with the proportion of the proceeds that a co-owner may be entitled to out of the proceeds of a sale. Those matters are dealt with in s.233. Section 233(2)(b) uses the words "costs reasonably incurred". Thus it is clear that the legislature intended there be compensation for costs incurred. That is, something that is expended in a money form, not something as a co-owner's own labour.

82 For the reasons which I have stated in the last preceding paragraph, I do not believe the respondents are entitled to be compensated for any maintenance work which the first respondent performed on the subject property. Even if I am wrong in what I have concluded above, I take the view that that claimed by the first respondent in relation to maintenance is not reasonably incurred within the meaning of s.233(2)(b). There is no obligation on a property owner to throw balls back to an adjoining school which have been thrown over the fence by the students of that school. To attend the subject property twice a day for this purpose, in my view, is quite unreasonable. It would have been sufficient, for someone to call into the property occasionally, when it was not occupied, to make sure everything is all right. That is the limit of what would have been reasonable. I do not believe any charge should be made for an occasional call into the property.

83 In relation to the allegation that the first respondent performed some maintenance work while the tenants were in occupation, I have been given no details of that whatsoever and very little information as to what was actually done. I am certainly not persuaded, that any allowance should be made in that regard. Therefore, I will not allow any amount to the respondents for maintenance of the subject property.

Renovations to the Subject Property

84 The respondents claim that the applicant should be responsible, for 20% of renovations which occurred to the property between approximately May 2015 and early 2016. It is clear that the renovations are not yet complete. The evidence is that they could be completed within one or two weeks. The respondents rely on the valuation of Mr Berkowitz, the quantity surveyor, which I have referred to above. That is, they say that the value of the renovations is $129,030, and the applicant should be responsible for 20% of that sum, which they claim is $25,806. The first respondent carried out most of the renovations himself, however, money was expended on materials and trades such as electrician and plumber that the first respondent was unable to do himself.

85 The agent informed the applicant, in or about January 2015, that she would not be receiving any rent for the property, because it was necessary to carry

out these renovations and repairs. It is clear that at no stage did the applicant agree to these renovations or repairs. In fact, her later correspondence made it clear that she disagreed with such happenings.

86 The respondents also claim, because they had the decision-making power, they could expend money on the property without the consent of the applicant. I have already dealt with this matter above, in the overview which I have given and found that, in relation to matters such as renovations, there was no agreement whatsoever between the parties. If there was any agreement, it was that the respondents could make some type of day-to-day decisions but not major decisions such as costly renovations. In any event, even if there was some type of implied authority, I agree with the submissions of Mr Mukherji, Counsel for the applicant, that the authority for the respondents to make decisions on behalf of the applicant as to upkeep of the property necessarily ended when the applicant and the respondents had the "falling out" with each other.

87 It is clear that, at the time of the falling out, the parties were no longer in accord and that the previous relationship had ceased. I agree with the point made by Mr Mukherji, that the, "*work is said to have been completed between September 2015 and February 2016. That is nine months after the dispute came to ahead. The bulk of the work appears to have been completed after the proceedings were issued*." These proceedings were issued on 19 October 2015.

88 The claim for renovations must necessarily be brought pursuant to s.233(2)(a) which relevantly reads:

> …VCAT must take into account…
>
> Any amount that a co-owner has **reasonably spent** on improving the land or goods. (emphasis supplied).

89 Mr Boden made a similar submission in relation to the interpretation of s.233(2)(a) as he made in relation to s.233(2)(b). That is, that the same is governed by the words used in s.228(1). I have already dealt with this matter in relation to the question of maintenance, and in my view, the same applies to the question of improvements. I do not need to say anything further except to reiterate that the improvements must be reasonably spent.

90 As I have stated, a lot of the work was done by the first respondent himself, however, a considerable amount of money was spent on labour and some tradesmen.

91 It necessarily follows, that the valuation by the quantity surveyor, Mr Berkowitz, is of no assistance to me in this regard whatsoever. What I have to be concerned with is the amount that was reasonably spent, not the value of the work performed. Given that fact, I put Mr Berkowitz's valuation to one side.

92 In relation to the work that was performed by the first respondent himself, as with the situation in regard to maintenance, I do not believe that he is

entitled to any recompense from the applicant. However, in relation to the monies that were spent for tradesmen and materials, that may be a different matter.

93 In my view, the question to be asked in relation to that expenditure and the first respondent's work is whether it was reasonable in all the circumstances. I have previously made comment that there was no agreement between the parties as to spending substantial amounts of money on renovations such as this. Further, given the circumstances of what happened on 1 January 2015 thereafter, such expenditure without the authority of the applicant became even more doubtful.

94 As I have previously said, most of the money involved, was spent after the proceedings were issued. Given the circumstances that proceedings were issued and the parties had a dispute before VCAT, it cannot be said that the expenditure was reasonable. In any event, as I have previously said, once there was a falling out between the parties, any implied agreement between them or expressed in the circumstances would be a nullity.

95 I take the view that any payments made in relation to renovations by the respondents in this case is clearly without the consent of the applicant and is not recoverable.

96 The situation of a volunteer, which I believe the respondents are in this particular instance, was made clear by the Master of the Rolls in *Leigh v Dickinson* (1884) 15 QBD 60 at [64] which was quoted in *Wheeler v Crowe* BC8803012, by Spender J, in the Federal Court of Australia, in 1987. The quotation from *Leigh v Dickinson* reads as follows:

> …It has been always clear that a purely voluntary payment cannot recovered back.
>
> Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit; in this case if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances that he cannot help accepting the benefit, in fact that he is bound to accept it; in this case he has no opportunity of exercising any option and he will be under no liability.

97 The respondent argued, that it was necessary to do these repairs because they were urgent. However the evidence does not support this argument that any urgent work was required to the property. The letters sent by the agent to the applicant did not support this situation. Also, the subject property continued to be rented out until October 2015 despite "urgent repairs" being required well before January 2015. This is not consistent with urgent repairs being required.

98 Further, the work that has been performed does not appear to be related to urgent work. The work has been categorised as improvement works and preparation of the property for a different use. That is, as a 7-room boarding house rather than as 9-room boarding house. Mr Boden has stated that it was necessary to remove one of the walls because they were water-logged. This may be so, but it nonetheless changed the character of the use for the premises.

99 I also note, that two certified valuers gave evidence before me. Both those valuers stated that the house on the subject property has no value. If sold, the subject property is likely to be sold for a developer and the value of the property would be that of a development site.

100 Given all the circumstances above, I am of the view that the works were not reasonably performed.

101 Further I note, that although the respondents supplied a list of money expended in relation to the renovations, no invoices were provided. It was said those invoices were with a former solicitor who was exercising a lien. However, I took the view that little effort had been made to obtain those documents. Further, I was not given any details of the solicitor's lien or the amount of money involved. Given those circumstances, I am not satisfied as to what money was actually expended on the property at all.

102 Thus I conclude insofar as the renovations are concerned, the applicant is not obliged to reimburse the respondents for the same.

Loss of Rental Income

103 The respondents allege, that as a result of the applicant's conduct, the agent resigned in May 2015, and while they tried to manage the property themselves for some time, such attempts were unsuccessful and the property has been completely empty since October 2015. They say that the vacancy has resulted as a result of the applicant's conduct towards the agent. Therefore, the respondents allege that the applicant should be responsible for the loss of rental that has occurred because there was few and then no tenants in the subject property. The respondents say that they made attempts to obtain the services of several other agents but those agents refused to manage the property because there was a dispute between the co-owners. Two letters were exhibited by the respondent in support of this allegation. There was a letter from Eric Cohen, dated 1 August 2016. In that letter, Mr Cohen stated as follows:

> …After consideration and examination of the property, location and layout, the 7 bedrooms, 2.5 bathroom design, as a rooming house and taking into consideration all aspects of the property and having considered the logistics of managing this property, I have determined that it is a very difficult property to manage as a residential rental, and we are not able to assist you in this matter. We appreciate you approaching us for this service, and hopefully can assist you in the future, in other real estate matters.

104 On 3 October 2016, Ms Lorkin, from Stockdale & Leggo, wrote:

> After careful consideration, we feel we are unable to manage the property due to the unfinished renovations.
>
> We are aware of the ongoing VCAT hearing and that inspection will be required at short notice.

105 It is clear, that the two letters from the real estate agents which I have referred to above and which were tendered by the respondents, do not support the respondents' allegation that the agents would not handle the property because of the dispute between the co-owners. In any event, even if that was a reason for the agents refusing to handle the property, in my view that is not sufficient to lay blame at the feet of the applicant. Any co-owner is entitled to bring proceeding in VCAT.

106 In relation to the applicant's alleged conduct to the agent who resigned, it cannot be said that her conduct was in any way wrongful. Mr Boden submitted, that because the applicant and her solicitors asked for accounts and threatened to report the agent to the relevant authorities, the applicant acted in an unjustifiable way and the agent was quite within her rights to resign.

107 I do not agree with this proposition. It is quite proper for a co-owner to ask a managing agent for accounts of the property and, in fact, I believe it is incumbent on a managing agent to provide a co-owner with a monthly statement, particularly if she requests the same. The threat made by the applicant to report the agent to the relevant authorities may be very distasteful to the agent, however in my view it is wrong to say that that is a good enough reason to blame the applicant for the agent's resignation. If the agent has done nothing wrong, she would have nothing to fear from any report.

108 It is clear, that since 1 January 2015, the respondents have had sole control of the subject property. Therefore, I fail to understand how the applicant could have done anything to stop them leasing the property. The agents make it clear, in the letters that were tendered to the Tribunal, that the difficulty with leasing the property was the unfinished state of the renovations. Those renovations were entirely in the hands of the respondents. It does not advance the respondents' case any further to say that the renovations could have been completed quite quickly within a week or two.

109 Thus for the above reasons, I will not allow the respondents' claim in relation to loss of rental against the applicant.

Applicant's Share of Rates and Other Costs

110 I have dealt with this matter in relation to the applicant's claim for rental in 2015. I have set the amount that the applicant would have been liable for rates and other matters off from the amount of rental that she would be entitled to and thus concluded, that the applicant was entitled to a net

amount taking into account the setoff of $1,656.42. Therefore I do not need to consider this matter further.

Real Estate Agent's Cancellation Fee

111 I have dealt with the facts of the cancellation fee earlier in these reasons.

112 The respondents' evidence was clear that they paid the $3,000 cancellation fee to the agent when she resigned in May 2015. However, it is quite clear that the applicant did not authorise the payment of this fee. I have found that if there was an agreement as to decision-making between the parties it did not extend to appointing agents or altering an agreement between the agents. When the respondents' signed the new agency agreement on 1 January 2015, they did so well knowing that the applicant was not part of that decision. The applicant had always been part of the decision in appointing agents previously and signing the agency agreement. Further, as the agent resigned, I find it difficult to understand why the cancellation fee was legally payable. If one were to interpret the words of the agency agreement, the only conclusion that can properly be made is either that the cancellation fee should be payable to the landlords, that is, the respondents and the applicant or that the cancellation fee was in fact so uncertain as to make it void. I fail to see how a cancellation fee can be payable by a party who did not cancel the contract. It was the agent that cancelled the contract so I cannot see why she was to be paid. If the respondents decided to make a voluntary payment then that was a matter for them, there is no reason the applicant should be responsible.

113 Therefore I find that the applicant is not responsible for the cancellation fee.

Rental for Occupation

114 The respondents at the commencement of the proceeding and the hearing, the respondents were claiming rental from the applicant in relation to her occupation of the subject property. However, at the time of final addresses, Mr Boden correctly conceded that the respondents were no longer claiming this sum, therefore I need say nothing further about it.

Valuations

115 I was addressed by both parties at length on the valuations provided by certified valuers in relation to the subject property. I was also addressed as to whether it was proper to order a transfer of the applicant's share of the property to the respondents. However, bearing in mind the findings that I have made above, it is quite clear that the applicant has a very substantial share in the subject property and a relatively small amount, which needs to be taken out of her share in order to compensate the respondents for the mortgage payments they have made since January 2015. Those mortgage payments are represented by a figure of $14,321.45. From that figure needs to be subtracted the figure of $1,656.42 which is the applicant's right to receive rental from the property that was not paid to her less the outgoings. Thus the respondents are entitled to a net adjustment of $12,665.03. That

being the case, it is quite clear that the property should be sold rather than a transfer of the applicant's share to the respondents as her share clearly has not been extinguished. As a result, I do not have to consider the question of valuation.

Conclusion

116 As a result of the respondents only having a net adjustment in their favour of $12,665.03 it is clearly not a situation where it would be appropriate or "just and fair" within the meaning of s228 of the Act to have anything else but a sale. Therefore, I intend to make the usual orders for the sale of the subject property with the applicant paying to the respondent out of her 20% net share of the property $12,665.03.

117 It is also clear, that throughout the period subsequent to 1 January 2015, the respondents had sole control of the property. Given those circumstances, it is very difficult to understand how anything that the applicant could have done or did do would in any way affect the ability of the respondents to find suitable tenants. Also, the respondents were unable to say why the renovations were not complete. It is clear from the letter from Stockdale & Leggo, that that was certainly an important reason why that agency refused to manage the property. The respondents said that, because the matter did not settle at mediation, "they threw their hands down". When I asked what was meant by that expression, I was told the "gave up" trying to let the property or complete the renovations.

118 For the above reasons, I will disallow the respondents' claim in relation to loss of rental.

Robert Davis
Senior Member