**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO W28/2014

**BUILDING AND PROPERTY LIST**

## CATCHWORDS

CO-OWNERSHIP–real property–section 233(3)(b) *Property Law Act 1958*–locks changed by co-owner, with subsequent failure to respond to requests by other co-owner to deliver set of keys–whether failure to provide a set of keys, together with other factors, meant that the latter had been "excluded from occupation of land".

Section 233(2)(e) *Property Law Act 1958*–assessment of "an amount equivalent to rent" payable to co-owner excluded from occupation of the land.

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|---|---|
| **APPLICANT** | Dravid Pty Ltd (ACN 105 974 552) |
| **RESPONDENT** | Kremin Pty Ltd (ACN 105 974 589) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Member A Kincaid |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 30 September 2014 |
| **DATE OF ORDER** | 8 May 2015 |
| **CITATION** | Dravid Pty Ltd v Kremin Pty Ltd (Building and Property) [2015] VCAT 623 |

## ORDER

1. Pursuant to section 233(1) of the *Property Law Act 1958*, the respondent must pay compensation to the applicant in the sum of $21,769 being an amount equivalent to rent for the period of 11 months from November 2013-September 2014 inclusive.
2. Payment of compensation must be made by disbursement from the proceeds of sale of the land, as set out in Order 10(b)(v) of the Tribunal's orders dated 30 September 2014.
3. No order as to costs.

A T Kincaid
**Member**

**APPEARANCES:**

| | |
|---|---|
| For the Applicant | Mr M Black of Counsel |
| For the Respondent | Mr L Stanistreet of Counsel |

## REASONS

### Background

1 The applicant and the respondent companies were co-owners in equal shares of land at Princes Drive, Morwell (the "**land**").

2 The parties are respectively controlled by brothers, David Taylor ("**DT**") and Ken Taylor ("**KT**").

3 On 30 September 2014, after a half day's hearing, the parties agreed on the terms of sale of the land. It has since been sold, and $850,653.44 being the net proceeds of sale, are now held in trust, pending my decision on the outstanding issue between the parties. That is, whether the applicant should be paid "compensation or reimbursement" by the respondent pursuant to section 233(1)(a) of the *Property Law Act 1958* (the "**Act**").

### The law

4 The relevant provisions of the Act are as follows:

> 225. **Application for order for sale or division of co-owned land or goods**
>
> (1) A co-owner of land…may apply to VCAT for an order or orders under this Division to be made in respect of that land …...
>
> (2) An application under this section may request-
>
> (a) the sale of the land…and the division of the proceeds among the co-owners;
>
> ….
>
> 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 …occurs.
>
> (2) Without limiting VCAT's powers, it may order-
>
> (a) the sale of the land…and the division of the proceeds of sale among the co-owners;…
>
> 233. **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.

…..

(5) This section applies despite any law or rule to the contrary.

## The parties' respective submissions

5 The applicant says that I should make an order for compensation to be paid to it under section 233(1)(a) of the Act. It says that "an amount equivalent to rent" within the meaning of section 233(2)(e) of the Act is the measure of compensation.

6 I may only consider making such an order if the applicant "did not occupy the land" and the respondent "occupied the land", within the meaning of section 233(2)(e) of the Act.

7 If so, I must also be satisfied that the applicant has been "excluded from occupation of the land" within the meaning of section 233(3)(b) of the Act.

8 The respondent accepts that the applicant did not occupy the land, but denies that the applicant was ever excluded from the land. It says that given that there is no basis for such a finding, the necessary statutory pre-condition to an order requiring the respondent to pay the applicant an amount equivalent to rent, has not been met.

9 If I determine that the applicant has been excluded from occupation of the land then, for the purpose of assessing compensation, I must also determine, pursuant to section 233(2)(e) of the Act, what "amount equivalent to rent [must be paid by the respondent to the applicant]".

## Description of the land and improvements

10 The land is about 2.5 acres in area, located to the south of Princes Drive, Morwell. There is a warehouse on the land of about 1400 square metres in area (the "**warehouse**").

11 The warehouse has a front door, and also a side door. Both doors had separate keys.

12 A colourbond steel workshop is located near the eastern boundary of the land, for which there is a third key.

13 A security fence surrounds the land. A front gate in the fence gives access to the land, for which there is a fourth key.

14 It is possible to "jump the fence" to access the land.

15 Until 2013 there was a corrugated iron fence running down the east side of the land.

16 In about 2007 a security camera was installed outside the door to the warehouse. The camera is located within one of the exposed elevated horizontal steel purlins forming part of the external structure of the warehouse (the "**purlin**"). At that time, sensors were also installed inside and outside the warehouse. If there was any movement across the sensor, an alarm would be sent to KT, and he would respond.

17 The sensor system could be turned off, by entering a security code in a control board inside the warehouse.

## Closure of business conducted on the land

18 The parties are equal shareholders in a company called Indoor GoKarts Australia Pty Ltd ("**Indoor**"). Indoor conducted a go-kart business in the warehouse, for which it paid rent to the parties. That business ceased trading in or around November 2012.

19 It is common ground that the closure of that business resulted from the fact that, during 2011 and 2012, there was a complete breakdown in the commercial and personal relationship between JT and KT.

20 The brothers subsequently failed to agree on an arrangement whereby the respondent or KT might buy out the applicant's interest in the land.

21 KT alleged in a letter dated 27 May 2012 to DT's solicitor, that DT had been removing equipment from the business that DT wrongly claimed was his personal property. He expressed the view in his letter that this conduct was compromising the safe operation of the business conducted by Indoor.

22 This was denied by DT. A letter from his solicitor to KT's solicitor dated 29 October 2013 alleged that many of the items were in fact removed by KT between November 2012 and January 2013.

23 DT gave evidence that with his income stream from the go-karting business suddenly discontinued, he had to return to work as a boilermaker and welder. It became necessary for him to spend extensive periods of time in Western Australia. KT gave evidence that DT's lengthy absences made it necessary for him to take over the management of the land.

## Subsequent Events

### Changing of security code

24 DT gave evidence that in June/July 2013 he visited the warehouse, and he was unable, using the security code known to him, to deactivate the sensor system. He telephoned KT's number, and shortly after KT returned the call. It is common ground that the security code had been changed by KT prior to DT's visit.

### Changing of locks by the respondent

25 KT also gave evidence that he changed the locks to the gate in the fence surrounding the land, and to the warehouse in about October 2013. He stated that his reasons for doing so were partly in contemplation of third parties coming on to the land for the purpose of the construction works being carried on next door, and partly because he thought someone had been accessing the warehouse, and removing equipment.

## Applicant's alleged knowledge of keys for new lock

26 KT said that prior to changing the locks, four people each had a set of keys: KT, DT, a mechanic named Andrew and an assistant in the business called Shane.

27 He said that upon changing the locks, he retained one set of new keys, and he stored a spare set of new keys at a location known only to himself and DT. He said that this was on the purlin.

28 He said that DT could, at any time, have "jumped the fence", and obtained the keys from the purlin.

29 He gave evidence that DT could therefore always have used those keys to enter the land and the warehouse, whenever DT chose to do so. He said that if DT had ever phoned him, seeking access, he would have told DT that there was a set of new keys on the purlin.

30 He gave evidence, and it is accepted, that DT was then in Western Australia, and could not be contacted. This was the reason, he says, why he felt that there was no need to inform DT of the change.

31 KT conceded that he was aware that DT wanted solicitors to receive relevant communications on his behalf (Mr Penton of Duffy & Simon had been acting for DT since 2012), but that KT did not inform them of the change.

Finding

32 DT denies that there was ever any private arrangement between the brothers, unknown to anyone else, relating to the storage of keys on the purlin.

33 The explanation by KT of the circumstances that existed after the changing of the locks ("if he turned up, I would have told DT where the new keys were") also suggests that there was no such private arrangement.

34 The suggestion in subsequent correspondence from KT (see below) that DT would need to notify KT if DT wanted access to the land and the warehouse does not, in my view, support the proposition that DT knew at all times, that the keys were on the purlin.

35 There is also no evidence that KT ever informed DT that a spare set of new keys was in the usual location alleged to have been known to both of them.

36 Particularly telling, was the assertion made by KT, during cross-examination, that he assumed that DT was removing assets from the warehouse. This assumption was confirmed by his letter to DT's solicitor dated 27 May 2012, to which I have referred. KT did not adduce evidence of this having occurred and, indeed, it is common ground that keys were held by a number of people prior to the locks being changed. It seems improbable, in such circumstances, that KT would have left a spare set of the new keys on the purlin for access by DT.

37 Therefore I find that if, after the locks were changed by KT in October 2013, a spare set of new keys was left by him on the purlin, DT had no knowledge of this.

**Was the applicant excluded from occupation of the land?**

38 Having regard to my finding above, it remains for me to determine whether the applicant was "excluded from occupation of the land" within the meaning of section 233(3)(b) of the Act.

39 Following closure of the business in November 2012, solicitors for KT wrote a letter dated 7 December 2012 to solicitors for DT, as follows:

> If [DT] requires access to the premises, or to any of the assets of [Indoor], please let us know. We shall then obtain [KT's] instructions…

40 DT gave evidence that when he visited the land in October 2013, there was a chain and new padlock preventing access through the front gate. He was able to enter the land by other means. Upon doing so, he also observed a chain wrapped around the inside handle of the front door of the warehouse, preventing access to someone who had the key to the front door. The side door was also locked. He subsequently rang his solicitors to inform them of this, seeking advice.

## Correspondence

41 The solicitors appear not to have taken prompt action. However in their letter dated 21 November 2013 to KT's solicitors, they stated, among other things:

> Another issue arose as a consequence of one of the local real estate agents, Philip Colavecchio, attending the premises in order to take a prospective purchaser through, only to discover that the locks had been changed. He was advised (our client was in Western Australia at the time) to contact your offices, and apparently has been frustrated.

42 By letter in response dated 2 December 2013, KT wrote to DT's solicitor as follows:

> …Because there are several sets of keys in possession of past employees as well as [DT], and that over the last 12 months items have been disappearing from the property, I have had to change some of the locks and secure the property. If [DT] or any representative of [DT's] wishes access to the property please notify me and I will facilitate this.

43 KT wrote a letter to DT's solicitor dated 1 January 2014,[1] stating:

> I have recently facilitated the access to the [land] by real estate agent, Philip Colavecchio, and his client has viewed the property. I am more than willing to facilitate any further approaches by potential buyers to view the property and can be contacted on mobile number [number provided] to arrange this.

44 Beyond this proposal that KT could be approached on an *ad hoc* basis to obtain access, no key was offered or provided to solicitors for DT.

45 KT wrote a letter to DT's solicitor dated 14 April 2014, stating as follows:

> It has come to my knowledge that [DT] is claiming that he has been prevented from accessing the property at 172-190 princess drive (sic) Morwell being the Indoor-Go-Karts Morwell business.

[1] Responding to a letter dated 16 December 2013, which is not in evidence.

> To my knowledge DT has been living and working in Western Australia and has never been denied access to the property as he has installed his own padlock to the premises.
>
> While I have been left responsible for the security and management of the property I have only been contacted once by you in relation to a real estate agent accessing the property which I arranged.
>
> If DT is having difficulty accessing the property I can be contacted on [mobile number provided] to make arrangements.

46 DT denies that he ever installed his own padlock to the premises, and there is no evidence of this.

47 By letter dated 15 July 2014 solicitors for DT wrote to solicitors who had then started acting for KT, as follows:

> …We would appreciate if you could assist us in gaining access to the premises and provide a key and the access code.

48 The applicant concedes that this was the first time that solicitors for the applicant expressly asked for the keys.

49 DT gave evidence that his solicitor was not subsequently provided with the keys.

50 By August 2014, a measure of agreement had been reached by the brothers concerning the sale of the land, and the assets owned by Indoor.

51 By letter dated 4 August 2014, solicitors for DT wrote to solicitors for KT, as follows:

> …Would you please ensure that the individual at the real estate agency is provided with the keys and code details, and that same is provided to this office as well.
>
> [Pending agreement between the brothers] there is no reason why the keys and security code cannot be provided by [the respondent] to [Stockdale & Leggo], in the process of preparing for the clearing sale and auction simply commence (sic).

52 DT gave evidence that his solicitor was not provided with the same.

53 By letter dated 18 August 2014 solicitors for DT wrote to solicitors for KT, as follows:

> …Furthermore, we have agreed to engage Stockdale & Leggo Morwell in relation to the subject property. Please have [the respondent] provide the necessary keys and security codes to Stockdale & Leggo Morwell without delay, and advise this office when same has taken place.

54 DT gave evidence that his solicitor was not provided with the same.

55 By letter dated 21 August 2014 solicitors for DT wrote to solicitors for the respondent, as follows:

> …We note the lockout continues as you have still refused to provide the keys and security code. We assume those will be supplied to Stockdale & Leggo and would appreciate you providing us with that information as soon as access has been granted.

56 By letter dated 4 September 2014 solicitors for DT wrote to solicitors for KT, as follows:

> …Your client continues to keep our client locked out of the premises. Despite numerous attempts for the keys to be left with the agreed real estate agent, [KT] has failed to do so, and this creates an unnecessary complication. [DT] requires an inspection of the premises prior to the [VCAT] hearing date of 30 September 2014. Please ensure that the keys and barcodes are given to Stockdale & Leggo Morwell forthwith.

## Analysis and Findings

57 The usual rule at common law, where property is owned by two people and one excludes the other, is that the person who does the excluding should pay an occupation fee. The law is summarised in the decision of Beasley JA (with whom Stein JA agreed) in *Biviano v Natoli,*[2] as follows:

> The rights of co-owners of property are to equal occupation of the land, neither one nor the other owning any particular parcel of land: se Megarry & Wade, The Law of Real Property , 5th ed (1984) Stevens, London at 422; *Jacobs v Seward* (1872) LR 5 HL 464: *Bull v Bull* [1955] 1 QB 234; *Jones v Jones* [1997] 1 WLR 438.
>
> A tenant in common is entitled to exercise acts of ownership over the whole of the common property without liability to be called to account in respect thereof; *Luke v Luke* [1936] NSW St R 16; (1936) 36 SR(NSW) 310;53WN (NSW) 101. This general rule will be displaced, however, where a tenant in common has wrongfully excluded a co-tenant from exercising the right to occupation.

58 Whether the applicant was excluded from occupation of the land, within the meaning of section 233(3)(b) of the Act, is a question of fact and law, which must be decided upon the evidence in each individual case.

59 In *Beresford v Booth*[3] Martin J of the Supreme Court of South Australia upheld a finding of the Magistrates' Court that the appellant was liable to pay occupation rent to the respondent. He held that the changing of the locks by the appellant was evidence upon which the Magistrate could fairly have found amounted to an exclusion of the respondent.

60 Changing of the locks by an owner may not in itself be sufficient to justify a finding that the other co-owner has been excluded from the property. In *Jacobs v Seward*[4] the parties were tenants in common of a field. It was held

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[2] (1998) 43 NSWLR 695

[3] [1999] SASC 166. See also *Nguyen v Scheiff* [2002] NSWSC 151 an interlocutory decision of Campbell J; *Hummelstad v Hicks* [2006] NSWSC 120; *Michael Senno v Natasha Bailey* [2011] NSWSC 679

[4] (1872) LR 5 HL 464

by the House of Lords that the mere locking of a gate to the field (and not shown to have been kept locked) by one of the owners was not an ouster of the co-owner, sufficient for the co-owner to maintain an action for trespass. The Lord Chancellor stated:

> But even if there had been a finding that the gate was locked, that would not have been sufficient unless it had been shown that the Plaintiff was excluded by the locking, or that on some occasion when [the Plaintiff] applied to have it opened it was not opened. The locking was essential if the grass was to be converted into hay, in order to prevent its being stolen and carried away by other persons during the course of the night, these fields being in the neighbourhood of London. Nothing whatever is said about what the object and intent of putting that lock on was, and nothing is said whatever to the effect of the Plaintiff being thereby excluded, or of his ever having made application and having been refused entrance, nor is it said that when the gate was opened to the Plaintiff's son by the Defendant to allow him to enter [to take away hay], there was any difficulty upon the subject, or that anything passed between the parties which showed that the intention of putting the lock there was to exclude the co-tenant in common.[5]

61 I find from the correspondence referred to above that, subsequent to the changing of the locks in October 2013, the respondent, being in sole possession of the keys for the new locks, was prepared for the applicant only to have access to the land on the respondent's own terms.[6]

62 I find that the respondent never offered to provide a spare set of keys to the applicant.

63 The correspondence between 15 July 2014 and 4 September 2014 also shows that even when an express request was made by the applicant for a spare set of keys, the respondent refused to provide one. I find that this failure by the respondent to provide a spare set of keys to the applicant was inconsistent with the rights of the applicant as co-owner to freely to occupy the land.[7]

64 In addition, and again unlike the circumstances in *Jacobs v Seward*, I am able to infer in this case, from the evidence given by the respondent, that there was an intention on the part of the respondent to exclude the applicant from the land. KT wished to control the way in which the applicant came upon the land because, as he conceded in cross-examination, he held an apprehension that DT was removing assets from the land.

65 In my view, all these matters are sufficient to distinguish the present circumstances from those under consideration in *Jacobs v Seward*.

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[5] Supra, at p 473

[6] See respondent's solicitors letters dated 2 December 2013, 1 April 2014 and 14 April 2014.

[7] See also *Michael Senno v Natasha Bailey* [2011] NSWSC 679.

66 I find that having regard to all of them, the applicant was excluded from occupation of the land within the meaning of section 233(3)(b) of the Act.

67 I now turn to consider the period of time for which the applicant was excluded.

68 The applicant contends that it was excluded from the land between June 2013 and September 2014 inclusive, the date of hearing, a period of 16 months.

69 I accept the submission of the respondent that, if I find that there was an exclusion, it only occurred from the beginning of November 2013, given that KT changed the locks in late October 2013. I find that before that date, the applicant had unrestricted occupation of the land.

70 It follows that the applicant was therefore excluded from occupation of the land for 11 months from November 2013-September 2014.

### If an order is made under section 233(1)(a) of the Act, how is an amount equivalent to rent to be calculated?

71 The applicant relies on a market appraisal of Stockdale & Leggo dated 14 August 2014, addressed to the applicant's solicitors. The appraisal states:

> We estimate the [land] would achieve [rental of] approximately $45,000-$50,000 per annum plus GST+Outgoings on the current market value.

72 The respondent challenges the reliability of the appraisal, submitting that it is not in the nature of a sworn valuation. In response, the applicant submits that the range of probable rental stated in the Stockdale & Leggo appraisal is supported by the respondent's offer, by letter to the applicant's solicitors dated 27 May 2012, to rent the warehouse and the asphalt section of carpark. That offer was for $800 per week plus GST which would, if accepted, have resulted in the respondent's interests paying $45,760 including GST per year, or a monthly rental of about $3,800 including GST. The applicant submits that this offer was for just a portion of the land.[8] It also submits that I should infer from the respondent's letter that the offer made by the respondent was only the start of a negotiation between the parties on rent, and that rent of a higher order might well have resulted, had the negotiations not foundered for other reasons.

73 In addition, the applicant relies on an appraisal of Philip Colavecchio of Keith Williams Estate Agency Pty Ltd dated 6 March 2012, to the effect that the land then had an estimated rental value of between $77,000 to $77,000 per annum plus GST and outgoings.

74 I also note from a profit and loss statement for Indoor for the year ended 30 June 2007 that Indoor also paid an annual rent to the parties of $39,136 in 2006 and $48,109 in 2007.

[8] Proposed by the respondent to be a rent for the warehouse and the asphalted carpark only, and not the workshop or the vacant land at the rear of the land.

75 I consider that these further matters provide support for the rental range stated in the appraisal of Stockdale & Leggo. I therefore find that the likely rental for the land is in the range suggested by Stockdale & Leggo.

76 The applicant adopts the figure of $50,000 in the Stockdale & Leggo appraisal. It adds GST of $5,000 and divides the resulting amount of $55,000 by twelve, to obtain a monthly rental figure of about $4,500 including GST. On this basis, and given my finding that the relevant period of exclusion was 11 months, a total rental of $49,500 is arrived at. This amount, if then divided by two,[9] would result in a payment to the applicant of an amount equivalent to rent to of $24,750.

77 The respondent submits that no GST should be added, for the purpose of the calculation of an amount equivalent to rent. I accept the submission of the respondent. When calculating an amount equivalent to "rent" for the purpose of section 233(2)(e) of the Act, I consider that no account should be taken of GST.

78 The respondent submits that I should adopt the lower end of the rental range indicated in the Stockdale & Leggo appraisal, that is to say, $45,000 per annum, which is $3,750 per month. It therefore calculates that total rent for the 11 months would be $41,250, and that, if this figure is divided by two, a payment to the applicant of an amount equivalent to rent should be $20,625.

79 I have determined to adopt the mid-figure of the range estimated by Stockdale & Leggo, that is to say, $47,500. I find that the monthly rent is therefore $3,958.00. I calculate that 11 months rent is therefore $43,538.00 which, when divided by two, provides a figure of is $21,769.

80 Therefore I will order, pursuant to section 233(1) of the Act, that compensation be paid by the respondent to the applicant in the sum of $21,769 being an amount equivalent to rent for the period of 11 months from November 2013-September 2014 inclusive

## Costs

81 The applicant submits that if I should find that the applicant has been excluded from the land, as contended by the applicant, then costs should follow the event. This is because it was necessary for the applicant to commence the proceeding in order to deal with the land. It also submits that this is a commercial dispute, which should be taken into account under section 109(3)(e).

82 The respondent submitted that if I find that the applicant has been excluded from the land, there should be no order for costs.

83 Sections 109(1), (2) and (3) of the Act provide as follows:

> 109. **Power to award costs**

[9] So as to account for the fact that there were two co-owners

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to-

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

84 It is apparent from the terms of section 109(1) of the Act that the general rule is that costs do not follow the event, and that each party is to bear their own costs in a proceeding. By section 109(2) of the Act, the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3).

85 In *Vero Insurance Ltd v Gombac Group Pty Ltd,*[10] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

[10] [2007] VSC 117

In approaching the question of any application to costs pursuant to section 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows-

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

86 I am not satisfied, having regard to the matters enumerated in section 109(3) of the Act, that there are any features of this proceeding that make it fair for me to make an order for costs in favour of the applicant.

A T Kincaid
**Member**