

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP825/2016

### CATCHWORDS

DOMESTIC BUILDING: Interest: Section 2 of the *Penalty Interest Rates Act 1983*; Section 53 of the *Domestic Building Contracts Act 1995*; Reimbursement of Fees: Sections 115B and 115C of the *Victorian Civil and Administrative Tribunal Act 1998*; Costs: Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

|                          |   |
|--------------------------|---|
| <b>FIRST APPLICANT</b>   | Mr Stephen Bartolic   |
| <b>SECOND APPLICANT</b>  | Mrs Vasilka Bartolic  |
| <b>FIRST RESPONDENT</b>  | Prestige Home Builders Pty Ltd (ACN: 081 377 639)   |
| <b>SECOND RESPONDENT</b> | Mr Tim Smith  |
| <b>WHERE HELD</b>        | Melbourne   |
| <b>BEFORE</b>            | Member C. Edquist   |
| <b>HEARING TYPE</b>      | Hearing   |
| <b>DATE OF HEARING</b>   | 22 September 2017   |
| <b>DATE OF ORDER</b>     | 22 September 2017   |
| <b>DATE OF REASONS</b>   | 1 December 2017   |
| <b>CITATION</b>          | Bartolic v Prestige Home Builders Pty Ltd (Building and Property)(Costs) [2017] VCAT 1962 |

### ORDERS MADE ON 22 SEPTEMBER 2017

#### FINDINGS

- 1 The applicants are entitled to an order for damages in the nature of interest against the first respondent on the sum of \$77,250 from 4 April 2014 to 22 September 2017 at the rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983*, calculated at \$26,890.42, in the manner set out in paragraph 6 of the affidavit affirmed by H Derek Lippner on 20 September 2017 (“the Lippner affidavit”).
- 2 The applicants are entitled to an order for damages in the nature of interest against the first respondent on the sum of \$180,250 from 7 May 2014 to 22 September 2017 at the rate fixed from time to time under s 2 of the *Penalty*

*Interest Rates Act 1983*, calculated at \$60,870.18, in the manner set out in paragraph 6 of the Lippner affidavit.

- 3 The total order for damages in the nature of interest against the first respondent to which the applicants are entitled is **\$87,760.60**.
- 4 The applicants, having been substantially successful in the proceeding, are entitled to an order under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* that the respondent reimburse to them the filing fee they paid when they filed their application of \$1,081.20, the hearing fee they paid of \$348.40, and the filing fee on the costs application they paid of \$358.30.
- 5 The total fees to be reimbursed by the respondent to the applicants accordingly total **\$1,787.90**.
- 6 I am satisfied that it is fair to make an order under s 109(2) of the *Victorian Civil and Administrative Tribunal Act 1998* that the first respondent should pay to the applicants some of their costs, having regard to the conduct of the proceeding by the first respondent in a way that necessarily disadvantaged the applicants.
- 7 A feature of the proceeding which is relevant to Finding 6 above is the relative strengths of the claims made by the respective parties. The applicant had a strong claim based on s 40 of the *Domestic Building Contracts Act 1995*, and for the reasons analysed in my decision dated 31 July 2017, the first respondent had no defence.
- 8 Another feature of the proceeding which is relevant to Finding 6 above is its nature and complexity.
- 9 The applicants are entitled to an award of costs totalling **\$49,640**, comprising the following elements:
  - (a) The fees of the applicants' expert witness Mr Spano billed by his company BHS Consultants Pty Ltd of \$7,865;
  - (b) Counsel's fees charged by Mr Settle of Counsel up to today, assessed following a review of the invoices appended to the Lippner affidavit as Annexure "HDL-2", at \$17,050.
  - (c) Counsel's fees (Mr Settle) in respect of the hearing today fixed at \$825.
  - (d) Solicitor's fees assessed, following a review of the invoices appended to the Lippner affidavit as Annexure "HDL-3", at \$23,900.

## **ORDERS**

1. The first respondent must pay to the applicants' damages in the nature of interest assessed at \$87,760.60.
2. The first respondent must reimburse to the applicants fees paid by the applicants in the proceeding totalling \$1,787.90.



## REASONS FOR ORDERS MADE ON 22 SEPTEMBER 2017

### INTRODUCTION

- 1 The proceeding came on for hearing before me on 3 July 2017. On 31 July 2017 I published my decision with reasons (“my Reasons”). I made Orders including an order that the first respondent Prestige Home Builders Pty Ltd must pay to the applicants Mr Stephen Bartolic and Mrs Vasilka Bartolic (“the owners”) damages totalling \$257,500. I also reserved the issues of interest, costs and reimbursement of fees. The claim by Prestige Home Builders against the second respondent Mr Tim Smith (“Mr Smith”) for indemnity or contribution was dismissed.
- 2 The owners duly made an application for interest, costs and reimbursement of fees. The application was returned before me on 22 September 2017 (“the costs hearing”).
- 3 On this occasion, as at the substantive hearing, the owners were represented by Mr M Settle of Counsel. However, unlike the substantive hearing, Prestige Home Builders was not represented. As might have been anticipated, Mr Smith was not present or represented either.
- 4 In support of the application, Mr Settle referred me to written submissions dated to August 2017 (“the owners’ written submissions”) and to an affidavit which had been sworn by his instructor’s principal Mr Derek Lippner on 20 September 2017 (“the Lippner affidavit”). The Lippner affidavit contained calculations concerning interest which had been updated from those set out in the written submissions. It also exhibited a number of invoices which had been rendered to the owners by their solicitors. These invoices contained particulars of the fees in respect of which reimbursement was sought, most of the Counsel’s fees which had been incurred, and the solicitors’ fees invoiced.
- 5 At the conclusion of the costs hearing I made Orders which set out a number of Findings. The Orders, including the Findings, are set out above.
- 6 Following the hearing, Prestige Home Builders sought written reasons for my decision. I now set out those written reasons. The reasons are based on a transcript of the hearing. They have been edited in the interests of readability, but they have not been substantively altered or expanded.
- 7 The first topic dealt with at the hearing was interest.

### INTEREST

- 8 Mr Settle took me to the interest calculations which had been set out in the Lippner affidavit. Interest had been calculated on the 2 sums that comprise the total award made on 31 July 2017 of \$257,500. Those figures were \$77,250 and \$180,250 respectively.

- 9 Interest on the sum of \$77,250 had been calculated from 4 April 2014 to 22 September 2017 (the date of the hearing) at \$26,890.42. Interest on the sum of \$180,250 from 7 May 2014 to 22 September 2017 was calculated at \$60,870.18). The total came to \$87,760.60.

**From what date should interest run?**

- 10 The first issue relating to interest raised by me with Mr Settle was whether interest should run from the date of payment, rather than the date of institution of the proceedings. I enquired whether there was a contractual entitlement to interest, or did an entitlement arise under an Act?
- 11 Mr Settle responded that the owners' claim was for the recovery of sums certain. He submitted that under my Reasons, and under the case referred to in my Reasons, *Imerva Corporation Pty Ltd v Kuna*,<sup>1</sup> Prestige Home Builders had no entitlement for to receive the sums of \$77,250 and \$180,250. The contract, and s 40(2) of the *Domestic Building Contracts Act 1995* expressly prohibited the making of the payments. So, it was contended, from the date of payment the owners had an entitlement to repayment of those sums.
- 12 In the absence of any submission to the contrary from Prestige Home Builders, I accepted Mr Settle's contention regarding the date from which interest should begin to run.

**At what rate should interest be calculated?**

- 13 I then raised another issue concerning interest. I referred Mr Settle to s 53 of the *Domestic Building Contracts Act*. This section provides that the Tribunal has power to award damages in the nature of interest.<sup>2</sup> In awarding damages in the nature of interest, the Tribunal can apply the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983*, or any lesser rate it thinks appropriate.<sup>3</sup>
- 14 I asked Mr Settle why the penalty interest rate of 10%, or more, should be applied rather than bank interest rates. His response was that the interest rate provided for under the *Penalty Interest Rates Act* was the rate the Government has seen fit to set. The penalty interest rate was above bank interest rates, and the owners said that the penalty interest rate was appropriate.
- 15 Because the legislation governing the proceeding was the *Domestic Building Contracts Act*, and because that Act expressly refers to an award of interest under the *Penalty Interest Rates Act*, and in its wisdom the Government has provided that the penalty interest rate is to be fixed by the Attorney-General from time to time, I accepted, in the absence of any

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<sup>1</sup> [2017] VSCA 168.

<sup>2</sup> *Domestic Building Contracts Act* s 53(2)(b)(ii).

<sup>3</sup> *Domestic Building Contracts Act* s 53(3).

submission from Prestige Home Builders to the contrary, that the penalty interest rate was the rate I should apply.

- 16 For these reasons I made an order for payment of interest assessed at a total figure of \$87,760.60, being the total of \$26,890.42 and \$60,878.10. I adopted the calculations set out in the Lippner affidavit.

## **COSTS**

- 17 Mr Settle informed me that the owners relied upon s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) To give context to what follows, it is convenient to set out relevant parts of s 109. The section provides:

### **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 subsection (2) only if satisfied that it is fair to do so, having regard to—
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
    - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
    - (iii) asking for an adjournment as a result of (i) or (ii);
    - (iv) causing an adjournment;
    - (v) attempting to deceive another party or the Tribunal;
    - (vi) vexatiously conducting the proceeding;
  - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
  - (d) the nature and complexity of the proceeding;
  - (e) any other matter the Tribunal considers relevant.

- 18 Mr Settle referred me to s 109(3)(a)(ii). In doing so, he submitted that Prestige Home Builders conducted the proceeding in a way that unnecessarily disadvantaged the owners by its conduct in “failing to comply with this Act, the regulations or the rules or an enabling enactment”. Mr Settle went on to submit that the finding of the Tribunal was there had been

non-compliance with an enabling Act, namely the *Domestic Building Contracts Act*. The non-compliance was with s 40(2) of that Act.

- 19 Mr Settle then referred me to s 109(3)(c), which is concerned with 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. In this connection Mr Settle referred me to page 5 (of 17) of my Reasons of 31 July 2017 where I had set out the email correspondence between Mr Jankulovski of Prestige Home Builders and Mr Tim Smith. This was the series of conversations in which Mr Smith was authorised to sign the contract.
- 20 Mr Settle took me to paragraph 3 of my Reasons where I had set out a summary of the defences raised by Prestige Home Builders. He then referred me to paragraph 7 of the owners' submissions, which repeated those defences. For context, I note that the defences listed there were that:
  - (a) Prestige Home Builders did not enter into the contract;
  - (b) the contract was illegal and unenforceable;
  - (c) Prestige Home Builders was not responsible for the conduct of Mr Smith; and
  - (d) Mr Smith was a concurrent wrongdoer.
- 21 In respect of the defence that Prestige Home Builders 'did not enter into the contract', Mr Settle argued the builder was well aware, right from the start, that he had authorised Mr Smith on his behalf to obtain insurance and to sign the contractual documents. So, he contended, looking at the relative strengths of the case, there was never a basis for pleading that Prestige Home Builders did not enter into the contract.
- 22 In respect of the defence that the contract was illegal and unenforceable, it was also contended that it was clear from the decision that had been handed down that the contract was not illegal and unenforceable.
- 23 As to agency, Mr Settle said Mr Smith was always authorised to act on behalf of Prestige Home Builders.
- 24 Mr Settle then took me to s 109(3)(d), which is concerned with the nature and complexity of the proceeding. He submitted that the proceeding was unduly made complex by Prestige Home Builders. It was unduly made complex by the defences that were taken, and by the non discovery of documents. The documents were at some stage produced by Mr Smith. Had Prestige Home Builders been forthright, and discovered those documents earlier, or not taken the defences which had been taken, the proceeding would not have been so expensive.
- 25 Mr Settle again referred me to paragraph 7 of the submissions, where it is argued that there was no tenable basis for these allegations, given the SMS exchange set out from paragraph 12 of my Reasons. These SMS's were disclosed by the second respondent Mr Smith.

- 26 I was asked by Mr Settle to take into account all of these matters when considering s 109(3)(e), which entitled me to have regard to “any other matter the Tribunal considers relevant”. I was told the defence by Prestige Home Builders was an attempt to avoid having a judgment being entered against it. It was an attempt that relied on material that was known to be inaccurate and untrue.
- 27 Having heard Mr Settle’s submissions, I referred him to the decision of Justice Gillard in *Vero Insurance Ltd v Gombac Group Pty Ltd*<sup>4</sup> which set out the process to be adopted by the Tribunal in awarding costs under s 109. Under s 109(2), the Tribunal may move from the default position set out in s 109(1), which is that each party is to bear their own costs except in certain circumstances. Section 109(3) provides that an order may be made under subsection (2) that a party pay the whole or a part of the costs of another party only if it is satisfied that it is fair to do so, having regard to a number of matters. In order to be satisfied that it is fair to order that some or all of the owners’ costs be paid, I noted I have to go to s 109(3), and look at the conduct of Prestige Home Builders, and be satisfied that its conduct of the proceeding unnecessarily disadvantaged the owners.

#### **Section 109 (3)(a)(ii)**

- 28 I then dealt in turn with the submissions made by Mr Settle. I rejected his argument that s 109(3)(a)(ii) had been engaged because of Prestige Home Builders failure to comply with an enabling enactment, namely s 40 of the *Domestic Building Contracts Act*. I did so on the basis that it is difficult to make the connection between breach of that Act and the *conduct* of the litigation. I noted that the breach of s 40 took place some time before the proceeding was instituted.

#### **Section 109 (3)(c)**

- 29 With respect to the relative strengths of the parties, I referred to the transcript of the directions hearing before SM Walker which was appended to Ms Sacha Roberts’ affidavit, which had been submitted in the substantive hearing. I acknowledged the force of the argument against Prestige Home Builders, in circumstances where correspondence ultimately came to light that created the clear chain of authority which was essential in establishing that it had entered into the contract. I accepted that this case is an example where the relative strengths of the respective cases of the parties is a factor to be taken into account in respect of costs.

#### **Section 109 (3)(d)**

- 30 I said I was satisfied that this is a case where s 109(3)(d), which is concerned with the complexity and the nature of the proceeding, is enlivened, for these reasons. Firstly, I had made an order for the payment of \$257,500. I hastened to add that mere quantum of the sum at stake in

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<sup>4</sup> (2007) 26 VAR 354; [2007] VSC 117.



litigation doesn't necessarily of itself justify an award of costs, because there might be a very straightforward legal principle, and a very straightforward set of facts, and yet the sum involved might be very substantial. However, the quantum here justified the view that this was complex, and serious, litigation. Secondly, the complexity of the case was certainly a factor that weighed on my mind when I determined that I should provide written reasons rather than give an *ex tempore* decision. There was a complex set of facts, and the case had been vigorously fought by Prestige Home Builders.

- 31 The next aspect is that the case was argued under s 40 of the *Domestic Building Contracts Act*. That section is a very powerful provision, and its power was highlighted dramatically in the decision of McDonald J, at first instance, in *Imerva v Kuna*,<sup>5</sup> and reinforced in the following Court of Appeal decision.<sup>6</sup>
- 32 I noted that there are not many sections of the *Domestic Building Contracts Act* that are scrutinised by the Court of Appeal. That in itself might have justified the parties seeking legal advice. So, another factor relevant to the issue of whether costs should be awarded today is that both parties saw fit to engage lawyers at an early point.

### **Section 109 (3)(e)**

- 33 As noted, this provision entitles the Tribunal to take into account "other matters". Perhaps presciently, I noted that if I was pressed to write a decision about costs, I would reserve the right to closely canvass my Reasons because they identify a number of aspects of the manner in which the litigation was run. These included the fact that there was no defence based on the emails. There were arguments about agency. There were arguments about authority. There was an argument that because money actually hadn't made its way to a bank account controlled by Prestige Home Builders but had been paid into Mr Smith's bank account, that somehow that made that whole contract unenforceable. These were arguments that had to be addressed, and the very fact that I needed to spend as many pages as I did dealing with them I think amply demonstrates the complexity of the matter.
- 34 I did not rely only on the fact that this was effectively large scale commercial litigation. It was the individual nature of the defences raised, the manner in which the case was run at the hearing, and the complexity of the underlying legal principles, coupled with the commercial importance of the case to both sides, that were the relevant factors.
- 35 For the reasons that I had identified, I was satisfied that the discretion of the Tribunal to award costs under s 109(3) had been enlivened. Having regard

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<sup>5</sup> [2016] VSC 461.

<sup>6</sup> [2017] VSCA 168.

to the significant burden of costs, I was also satisfied it was fair to make an award of costs.

### **ASSESSMENT OF COSTS**

- 36 We then came to the question of assessment. I was asked to assess costs based on the affidavit material.
- 37 The first items mentioned were the filing fee and the hearing fee paid by the owners. Strictly speaking they are to be dealt with not under s 109 of the VCAT Act, but under s 115B. However, it was convenient to deal with them at this point of the hearing.

### **REIMBURSEMENT OF FEES**

- 38 Section 115B(1)(a) of the VCAT Act empowers the Tribunal to make an order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding.
- 39 The power of the Tribunal to make an order for reimbursement of fees in the case brought under the *Domestic Building Contracts Act 1995*, such as the present proceeding, is qualified by s 115C of the VCAT Act. Under s 115C there is a presumption that fees ought to be reimbursed in circumstances where the applicant has been substantially successful.
- 40 In circumstances where the owners have got an award for the \$257,500 they sought there is no doubt they have been substantially successful for the purposes of s 115C. On that basis I was happy to make an order for reimbursement of fees.
- 41 Having confirmed on the Tribunal's database that the fees paid by the owners are those fees are set out at paragraph 12 of the Lippner affidavit, namely \$1,081.20 being the filing fee, \$348.40 being the hearing fee for one day, and \$358.30 which is the costs application fee, I made an order for the total of \$1,787.90.

### **COSTS-EXPERT'S FEES**

- 42 Mr Settle referred me to paragraph 11 of the Lippner affidavit, where two experts were referred to. One was Joseph Laurence Spano of Beecham Hogg Spano ("BHS"). I referred to paragraph 45 of my Reasons. The fees of BHS claimed were \$7,865 inclusive of GST.
- 43 Mr Spano came to the hearing. He gave evidence about the failure to complete the relevant stages. I indicated that there no issue with the recovery of this expert's fees, as his evidence was critical. Unless the owners could satisfy the Tribunal that work had been claimed and paid for by Prestige Home Builders which had not actually been completed then, then the breach of s 40 would not have been made out.
- 44 The other expert witness was Abode Restorations. Mr Settle did not press for recovery of these fees, and no allowance was made for them.

45 The finding that Mr Spano's fees of \$7,865 were allowed is reflected in Finding 9(a) in my Orders made on 22 September 2017.

#### **COSTS-COUNSEL'S FEES**

46 The counsel's fees claimed were those of Mr Settle. A set of invoices from Mr Settles Clark were exhibited to the Lippner affidavit. Counsel's invoices started after Mr Settle received the brief on or about 3 May 2016.

#### **Counsel's tax invoice No 5656 dated 6 May 2016**

47 According to the description of work, Mr Settle had on 3 May 2016 reviewed the brief, drafted the notice of termination and an email response to the ANZ bank. On 4 May 2016 he had draft of the memorandum regarding future conduct of the matter.

48 I disallowed drafting a notice of termination and the other items as not being costs of the proceeding.

#### **Counsel's tax invoice No 5662 dated 27 May 2016**

49 I allowed fees of \$825 inclusive of GST for the initial conference with the owners on 18 May 2016, but disallowed drafting a letter to Prestige Home Builders on 23 May 2016 on the basis that this was contractual advice.

#### **Counsel's tax invoice No 5685 dated 27 June 2016**

50 I allowed fees of \$1,375 inclusive of GST for drafting and revising the Points of Claim on 17 June 2016.

#### **Counsel's tax invoice No 5712 dated 9 September 2016**

51 I disallowed drafting letters to the building surveyor and insurer on 8 September as not being relevant to the litigation.

52 I allowed a fee of \$550 inclusive of GST for attending a VCAT directions hearing on 8 September 2016 in respect of which costs had been reserved.

#### **Counsel's tax invoice No 5726 dated 23 September 2016**

53 In respect of a directions hearing before Senior Member Levine on 22 September 2016 I allowed a total of \$1,650 for 3 hour's work, at \$550 per hour. This covered preparation, preparing draft orders and the appearance. I noted the orders made were quite complex, and dealt with the joinder of Mr Smith, and third-party discovery.

#### **Counsel's tax invoice No 5736 dated 7 October 2016**

54 In respect of fees charged on 5 October 2016, I allowed one hour at \$550 in respect of a review of documents. For 6 October 2016, I allowed one hour at \$550 for preparation of a draft reply. For 7 October 2016, I allowed one hour at \$550 for settling the reply and a telephone conference with Sacha Roberts and then with Derek Lippner. The total allowance is accordingly \$1,650 inclusive of GST.

**Counsel's tax invoice No 5762 dated 16 December 2016**

55 On 15 December 2016 Mr Settle appeared at a directions hearing before Senior Member Lothian. The orders made indicate that Mr S Smith, solicitor, appeared for Prestige Home Builders and Mr T Smith appeared in person. Costs were reserved. I allowed the one hour claimed, at \$550, for this directions hearing.

**Counsel's tax invoice No 5797 dated 21 February 2017**

56 On 21 February 2017 Mr Settle marked fees of \$275 for drafting a compulsory conference position paper prior to a compulsory conference before Member Kincaid. As the parties had been ordered by Senior Member Lothian to prepare a position paper, this fee was allowed. Mr Lippner attended at the compulsory conference, so Counsel's fees were not incurred in respect of the conference.

**Counsel's tax invoice No 5858 dated 2 June 2017**

57 On 1 June 2017 Mr Settle charged \$275 for settling an affidavit of Derek Lippner. These fees were disallowed. Neither Mr Settle nor his instructor could readily identify what the affidavit related to, and the claim was not pressed.

**Counsel's tax invoice No 5870 dated 19 June 2017**

- 58 There was a directions hearing on 16 June 2017 before Senior Member Farrelly at which an application for discovery by Mr Steven Smith of S Smith & Associates, Lawyers was made. Prestige Home Builders' application under s 75 to have the proceeding against it struck out was dismissed. The owners' costs were reserved. This was clearly a complex directions hearing.
- 59 Preparation of half an hour on 16 June 2017 was claimed, and I allowed that. An appearance fee in respect of one and a half hours was also claimed, and that too was allowed. A total of 2 hours work, or \$1,100, was allowed.

**Counsel's tax invoice No 5875 dated 5 July 2017**

- 60 On 28 June 2017 fees were marked for preparation for a conference on 29 June 2017, and the hearing set for 3 July 2017. 4 hours were claimed at \$550 per hour, or \$2,200. I was prepared to accept that fee.
- 61 On 29 June 2017 Mr Settle charged fees of \$825 for a conference with the owners, which I allowed.
- 62 On 3 July 2017 Mr Settle appeared for the owners at the hearing. He marked \$5,500 which he confirmed was his daily fee. I allowed the fee claimed.

### **Counsel's tax invoice No 5888 dated 3 August 2017**

63 The penultimate claim for Counsel's fees was for drafting submissions on interest and costs on 2 August 2017, for which \$550 was charged. I allowed this claim.

### **Summary of Counsel's fees to 2 August 2017 allowed**

64 In summary, I allowed:

|                   |         |
|-------------------|---------|
| 18 May 2016       | \$825   |
| 17 June 2016      | \$1,375 |
| 8 September 2016  | \$550   |
| 22 September 2016 | \$1,650 |
| 5 October 2016    | \$550   |
| 6 October 2016    | \$550   |
| 7 October 2016    | \$550   |
| 15 December 2016  | \$550   |
| 21 February 2017  | \$275   |
| 16 June 2017      | \$1,100 |
| 28 June 2017      | \$2,200 |
| 29 June 2017      | \$825   |
| 3 July 2017       | \$5,500 |
| 2 August 2017     | \$550   |

65 The total sum allowed accordingly was \$17,050, which is the figure reflected in Finding 9(b) made at the costs hearing

66 At the end of the costs hearing Mr Settle indicated his fees would be \$825 to reflect an appearance of an hour and a half at \$550 per hour, which I allowed. This is reflected in Finding 9(c).

### **COSTS-SOLICITOR'S FEES**

67 The invoices from the owner's solicitors were exhibited to the Lippner affidavit as Exhibit "HDL-3". The fees were \$68,545.41, and they included disbursements including postage fees, ASIC search fees, VCAT filing fees, transcript fees and counsel's fees.

### **Invoice 1-11 May 2016**

68 We began by discussing individual invoices, and dealt first with the invoice of 11 May 2016. Apart from expenses, this related to fees for professional services of \$2,289 exclusive of GST. Having reviewed the scope of work

described in detail, I confirmed that I understood the scope of work, but did not see why this invoice was recoverable as being related to the proceeding (which began in June 2016). I disallowed the solicitor's fees, but noted that counsel's fees had been dealt with.

#### **Invoice 2- 1 June 2016.**

69 The solicitor's fees of \$1,281 exclusive of GST were in relation to meeting with Counsel to discuss next steps and strategy. This I accepted. Then there was preparing a letter to Prestige Home Builders and discussing it, amending that letter, an email and a telephone call to Steve Bartolic, reviewing emails from Steve Bartolic and an email to the director of Prestige Home Builders attaching a letter, and an email to Steve Bartolic in respect of the letter of 23 May 2016. I said it was hard to see why these items were recoverable as part of the litigation, and disallowed them.

#### **Invoice 3: 25 June 2016**

70 The fees of \$1,554 exclusive of GST related to meeting with Mr Settle on site, and with him and Prestige Home Builders in Mornington, reviewing email from Mr Settle and responding, meeting with Mr Settle preparing points of claim, preparing application, reviewing further materials, attending VCAT to file the application. I allowed the meeting on site and the other solicitor's costs.

#### **The issue of Mr Lippner's hourly rate**

71 It became apparent from reviewing the invoices that Mr Lippner's base rate, exclusive of GST, was \$410 an hour. That was an issue because the default scale in the Tribunal is the County Court scale, which is 80% of the Supreme Court scale. And attendance by a solicitor, at 80% of the Supreme Court rate, came to something like \$314 per hour. To address the issue, Mr Settle suggested that Mr Lippner's rate should be reduced by 25%. (This would reduce \$420 to \$315 per hour).

#### **The proposal to reduce solicitor's fees overall by 40%**

72 Mr Settle at this juncture went on to suggest that the invoices might be looked at in a global way. He proposed that rather than going through each invoice line by line, which would take a considerable amount of time, perhaps maybe 60% of the costs should be allowed, on the basis of his understanding that at taxations 50-60% of the costs claimed were generally allowed. He resisted the solicitor's costs being sent to taxation to be assessed on the default scale. His concern was the costs to be incurred by the owners when going to a taxation when they might not be able to recover at all.

73 In considering the proposal, I:

- (a) reviewed the subsequent invoices and made comments about a number of them;

- (b) took into account that part of our charter at the Tribunal is to deal with disputes as economically and efficiently as possible;<sup>7</sup>
- (c) confirmed that I had determined that an award of costs is justifiable;
- (d) was mindful of the default scale;
- (e) took that into account that there invoices where there were questionable or non-allowable items in relation to attendances on Tom Carson, another builder, banks such as the NAB, and insurers, which would not have been recoverable;
- (f) considered that adopting the global discount approach would save both the owners' solicitors and those of Prestige Home Builders the expense and inconvenience of a taxation, which would be very significant; and
- (g) concluded that in the context of a total claim for costs of \$40,000, I considered that if that figure was effectively cut in half then, it was hard to see how Prestige Home Builders could say that that was unfair, and how they could ever do better than that at the taxation.

74 Having accepted Mr Settle's proposal is that we should take 25% off the hourly to account for the difference in Mr Lippner's hourly rate from the scale rate, as this was appropriate, I adopted his further proposal that I make a further global discount to reflect the non-recoverable items. However, I fixed the further discount at 25%, so that the total discount was 50%.

#### **Calculation of solicitor's costs.**

75 Total solicitor's fees were \$47,828.74. Half of this figure is \$23,914.37. I rounded that figure down to \$23,900, and indicated that I thought I had provided substantial fairness to both parties by adopting the approach of reducing solicitor's fees by 50%.

76 Ms Roberts did not press a claim for her costs of today, and none were allowed.

#### **SUMMARY**

77 At the conclusion of the hearing I confirmed I had made the respective allowances set out in the Findings.

C. Edquist  
**Member**

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<sup>7</sup> See s 98 of the VCAT Act.