VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO: W141//2010

CATCHWORDS

CO-OWNERSHIP – Part IV of the *Property Law Act 1958* – Costs – s 112 and s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*; whether costs of the proceeding are to be taken into account in determining how the proceeds of sale are to be distributed; whether enhanced costs order should be made.

APPLICANT	Eftichia Karagiozakis
FIRST RESPONDENT	Mark Karagiozakis
SECOND RESPONDENT	Margo Karagiozakis
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Costs Hearing
DATE OF HEARING	24 September and 14 October 2014; 25 February 2015.
DATE OF ORDER	5 March 2015
CITATION	Karagiozakis v Karagiozakis No 2 (costs) (Building and Property) [2015] VCAT 239

ORDER

The Applicant must pay the Respondents' costs of and incidental to this proceeding, including reserved costs, on a party and party basis to be agreed between the parties, failing which to be assessed on the County Court *Scale of Costs* and taxed by the Victorian Costs Court.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

Applicant:	Ms E Karagiozakis with Mr N Butcher, in person.
First & Second Respondents:	Mr M Black of counsel. Mr A Blogg, solicitor (25 February 2015)

REASONS

INTRODUCTION

1. On 12 August 2014, I made orders for the sale of the property, the subject of this proceeding (**'the Property'**), together with *Reasons* of the same date (**'the Sale Orders'**). The orders dated 12 August 2014 listed the proceeding for a further directions hearing on 24 September 2014, for the purpose of hearing any submission on the question of costs or other matters relating to the Sale Orders.

2. At the commencement of the costs hearing on 24 September 2014, the Applicant advised the Tribunal that she had filed a summons on originating motion with the Supreme Court of Victoria, seeking leave to appeal the Sale Orders. The Applicant further stated that she had been advised by the Tribunal that the Sale Orders had been stayed pending any appeal. That advice was erroneous as no order had been made staying the Sale Orders. Nevertheless, given the Applicant's misapprehension, the Applicant was not in a position to respond to any application for costs or make any submission concerning ancillary orders relevant to the sale of the Property. Consequently, the hearing was adjourned, part heard, to 14 October 2014. In addition, any application to stay the Sale Orders was also to be made on that return date, given that the leave to appeal application was listed to be heard by the Supreme Court on 30 September 2014.

3. On 30 September 2014, Muktar AsJ refused leave to appeal. His Honour further dismissed the Supreme Court proceeding.

4. Upon the return of the proceeding on 14 October 2014, the Applicant renewed her application to stay the Sale Orders. The grounds for the stay application were not clearly articulated but seemed to focus on the Applicant having been served with a Magistrates' Court *Compliant*, which concerned a claim by the State Revenue Office seeking payment in respect of outstanding land tax. All three co-owners were named as defendants to that proceeding.

5. The stay application was refused; principally on the ground the Sale Orders were not the subject of an appeal and the matters relied upon in support of the stay application had no relevance to the sale of the Property. Oral reasons were given by me on that day.

6. The hearing on 14 October 2014 next considered an application by the Respondents that their costs of and associated with the proceeding be paid by the Applicant. At that point, the Applicant indicated that she was not prepared to respond to such a claim. She said that she had recently engaged legal representation to answer any application for costs and also make an application on her behalf that the Respondents pay her costs of and associated with the proceeding. This was surprising given that the

orders made on 24 September 2014, adjourning the directions hearing on that day, expressly stated:

> This application directions hearing is adjourned to be heard before Senior Member E Riegler at 9.30 am on 14 October 2014 at 55 King Street, Melbourne, at which time the Tribunal will consider the Respondents' application for costs, any renewed application to stay the Tribunal's orders dated 12 August 2014 and any application to vary the dates for the steps to be undertaken under the Tribunal's orders dated 12 August 2014.

7. Nevertheless, in order to ensure that the Applicant was afforded procedural fairness, I gave the Applicant leave to file and serve written submissions on the question of costs, together with an opportunity to respond to the Respondents' submission on the final form of orders to be made, again by way of written submissions. What follows are my findings concerning the question of costs and how they are to be paid.

ORDERS SOUGHT

8. Mr Black of counsel appeared on behalf of the Respondents on 24 September and 14 October 2014. On 14 October 2014, he filed a document entitled *Amendments Sought to Final Orders*, which varied the Sale Orders to take into account the costs of the proceeding and other matters relevant to the sale process. That document stated (adopting the same numbering as the Sale Orders and with the underlined portions reflecting the proposed changes to the Sale Orders):

> 14. …
>
> (b) The proceeds of sale will be applied as follows and in the following priority:
>
> (i) The Real Estate Agent's commission or fee, including the auction and other expenses of the sale <u>by payment of same to the Real Estate Agent or, in the event one of the parties has paid same, by reimbursement to that party</u>;
>
> …
>
> (v) The net balance to be paid as follows and in the following priority:
>
> (A) Two thirds to the Respondents;
>
> (B) Payment to James Michael Keogh to satisfy Caveat No. AG438239H;
>
> <u>(C)</u> ~~The balance to the Applicant.~~ <u>Payment to the Respondents of one third of any amount paid to the Commissioner of State Revenue by the Respondents to settle Magistrates' Court proceeding E 12768147</u>;

(D) Payment to the Respondents of the amount due to them as costs in this proceeding plus interest at the rate prescribed by the Penalty Interest Rates Act from 15 October 2014;

(E) $10,000.00 to be paid to the Respondents' solicitors to be held in an interest-bearing account and to be disbursed by agreement between the parties or in payment of the amount of costs assessed to be payable by the Applicant to the Respondents in respect of Supreme Court proceeding SCI 2014 4705 and with any balance remaining following such payment to be paid to the Applicant;

(F) The balance to the Applicant.

19. Any compensation received pursuant to s98 or s106 of the *Planning and Environment Act* to be applied as follows and in the following priority:

(a) The legal costs associated with the compensation application.

(b) As to the net balance:

(i) Two thirds to the Respondents;

(ii) One third to the Applicant.

9. On 27 November 2014, revised written submissions on the question of costs were filed by the Applicant. Those submissions concluded with a statement that the Applicant wished to be further heard on the question of costs before any final ruling was made. Accordingly, a further directions hearing was listed for 25 February 2015. On that day, Mr Blogg, solicitor, appeared on behalf of the Respondents. The Applicant and her partner, Mr Butcher appeared in person.

10. Mr Blogg submitted that the *Amendments Sought to Final Orders* document previously filed by the Respondents was to be slightly amended to take into account a number of factors which had arisen since the proceeding was last before the Tribunal. In particular, he said that the auction of the Property could not be conducted within the period ordered by the Tribunal because the appointed real estate agent was not willing to commence marketing the Property until funds had been paid into its trust account. Similarly, the solicitor that had been engaged to advise on the parties' rights to claim compensation for any loss on sale due to overlays affecting the Property, was not prepared to act until funds were placed into its trust account. Mr Blogg said that these factors had prevented the Property from being auctioned by the date previously ordered.

11. The Applicant submitted that the real estate agent had not acted in accordance with the Tribunal's orders dated 12 August 2014 because those orders contemplated that marketing expenses would be paid out of the sale proceeds, rather than pre-paid. She said that the Tribunal's orders did not require any funds to be placed in trust.

12. Despite the Tribunal's orders dated 12 August 2014, the Respondents had, nevertheless, pre-paid their proportion of marketing expenses and legal costs (two thirds). This was done so as not to delay auctioning of the Property. However, the Applicant had refused to pay her share, leading to the current impasse. Moreover, the Applicant suspected that the real estate was poised to undertake less marketing than what was originally quoted. This prompted her to make an application for an order that the appointment of the real estate agent be revoked and for the appointment of a different real estate agent.

13. At the conclusion of the directions hearing on 25 February 2015, I dismissed the Applicant's application to revoke the appointment of the real estate agent and gave oral reasons as to why no such order was to be made. In essence, I was not persuaded that the real estate agent had acted improperly. Therefore, I did not consider there were any grounds to justify revoking its appointment.

14. In relation to the solicitor which was selected to provide advice concerning any loss on sale claim, the same situation arose. In particular, the solicitor required funds in trust before it was prepared to act. The Applicant indicated that she was not prepared to do that and suggested that the better course was for each party to engage their own solicitor to pursue any loss on sale claim. Ultimately, the Respondents consented to that course and orders were made giving effect to that variation to the Sale Orders.[1]

15. That then left for consideration the competing claims for costs and whether any order for costs should be taken into account in the distribution of net sale proceeds. In that regard, the Respondents maintained their position, as set out in the *Amendments Sought to Final Orders* document filed with the Tribunal, subject to some minor variation to the orders sought. In particular, Mr Blogg submitted that the costs of the Supreme Court proceeding had now been taxed. He submitted that this taxed amount, together with unpaid costs previously ordered in this proceeding, should be deducted from the Applicant's share of the net proceeds of sale. The Applicant objected to any such order being made.

COSTS

16. The Respondents claim that their costs of the proceeding should be paid by the Applicant. Initially, the Applicant also sought an order that her

[1] See Tribunal's orders dated 25 February 2015.

costs be paid by the Respondents. However, her position, as set out in her revised *Outline of Submission of Costs* dated 27 November 2014, now is that there should be no order for costs in the proceeding.

17. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). The relevant provisions are to be found in s 109 and s 112 which provide as follows:

> **109. Power to award costs**
>
> (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.
>
> **112. Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if –
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
>
> (b) the other party does not accept the offer within the time the offer is open; and
>
> (c) the offer complies with sections 113 and 114; and

(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

(3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal –

(a) must take into account any costs it would have ordered on the date the offer was made;

…

Settlement offers

18. Mr Black referred me to the affidavit of Andrew Collis Blogg dated 23 September 2014, the solicitor with the care and conduct of the matter on behalf of the Respondents. In that affidavit, Mr Blogg makes reference to a number of offers of settlement served on the Applicant by the Respondents.

Offer of settlement dated 25 July 2011

19. The first offer of settlement is dated 25 July 2011. It pre-dates the date when this proceeding was reinstated upon the application of the Applicant on 18 March 2013. That settlement offer was made after the parties had already entered into terms of settlement dated 11 April 2011, which provided for the sale of the Property. The terms of that offer were that the Respondents would purchase the Applicant's share in the Property for $623,333.33, being one third of the $1.87 million reserve price referred to in Clause 5 of the terms of settlement. That offer was not accepted.

Offer of settlement dated 28 August 2013

20. The second offer of settlement referred to in Mr Blogg's affidavit is dated 28 August 2013. That offer is in the form of a letter which offered to resolve the proceeding on the basis that:

(a) the Property was to be sold by public auction or, if not, by private sale;

(b) Knight Frank was to be appointed as the real estate agent;

(c) Ferraro & Co was to be appointed as solicitors to undertake the conveyance;

(d) there would be no reserve price;

(e) the net proceeds of sale were to be distributed one third to the Applicant, one third to the First Respondent and one third to the Second Respondent;

(f) any amount required to discharge the caveat lodged by Keogh & Co was to be paid from the Applicant's share of the net proceeds of sale;

(g) Best Hooper was to be appointed to advise on and conduct any claim for loss on sale compensation;

(h) there were to be mutual releases; and

(i) the proceeding was to be struck out with the right to apply to reinstate.

21. The offer dated 28 August 2013 was not accepted.

Offer of settlement dated 27 November 2013

22. The third offer of settlement is dated 27 November 2013, again in the form of a letter which proposed that the Property be offered for sale on the following terms:

(a) the reserve price would be $2.4 million;

(b) the selling agent would be Biggin Scott or RPM Real Estate Group;

(c) the time the Property would be offered for sale was to be determined by the real estate agent;

(d) the solicitors who were to undertake the conveyancing would be either Best Hooper or the Verduci Lawyers;

(e) any claim made for loss of sale compensation would be conducted by either Best Hooper, HWL Ebsworth or Rennick and Gaynor;

(f) the net proceeds of sale would be distributed equally, with the money required to discharge the caveat lodged by Keogh & Co to come from the Applicant's share; and

(g) alternatively, if the Applicant did not agree to the suggested real estate agents or solicitors, those persons could be selected by the Principal Registrar.

23. That offer was open for a period of 14 days but was not accepted by the Applicant.

Offer of settlement dated 4 February 2014

24. The fourth offer of settlement is dated 4 February 2014. The terms of that offer are:

(a) the Property is to be sold by public auction within 120 days of agreement or sold by private sale;

(b) Knight Frank is to be appointed as the real estate agent or, if the Applicant was to propose an alternative real estate agent, that would be considered by the Respondents;

(c) failing agreement as to the real estate agent, the Principal Registrar could appoint the real estate agent;

(d) the conveyancing solicitor was to be Ferraro & Co;

(e) the reserve price for the Property was to be $1.87 million, being the reserve price stipulated in the terms of settlement dated 7 April 2011;

(f) the net proceeds of sale were to be distributed equally;

(g) the caveat lodged on the Property by Keogh & Co must be paid from the Applicant's share;

(h) either party could bid at the auction and would only be required to pay the remaining party their share;

(i) Best Hooper would be appointed to advise on and conduct any claim for loss on sale compensation;

(j) there were to be mutual releases; and

(k) the proceeding was to be struck out with the right to apply for reinstatement.

25. That offer of settlement was expressed to remain open until 12 February 2014. It was not accepted.

26. In addition to the offers referred to above, an open offer on similar terms was made by the Respondents at the commencement of the hearing on 18 December 2013. Again, this was not accepted by the Applicant.

Should costs be ordered pursuant to s 112 of the Act?

27. Mr Black submitted that the Respondents' offers dated 28 August 2014 and 27 November 2014 were offers of settlement made under s 112 of the Act. The Applicant concedes that those offers complied with the Act.[2]

28. Mr Black argued that the Sale Orders were not more favourable to the Applicant than the offers made. He said that the only material difference between the offers and the Sale Orders concerned the reserve selling price.

29. He contended that a lower *ordered* reserve price to what was stated in the offers effectively meant that the *offered* reserve price was more favourable to the Applicant than the *ordered* reserve price. He further argued that it was of no consequence that the offer dated 28 August 2013 did not specify any reserve price because the parties would be indemnified for any loss on sale by virtue of the fact that the Property was affected by various overlays, which entitled them to compensation for loss on sale under the *Planning and Environment Act 1987*. Mr Black referred to the evidence of Mr Hay, the sworn valuer who gave evidence on behalf of the Respondents, who said that it was common for there not to be any reserve

[2] The Applicant's *Outline of Submission of Costs* (revised) dated 27 November 2014 at page 7.

selling price if a property was subject to a loss on sale compensation claim. This was because the amount of compensation would be calculated by reference to the difference between the sale price and the value of the property, absent any overlay. In other words, it made no difference if the property sold for under market value because the vendor would be compensated with an amount that supplemented the sale price, so that it was commensurate with the market value of the property, absent any overlay.

30. The above analysis is, to some extent, speculative. It assumes that a loss on sale compensation claim will be successful. It also assumes that there will be a greater prospect of sale without there being any reserve price set and that there is no net benefit to the parties by achieving a higher initial sale price. In my view, the requirement to make certain assumptions in order to find that the settlement offer is more favourable than the Sale Orders means that I cannot safely conclude that it is more favourable than the Sale Orders.

31. Moreover, there are several other factors raised by the Applicant which put into question whether any of the Respondents' offers are more favourable than the Sale Orders. In particular:

    (a) Some of the offers provide for the appointment by the Respondent of the selling agent and solicitors. However, the Sale Orders provide for the joint appointment by the parties of the selling agent and solicitors.

    (b) The offers are silent as to what deposit is be given upon sale, whereas the Sale Orders provide for a deposit of not less than 10% upon the signing of a contract.

    (c) The offers do not set out any mechanism to effect the settlement of the sale, whereas the Sale Orders provide for that.

32. Accordingly, I find that when weighing up all factors, I cannot conclude, with certainty, whether the offers were or would ultimately be more favourable than the Sale Orders.

Should costs be ordered under s 109 of the Act?

33. Mr Black submitted that if costs were not awarded under s 112 of the Act, costs were sought under s 109 of the Act. In that regard, Mr Black contended that there were several grounds which justified an order for costs in favour of the Respondents:

    (a) the Applicant has conducted the proceeding in a way that has unnecessarily disadvantaged the Respondents by failing to set out the relief sought or the basis upon which it should be granted (s 109(3)(a));

(b) the Applicant has been responsible for unreasonably prolonging the time taken to complete the hearing (s 109(3)(b));

(c) the position adopted by the Applicant:

(i) had no tenable basis in law (s 109(3)(c));

(ii) alternatively had little merit or prospects of success(s 109(3)(c));

(d) the Applicant rejected or failed to respond to reasonable settlement offers and reasonably proposed orders (s 109(3)(e)); and

(e) the Applicant failed to heed the warnings of the Tribunal to conduct the hearing efficiently and to confine cross-examination to relevant matters (s109(3)(b) and (e)).

34. In response, the Applicant submitted that the Respondents' arguments failed to take into account that the Applicant was self-represented. Moreover, she submitted that any failing on her part to succinctly set out the relief sought, is not a matter which unnecessarily disadvantaged the Respondents because it did not prolong the hearing time.

35. The Applicant submitted that the Respondents had failed to show one aspect of the Applicant's claim which had no tenable basis in law or which had little merit or prospects of success.

36. As to the allegation that the Applicant had failed to heed the warnings of the Tribunal to conduct the hearing efficiently, she argued that the hearing was conducted under the careful control of the Tribunal and the appropriate objections by counsel for the Respondents safeguarded against any prolongation of the hearing. Therefore, she submitted that it cannot be said that her conduct in any way prolonged unreasonably the time taken to complete the proceeding.

37. Finally, she argued that it was not unreasonable for her to reject the settlement offers made by the Respondents, having regard to the timing of the offers and the uncertain nature of the sale procedure set out therein.

38. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[3] Gillard J set out the steps to be taken when considering an application for costs under s 109 of the Act:

> [20] In approaching the question of any application to costs pursuant to s 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.

[3] [2007] VSC 117.

(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.

Unnecessary disadvantage/prolonging of proceeding

39. Mr Black pointed to a number of factors, which he submitted demonstrate examples of the Applicant causing the Respondents unnecessary disadvantage or unreasonably prolonging the hearing of the proceeding. In particular, he argued that the application and other documentation filed by the Applicant was unclear and confusing. Mr Black contended that affidavits filed by the Applicant contained numerous accusations as to what, in broad general terms, the Respondents or others have done wrong but there were no particulars or evidence to back up those accusations. Mr Black argued that, on one occasion, the Applicant claimed 83.3% of the proceeds of sale of the Property but provided no reasoning or details how that claim was derived.

40. Mr Black pointed to the fact that there were numerous summonses issued at the request of the Applicant to persons who had no real relevance to the issues to be determined in the proceeding. Ultimately, those summonses were quashed.

41. I accept that it was difficult to discern what relief the Applicant was seeking in the proceeding. As I indicated in my *Reasons* dated 12 August 2014, it appeared that the Applicant's position was that she wanted control over the sale process. I understood this to mean that she wanted to:

(a) dictate the mode of sale;

(b) stipulate when the Property was to be sold;

(c) select the selling agent and conveyancing solicitor;

(d) organise the loss on sale compensation claim herself; and

(e) determine the reserve price.

42. However, nothing definitive was ever advanced by the Applicant concerning the sale process or how the proceeds of sale were to be distributed. Throughout the hearing, she remained equivocal on what was to happen with the Property. No alternative real estate agent was suggested prior to or during the hearing, nor did she ever give any indication as to who the conveyancing solicitor or loss on sale compensation solicitor was to be. On numerous occasions throughout the

hearing, I suggested to the Applicant that if she was uncomfortable with the Respondents selecting the real estate agent, conveyancing solicitor or loss on sale compensation solicitor, the Tribunal had power to order that the Principal Registrar select those persons.

43. In my view, the Applicant's attention focused, for the large part, on peripheral matters, rather than dealing with any relief sought under Part IV of the *Property Law Act 1958*. As I have already mentioned in my *Reasons*, the Applicant spent considerable time prosecuting conspiracy theories, which were not relevant to the central issues for determination. Despite my directions and warnings, the Applicant persisted in conducting the proceeding in that manner. This led to the proceeding occupying more days than would otherwise have been the case.

Strength of the Applicant's case

44. As I have already indicated, it was difficult to distil precisely what relief was being sought by the Applicant, as her position altered during the course of the hearing. For a large part of the hearing, most of her energy was spent in trying to establish that there was fraud on the part of the Respondents. However, no material evidence was adduced to make out that claim.

45. In my view, the position taken by the Applicant and the way in which she prosecuted her claim had no tenable basis in fact and law.

Rejecting settlement offers

46. In *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority*,[4] the Victorian Supreme Court of Appeal commented on the rejection of a reasonable settlement offer the following terms:

> [28] As we said at the outset, the unreasonable refusal of an offer of compromise is, by itself, a proper ground for the award of indemnity costs or - in the present case - the award of solicitor-client costs. It follows that it is not necessary for the applicant for such an order to establish matters which might be relevant to other, well-recognised, grounds for indemnity costs…
>
> [29] Nor is it necessary for the applicant offeror to show that the offeree acted with "wilful disregard of known facts or clearly established law", or that it acted with "high-handed presumption". We agree with Redlich, J. that such conduct is not a prerequisite for a finding that the rejection of a Calderbank offer was unreasonable.

47. As highlighted by Mr Black, the various offers of settlement made by the Respondents demonstrated their desire to resolve the proceeding without having to proceed and persist with what ultimately was protracted litigation. Although the offers of settlement were marginally different to the Sale Orders, the fundamental aspects of the offers of settlement were

[4] *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority* [2005] VSCA 298.

no different to the Sale Orders. The only material difference related to the reserve selling price and the procedural elements of sale.

48. Having regard to the parties' intentions to claim compensation for loss on sale under the *Planning and Environment Act 1987*, I consider that it was unreasonable not to have accepted, at the very least, the offer of settlement dated 28 August 2013, which did not stipulate any reserve price. That offer was made not long after the proceeding was reinstated, following a failed mediation.

49. Mr Black submitted that the Applicant failed to respond to any of the offers of settlement made by the Respondents. He argued that in circumstances where the only real issue in dispute was the mechanics of the sale and the compensation claim, the Applicant's conduct justifies an award of costs. In my view, the rejection of the 28 August 2013 offer is a factor weighing in favour of excising my discretion to award costs under s 109 of the Act.

Should costs be ordered?

50. Considering the matters referred to above, I find that it would be fair, in the present case, that the Applicant pays the Respondents' costs of the proceeding. In summary, the failure to properly articulate her claim, the dogmatic approach to pursuing her conspiracy theories, despite warnings given by the Tribunal to focus on the issues which were relevant to relief under the *Property Law Act 1958*, and her failure to accept or at the very least, respond to the reasonable settlement offers made by the Respondents are all factors which have led me to conclude that costs should be awarded in favour of the Respondents.

Quantum of costs

51. Mr Black submitted that the Respondents' costs, calculated on a party and party basis according to County Court *Scale of Costs*, are $73,355. He argued that the Respondents would be content with an order as to costs fixed in the amount of $65,000, so as to avoid having those costs taxed.

52. I do not accept that it would be fair to fix costs at this stage in the proceeding. In particular, I note that the assessment of the Respondents' costs extends from 9 December 2010. However, the current proceeding was only reinstated on 18 March 2013. Prior to that date, the proceeding was settled under terms of settlement entered into between the parties. Pursuant to those terms of settlement, orders were made on 7 April 2011 that the proceeding was struck out, with no order as to costs.

53. Moreover, there is no evidence of what costs were incurred by the Respondents. All that is before me is a document setting out a number of items of legal work and a reference to the relevant County Court *Scale of Costs*. The author of that document was not called to give evidence, nor do I know who prepared that document.

54. Therefore, costs will need to be taxed by the Victorian Costs Court, if the parties are unable to agree on the quantum of costs.

55. Mr Black submitted that if costs are to be taxed, then the Respondents seek the following orders:

(a) The Applicant is to pay the Respondents' costs of the proceeding, including reserved costs:

(i) from the commencement of the proceeding until 1 March 2013 on the County Court *Scale of Costs* on a party and party basis; and

(ii) from 1 March 2013 on an indemnity basis.

Should an enhanced costs order be made?

56. It is trite law that an enhanced costs order will only be made in special circumstances.[5] In *Colgate Palmolive v Cussons*, Sheppard J distilled a number of principles or guidelines after analysing relevant authorities. His Honour observed:

> 5. Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v. Weekes* (1989) 92 ALR 131 at 152; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp*); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v. Hutchinson* (1987) 10 NSWLR 525, *Maitland Hospital v. Fisher (No. 2)* (1992) 27 NSWLR 721 at 724 (Court of Appeal), *Crisp v. Keng* (Supreme Court of New South Wales, 27 September 1993, unreported, Court of Appeal) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in *EMI Records*). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order.[6]

[5] *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248.
[6] Ibid at 257.

57. As I have already stated, the starting point when considering an application in this Tribunal that one party pay the costs of another party is that costs lie where they fall. Costs will only be awarded when the Tribunal considers it fair to do so, having regard to the factors set out in s 109(3) of the Act. In that sense, many of the special circumstances which might persuade a court to make an enhanced costs order are merely factors which enliven the Tribunal's discretion to award party and party costs.

58. I accept that in this proceeding, the Applicant has conducted the proceeding in a way that has, to a large extent, ignored the issues to be determined under Part IV of the *Property Law Act 1958*, despite being directed on numerous occasions that the line of enquiry prosecuted by her was irrelevant to the issues to be determined. As I have already indicated, much time was devoted to peripheral or irrelevant matters raised by the Applicant. Those peripheral or irrelevant matters raised allegations relating to fraudulent conduct on the part of the Respondents, their solicitors and counsel, which I found were groundless.

59. The Applicant's failure to address the central issues for determination could lead one to conclude that the proceeding was commenced or continued for some ulterior motive. This view might be reinforced by the fact that she was given ample opportunity to re-cast her case after being directed on numerous occasions that the allegations of fraud, even if proved, were not issues central to determining the proceeding consistent with the relief sought under Part IV of the *Property Law Act 1958*.

60. In my view, the *defence* raised by the Applicant that she was self-represented is not to the point. The mere fact that a party is not legally trained does not exonerate that party from having to pay the costs of another party, if it is fair that a costs order should be made.[7] Although the Applicant can justifiably be criticised for the way in which she has conducted the proceeding, I find that her conduct was motivated by a misguided belief that the Respondents were trying to deceive her, rather than for some ulterior motive. I do not consider that her conduct was deliberately aimed to prolong the proceeding with the object of unnecessarily disadvantaging the Respondents. Consequently, I do not find that it would be fair, in the circumstances, to make an enhanced costs order.

61. Accordingly, I will order that the Applicant pay the Respondents' costs of and associated with this proceeding from the date of reinstatement (18 March 2013) on a party and party basis calculated pursuant to the County Court *Scale of Costs*. The quantum of those costs, if not agreed, is to be taxed by the Victorian Costs Court.

[7] *Spalla v St George Motor Finance Ltd (No 8)* [2006] FCA 1537 at [20].

Setting aside an amount on account of any costs debt

62. The Respondents seek an order that a sum be set aside or deducted from the Applicant's entitlement to the net proceeds of sale in order to pay for the Respondents' costs.

63. In my view, such an order goes beyond the scope of the Tribunal's powers under Part IV of the *Property Law Act 1958*. Such an order would elevate the Respondents' rights above those of unsecured creditors. By contrast, I note that s 232(g) of the *Property Law Act 1958* empowers the Tribunal to order that the costs of the sale be met by one or more of the co-owners or from the proceeds of sale. However, I do not consider that the payment of one party's costs of the proceeding can properly be categorised as a *cost of the sale*. Consequently, I refuse to make such an order, the effect of which would be to garnish a debt to the Applicant's share of the net proceeds of sale.

64. Similarly, I refuse to make any similar kind of order concerning any amount that might be payable by the Applicant to the Respondents in respect of the Supreme Court Proceeding.

Payment to the Commissioner of State Revenue

65. Having regard to the form of orders made on 12 August 2014, I do not consider it necessary to amend those orders to effect a payment to the Commissioner of State Revenue in respect of land tax levied over the Property. Such a payment is contemplated under Order 14 (b) (iii) of those orders. In particular, those orders state that any outstanding rates, charges taxes and imposts be paid prior to the net proceeds of sale being distributed.

SENIOR MEMBER E. RIEGLER