VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO.BP471/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Costs hearing. Section 109, and sections 112-114 of the *Victorian Civil and Administrative Tribunal Act* 1998. Costs ordered under section 112 (2) of the Act. Claim for costs on an indemnity basis refused. Costs ordered after date of offer of settlement on a standard basis pursuant to the County Court scale.

APPLICANTS	Catherine Margaret Speechley and Leigh Speechley
RESPONDENT	Midway Ltd (ACN 005 160 044)
WHERE HELD	Melbourne
BEFORE	Senior Member M Farrelly
HEARING TYPE	Costs Hearing
DATE OF HEARING	31 January 2018
DATE OF ORDER	20 February 2018
CITATION	Speechley v Midway Ltd (Building and Property) [2018] VCAT 246

ORDER

1. The applicants must pay the respondent's costs of the proceeding incurred after 9 March 2017, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicants	Ms R. Sion of Counsel
For the Respondent	Mr P. Chiappi of Counsel

REASONS

1 The hearing in this proceeding was conducted before me over 11 days in May, June and July 2017. It concerned claims brought by the applicants for compensation and other orders under the *Water Act* 1989.

2 On 17 July 2017, I handed down my decision with extensive written reasons. To the extent some of the applicants' claims purported to be claims brought under the *Environment Protection Act* 1970, such claims were struck out for want of jurisdiction. Otherwise, all of the applicants' claims were dismissed.

3 The respondent now brings a claim seeking orders that the applicants pay the respondent's costs of the proceeding.

Brief history

4 The respondent is in the business of tree plantations. It operates one such plantation on its property, approximately 516 hectares, in Kilmore East, Victoria.

5 The applicants own a neighbouring property of approximately 120 hectares upon which they reside in their home and operate a small beef cattle farm.

6 On 7 February 2009, 'black Saturday' as it is now known, all of the trees in the pine plantation, save for a few small patches in low lying valleys, were killed in the fire. Between March and November 2009, the respondent harvested the dead plantation. In the winter of 2010, the respondent planted a new plantation of blue gum seedlings across most of the property. Prior to planting the seedlings, the respondent used helicopters to spray the plantation site with chemical herbicides, one such chemical being "simazine".

7 In 2010, the extended period of drought across Victoria broke. In 2010 and early 2011, Kilmore, like most of the state, experienced heavy, well above average rainfall. The rainfall led to heavy flows of water down creek beds on the respondent's property and into a dam on the applicant's property. With the water came logging debris, large amounts of sediment from the eroding landscape, and traces of the chemical simazine. The floodwaters damaged fencing on the applicant's property and destroyed a bridge crossover at their dam.

8 When traces of simazine were discovered in the applicants' dam, the applicants, believing the simazine to be harmful, ceased using the dam altogether and fenced it off. This action, in addition to costing considerable money, significantly compromised the operational capacity of their cattle farm.

9 The applicants also believed that the respondent was, by reason of the manner in which it harvested the dead pine plantation and its lack of care and maintenance of waterways on its property, responsible for the damaging, sediment laden flows of water onto the applicants' property and into their dam.

10 The applicants pursued their complaints against the respondent with a number of authorities, including the Victorian Environment Protection Authority ("**EPA**"). The EPA inspected the applicants' property and the respondent's property, and carried out water sampling tests. The tests confirmed traces of simazine, albeit at very low levels.

11 In May 2013 the EPA served a 'Clean Up Notice' on the respondent requiring it to remove a large amount of sediment from the applicants' dam. Later, in October 2013, the EPA served on the respondent a 'Pollution Abatement Notice' requiring the respondent to undertake erosion/sediment control works on its property so as to reduce the discharge of sediment into waterways which flowed onto the applicants' property and into the applicants' dam. Although the respondent challenged the validity of both notices, and in the case of the Pollution Abatement Notice, brought its challenge to this Tribunal, the respondent attended to:

a) various erosion protection / sediment control works on its property; and

b) the removal and disposal of a very large quantity of sediment from the applicants' dam.

The respondent says the total cost of such works, including consultants' and legal fees, exceeded $700,000.

12 The EPA approved the works carried out. In September 2014, the Pollution Abatement Notice was, pursuant to consent orders between the EPA and Midway, revoked. In May 2015, the EPA revoked the Clean Up Notice.

13 By application filed in the Tribunal on 21 April 2016, the applicants commenced this proceeding against the respondent seeking compensatory damages and further orders to require the respondent to attend to further clean up / erosion protection works. The applicants' claim for compensatory damages included numerous heads of damage totalling in excess of $550,000. The respondent denied all claims brought against it.

14 As noted above, the hearing ran for 11 days in May, June and July 2017. The applicants represented themselves, as they had throughout the proceeding. The respondent was represented by Mr Chiappi of Counsel.

15 My written decision was handed down on 17 July 2017.

The Costs hearing

16 The costs hearing proceeded before me on 31 January 2018. Prior to the hearing, both parties had filed and served written submissions. At the costs hearing, the respondent was again represented by Mr Chiappi of counsel.

17 The applicants were represented by Ms Sion of counsel. This was the first occasion in the proceeding that the applicants were represented by a professional advocate. As noted by Ms Sion, her knowledge of the proceeding was obtained by reading my decision of 17 July 2017 and taking instructions from the applicants.

COSTS UNDER THE VCAT ACT

18 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") provides that each party is to bear its own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (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.

19 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

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

ii. The Tribunal should 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 s109(3).

20 Section 112 of the Act makes special provision in respect of the making of a cost order in circumstances where a party has rejected a settlement offer made by another party:

> **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 subsection (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; and
>
> (b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

Level of costs

21 Where the Tribunal is minded to make an order for costs, the Tribunal will often identify the basis and scale upon which the sum of costs is to be

[1] [2007] VSC 117 at [20]

assessed or "taxed" in the event the parties are unable to agree on the sum of costs.

22 As to the *scale* of costs, the Tribunal will usually identify a scale operative within the Magistrates Court, the County Court or the Supreme Court. If the Tribunal does not nominate any particular scale, the applicable scale will, by virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, be the County Court scale.

23 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis generally includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher "indemnity" basis generally includes all costs *actually* incurred, save to the extent they are of an unreasonable amount or have been unreasonably incurred.

24 As I have noted in the past[2], indemnity cost orders are made only in exceptional or extreme cases such as where the conduct of a party is vexatious or particularly obstructive, or where a party's case is hopeless or fanciful and with no real prospect of success, or where a claim is brought for an ulterior purpose.

SETTLEMENT OFFERS

The 24 February 2017 offer

25 On 24 February 2017, the respondent, through its lawyers, sent a letter by email to the applicants which included an offer of settlement made on a "without prejudice save as to costs" basis ("**the 24 February 2017 offer**")**.** In the letter, a number of issues are raised including the EPA'S satisfaction with remedial works undertaken by the respondent, and the asserted strength of the respondent's position having regard to various documents and reports. The letter then sets out an offer of settlement by which the respondent offered to pay the applicants $200,000 subject to conditions. One of the conditions was that the applicants release the respondent from liability for all claims in the proceeding "*and from all claims of whatever nature and howsoever arising, whether past present or future, including any claims in relation to water or sediment run-off of any nature from* [the respondent's property] *and claims and complaints to our clients certification or accreditation bodies profit in relation to water or sediment run-off from the respondent's property"*;

The offer was open for acceptance for 14 days. The letter expressed that if the offer was not accepted, and the applicants obtained no more favourable a result in the VCAT proceeding, the respondent would rely on the offer on the question of costs "in accordance with the principles enunciated in the

[2] Taylor v Trentwood Homes Pty Ltd [2012] VCAT 1125 at paragraph 34

cases of *Calderbank v Calderbank* [1975] All ER 333 and *Cutts v Head* [1984] Ch 290."

26 At 10:49 am on 9 March 2017, the applicants sent an email to the respondent's lawyer confirming that they did not accept the 24 February offer.

The 9 March 2017 offer

27 Later that day, 9 March 2017 at 7:04 pm, the respondent's lawyers emailed to the applicants a further offer of settlement ("**the 9 March 2017 offer**"), the terms of which are set out in full below:

> **Without Prejudice**
>
> Dear Mr and Mrs Speechley
>
> **RE: MIDWAY LIMITED ATS Catherine & Leigh Speechley**
>
> **VCAT CASE NO. BP471/2016**
>
> Our client offers to pay you the sum of $200,000, inclusive of all costs and interest, in full and final settlement of the proceeding.
>
> Payment will be made within 30 days of acceptance.
>
> The offer is open for a period of 14 days from 10 March 2017 after which time it will lapse and be incapable of acceptance.
>
> If the offer contained in this letter is accepted by you, please sign and date a copy of this letter where indicated overleaf and return the signed copy to us within the 14 day period.
>
> This offer is made pursuant to sections 112 to 114 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**Act**). Accordingly, if at the hearing of the matter, you obtain a result no more favourable than the offer contained in this letter, we will seek an order under section 112 (2) of the Act that you pay all of our client's costs incurred in the proceeding from the date of this letter.
>
> Please note that this letter cannot be disclosed to the Tribunal before the determination of the claim and only then on the question of costs if appropriate.
>
> The offer is made with a denial of liability.
>
> Yours faithfully

28 The applicants did not accept the offer.

29 On 23 March 2017 at 6:09 pm, the applicants emailed a letter to the respondent's lawyers whereby the applicants made an offer of settlement that required, amongst other things, the respondent to pay the applicants $540,000 and the respondent to take a number of further landscape protective/remedial works, the methodology of such works to be agreed by

the applicants. The offer further required that the respondent "*takes effective measures to stop their polluting of our property*".

30 It appears that the respondent did not respond to the applicants' offer dated 23 March 2017.

COST ORDERS SOUGHT

31 The respondent seeks orders that the applicants pay the respondent's costs of the proceeding as follows:

a) costs of the proceeding up to the date of the 9 March 2017 offer to be assessed on a standard basis pursuant to the County Court scale. These costs are sought pursuant to section 109 of the Act; and

b) costs of the proceeding incurred after the 9 March 2017 offer to be assessed on an indemnity basis. These costs are sought pursuant to section 112 of the Act.

32 Alternatively to the above, the respondent seeks an order that the applicants pay the respondent's costs on whatever basis the Tribunal may decide is appropriate.

CONSIDERATION UNDER SECTION 109 OF THE ACT

Relative strengths of claims

33 It is apparent from my reasons handed down on 17 July 2017 that the respondent's case was strong, relative to the case brought by the applicants.

34 The respondent led authoritative and helpful expert evidence, including:

- evidence from Mr Bren and Mr Phillips in respect of the erosive nature of the general landscape at and around the parties' properties;
- evidence from Mr Bren as to the relationship between trees, soil salinity and soil erosion, and the impact on that relationship of the black Saturday fire;
- evidence from Mr Tomkins as to the nature of the chemical herbicides applied by the respondent to its property before it planted the replacement blue gum plantation. Evidence from Mr Tomkins as to the impact on animals and humans of the presence of the chemical simazine in drinking water, having regard to safety tolerance levels and the levels of simazine detected in the applicants' dam;
- evidence from Mr Bren and Mr Phillips in respect of measures of turbidity in water, and evidence from Mr Phillips as to the suitability of turbid water for cattle; and
- evidence from Mr Curtis as to the nature and effect of the various works undertaken by the respondent in response to the EPA notices.

35 In contrast, the expert evidence led by the applicants was of limited use. Mr Young gave evidence as to the turbidity of water and levels of sediment in the applicants' dam, however I found his evidence lacked clarity and, at times, relevance. And there is doubt as to the "independence" of his evidence because Mr Young is the brother of the applicant, Mrs Speechley. That is not to say that Mr Young did not give his honest opinion, but the closeness of his relationship to the applicants necessarily raises the doubt.

36 Ms Duclos, called by the applicants, gave evidence as to the environmental impact of the respondent's activities, in particular the harvesting of the burned pine plantation, having regard to the applicable code of practice for timber production. As noted in my decision[3], I was critical of Ms Duclos' sweeping statement, not supported by evidence, as to the respondent's alleged failings. To her credit, Ms Duclos conceded the difference between harvesting a *dead* plantation, as was the case here, and harvesting a *live* plantation[4].

37 Expert evidence in this case was very important, and the expert evidence presented weighed manifestly in favour of the respondent's case.

38 However, I would not go so far as to say that all of the claims brought by the applicants had no tenable basis in fact or law. There were flows of water from the respondent's property onto the applicants' property, and those flows of water brought with them plantation harvesting debris, traces of the chemical simazine and significant quantities of (erosion) sediment. The EPA apparently considered the environmental impact to be significant enough to warrant the issuing of the *Clean Up Notice* and the *Pollution Abatement Notice.* Although it always disputed the validity of those notices, the respondent did take significant actions, at considerable cost, to satisfy the EPA.

39 One can understand that the applicants' belief that they had legitimate claims against the respondent was bolstered by the EPA's involvement and the respondent's response to the EPA's involvement.

40 In my view, it cannot be said that the applicants had no arguable case in respect of damage caused by debris and sediment laden flows of water onto their land from the respondent's land. That does not mean that the arguable case was a strong case. For the reasons set out in my decision handed down 17 July 2017, I found the respondent was not liable to the applicants in respect of the damaging flows of water.

41 And the fact that the applicants had at least an arguable claim, does not justify many of the unrealistic claims brought by the applicants, including:

[3] Paragraph 59 in my decision 17 July 2017
[4] paragraph 63 in my decision 17 July 2017

a) the claim for compensation, at the rate earned by a general farmhand, for the time taken to regularly check fencing on their farm after it was reinstated after the fire;

b) the claim for loss associated with the alleged simazine pollution of their cattle in circumstances where:

i. the applicants had been provided with government authoritative opinion that the levels of simazine detected in their dam water would not result in unsafe residues of simazine in their cattle[5]; and

ii. the applicants turned down an offer from the Department of Primary Industries to test their cattle to determine the level of any simazine residue[6]; and

iii. the applicants obtained no expert evidence to support the claim;

c) the applicants' claim for compensation for the extra cost of food over 6 years allegedly caused by their reduced time capacity, because of their involvement in this very litigation, to devote to growing food on their property;

d) the claim for lost farm productivity in a sum of $226,669, with no evidence to support the calculation. The applicants say the sum was set out in a computer generated spreadsheet prepared by a family member, yet they did not produce the spreadsheet;[7]

e) the applicants' claim for compensation in the sum of $210,000 as "lost opportunity cost" for the time spent by them, calculated at a general farm hand's hourly rate of $34 per hour, in pursuing their claims against the respondent.

42 Yet I do not doubt the honesty of the applicants. Having listened to and observed the applicants over the course of the 11 day hearing, I found them to be honest witnesses who believed in the legitimacy of their claims.

Nature and Complexity of the proceeding

43 It is apparent from my decision of 17 July 2017 that the proceeding involved issues of considerable factual and legal complexity, including:

- the matters of expert evidence referred to above;
- the large volume of documentation discovered in the proceeding and produced in the tribunal book for the hearing including Mitchell Shire Council policies, minutes of meetings and reports, code of practice for timber production, government publications on chemicals and safe

[5] see paragraphs 135 – 141 in my decision of 17 July 2017
[6] ibid
[7] paragraph 22(i) in my decision of 17 July 2017.

drinking water tolerance levels, documentation produced by the EPA in respect of the notices issued by it;

- issues as to VCAT's jurisdiction and the *Limitations of Actions Act* 1958; and
- careful analysis of applicable provisions of the Water Act.

44 In my view, the issues warranted the use of experienced lawyers.

45 I note that the manner in which the respondent conducted the hearing was exemplary. The respondent's representatives and counsel were polite and respectful towards the applicants, showing a good measure of tolerance.

46 In relation to costs incurred prior to the 9 March 2017 offer, the respondent says that having regard, in particular, to the relative strengths of the parties' claims as discussed above, it is fair that the Tribunal depart from the prima facie rule that each party bear their own costs.

Other matters

47 The applicants submit that it was reasonable that they rely on matters set out in the *Clean Up Notice* issued by the EPA. As discussed above, it is understandable that the applicants' belief in the legitimacy of their claims was bolstered by the involvement of the EPA and the respondent's response to the notices issued by the EPA.

48 It is also noteworthy that the EPA revoked the notices following the landscaping and sediment removal works carried out by the respondent, and the applicants commenced this proceeding after the revocation of the notices and no witnesses from the EPA were called to give evidence.

49 The applicants submit that regard should be had to the fact that they were self-represented throughout the course of the proceeding. In my view this is a relevant consideration. There is also merit in the respondent's submission that the applicants, from the beginning, ignored advice provided to them by various authorities.[8]

50 The respondent says that the 24 February 2018 offer was, in all the circumstances, a reasonable offer and it was unreasonable on the part of the applicants to not accept the offer. I accept that a *Calderbank* offer, such as the 24 February 2018 offer, may be considered under section 109 (3) (e) as "any other matter" the Tribunal considers relevant.

51 However, in my view the 24 February 2018 offer should be disregarded because of the broad nature of the releases sought. As noted above, the offer required the applicants to release the respondent from, amongst other things, all *future* claims of whatever nature and howsoever arising. In my view it is plainly unreasonable to expect the applicants to have accepted an offer that includes a release from unknown potential future events. As such,

[8] as noted earlier, see in particular paragraphs 135 – 141 in my decision of 17 July 2007

I disregard the 24 February 2017 offer in considering whether it is fair to depart from the prima facie rule that each party bear their own costs.

Conclusion on section 109 consideration

52 In respect of the costs incurred by the respondent prior to the 9 March 2017 offer, the question before me is whether, having regard to the matters discussed above, I consider it fair to depart from the prima facie rule that each party bear their own costs. I have reached the view that it would not be fair.

53 The respondent's case was significantly stronger than the applicants' case, as evident from the outcome and my reasons handed down 17 July 2017. The proceeding had complexity warranting the engagement of lawyers. The applicants brought some claims that were unrealistic.

54 However, as discussed above I consider the applicants had at least an arguable claim in respect of damage caused by debris and sediment laden flows of water onto their land from the respondent's land. This, coupled with the fact that the applicants were self-represented throughout the proceeding is, in my view, sufficient in this case to find that it would not be fair to depart from the prima facie rule in respect of costs incurred by the respondent prior to the 9 March 2017 offer.

SECTIONS 112 – 114 OF THE ACT AND THE MARCH 2017 OFFER

55 The respondent says that the 9 March 2017 offer calls for the application of section 112 of the Act. Because the orders I made on 17 July 2017 dismissing the applicants claims are clearly and manifestly not more favourable to the applicants than the offer, the respondent says I should make an order under section 112 (2) of the Act that the applicants pay all costs incurred by the respondent after the offer was made.

56 The 9 March 2017 offer is well drafted. It is concise, clear and does not waste words. It meets all the requirements to attract the operation of section 112 (2) of the Act, and leaves no doubt that it will be used to seek an order for costs under section 112 (2) of the Act in the event the offer is not accepted and the applicants fail to obtain a more favourable outcome at the hearing.

57 Under section 112 (3) of the Act, when determining whether the orders made at the hearing are not more favourable to the applicants than the offer, I must take into account any costs the Tribunal would have ordered on the date the offer was made. In my view, this means considering whether, if the case had been determined at the time of the offer, a cost order under section 109 of the Act would have been made. For the reasons discussed above, I consider that no cost order would have been made at the time of the offer. But it is immaterial, because an offer of $200,000 is manifestly more favourable to the applicants than a decision dismissing the applicants' claims, regardless of whether the decision would have included a cost order.

58 The words "*and unless the Tribunal orders otherwise*" appearing in section 112 (2) of the Act leave the Tribunal with the discretion to not make an order for costs even when all the requirements to attract an order for costs under section 112 have been met.

59 The applicants submit that I should exercise that discretion and not make an order for costs. They submit that they thought the terms of the offer were similar to the terms of the 24 February 2017 offer. They say that the 9 March 2017 offer was couched in similar terms to the 24 February 2017 offer.

60 I do not accept the submission. As noted above, I consider the 9 March 2017 offer is well drafted, clear and concise. It is not at all similar to the 24 February 2017 offer.

61 Further, on 9 March 2017, *before* the 9 March 2017 offer was served on the applicants, the applicants confirmed by email to the respondent's lawyer their rejection of the 24 February 2017 offer. In that email, in addition to confirming that they did not accept the 24 February 2017 offer, the applicants stated that the sum offered ($200,000) *"is a fraction of the cost of completing proper Midway* [the respondent] *pollution clean-up of our dam, and of remedying the damage to our property as noted in our claim at VCAT… Your offer also provided no information on actions Midway would take to stop the pollution which is still occurring".*

62 In my view, it is apparent that the applicants considered the offer of $200,000 to settle all their claims in the proceeding was inadequate.

63 I do not accept that the 9 March 2017 offer was in any way unclear or confusing.

64 The applicants submit that, as non-lawyers, they did not fully understand the consequences of not accepting the 9 March 2017 offer. Again, I do not accept the submission. The 9 March 2017 offer was very clear in setting out the potential consequence, namely a cost order in favour of the respondent, if the offer was rejected.

65 In my view, there is no good reason why I should decline to make a cost order in favour of the respondent under section 112 (2) of the Act. I appreciate that such an order will have a profound impact on the applicants, however that is no reason to deny the respondent the operation of section 112 (2).

66 I will order that the applicants must pay the respondent's costs of the proceeding incurred after 9 March 2017. The only remaining issue is to determine the level of such costs.

67 There is no presumption that the words "all costs incurred" in section 112 (2) of the Act means costs on an indemnity basis. As noted by Ashley JA in *Verlado and Anor v Andonov*[9]:

> Section 112 (2) creates, on the one hand, a prima facie entitlement to payment of "all costs" in favour of a successful offeror. Ordinarily, it appears, costs would be assessed in such a case on a party and party basis – although the Tribunal would be empowered to allow costs on a more favourable basis"

68 The applicant concedes the operation of section 112 (2) as noted above, and submits that I should have regard to the *Supreme Court (General Civil Procedure) Rules* 2015 governing offers of compromise which provide, in certain cases, for costs on an indemnity basis in circumstances where an offer of compromise has been rejected.

69 I do not accept the submission. The rules governing offers of compromise under the Supreme Court Civil Procedure Rules are rules made for a different jurisdiction with a different general approach to costs.

70 As noted earlier, in my view indemnity costs should not be ordered save for exceptional or extreme cases, such as where the conduct of a party is vexatious or particularly obstructive, or where a party's case is hopeless or fanciful and with no real prospect of success, or where a claim is brought for an ulterior purpose.

71 There is no suggestion that the applicants have, in this case, acted vexatiously or in an obstructive manner, or that they have brought their claim for an ulterior purpose.

72 The respondent submits[10] that it is appropriate to award costs on an indemnity basis because:

a) the offer was made at a time when there existed undisputed evidence as to the causation of the majority of the applicants claims such that the applicants were in a position to make a reasoned assessment of their prospects;

b) the offer was made a reasonable time prior to the hearing;

c) the applicants claims lacked merit; and

d) the offer was generous particularly having regard to the fact that the applicants were representing themselves and, as such, their actual costs of the proceeding were minimal.

73 I accept that the offer was generous and made a reasonable time prior to the hearing. I accept that an objective assessment of the information available at the time the offer was made would have revealed the weakness of the

[9] [2010] VSCA 38, at 47
[10] paragraph 50 in respondent's primary submissions as to costs dated 27 October 2017

applicants' claims. However, in my view these matters are not sufficient to warrant an order for costs on an indemnity basis.

74 While *some* of the applicants' claims could be considered fanciful and with no real prospect of success, that cannot be said about *all* of their claims. As discussed earlier, I consider that the applicants had at least an arguable case in respect of the damage associated with flows of the debris and sediment laden water onto their property from the respondent's property. This, coupled with the fact that the applicants were self-represented and were not pursuing their claims in a vexatious manner or for an ulterior purpose, is reason enough in my view to decline an order for costs on an indemnity basis.

75 I think it is appropriate that the costs be awarded on the ordinary scale as referred to in rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, that is on a standard basis pursuant to the County Court scale.

CONCLUSION

76 For the reasons set out above, I will make no order as to costs in respect of costs of the proceeding incurred prior to 9 March 2017. In respect of costs of the proceeding incurred by the respondent after 9 March 2017, I will order that the applicants must pay such costs, the sum of which, if not agreed, to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

SENIOR MEMBER M. FARRELLY