**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. D69/2014

## CATCHWORDS

*Domestic Building Contracts Act* 1995 – s.53 – damages in the nature of interest – claim for – whether "fair" to order payment of – matters to be considered – interest as damages - compensation for loss of use of money - calculated from when money should have been paid – award of interest compensatory not punitive – s.112 – offer of settlement – result less favourable to the offeree – offeror entitled to order for "all costs" incurred after the offer is made – "all costs" means on the standard basis unless circumstances of the case warrant an award on a more favourable basis – when can indemnity costs be awarded?

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| **APPLICANT** | TCM Building Group Pty Ltd (ACN 139 290 618) |
| **RESPONDENT** | Kristine Mercuri |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member R. Walker |
| **HEARING TYPE** | Costs Hearing and claim for interest |
| **DATE OF HEARING** | 19 May 2017 |
| **DATE OF ORDER** | 17 July 2017 |
| **CITATION** | TCM Building Group Pty Ltd v Mercuri (Building and Property) [2017] VCAT 1057 |

## ORDERS

1. Order the Respondent to pay to the Applicant interest assessed in the sum of $39,547.53.
2. Order the Respondent to pay the Applicant's costs of this proceeding including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court in accordance with the County Court Scale on the standard basis up to and including 29 August 2014 and thereafter on an indemnity basis.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

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| For Applicant | Mr G. Hellyer of Counsel |
| For Respondents | Mr B. Reid of Counsel |

## REASONS

### Background

1. This proceeding was brought by the applicant ("the Builder") against the Respondent ("the Owner") to recover money it claimed to be owed pursuant to a major domestic building contract. In her counterclaim, the Owner sought damages claimed to have been suffered as a result of defective workmanship and other matters.

2. A decision was handed down on 1 July 2015 and was subsequently corrected by a further order on 17 February 2016, that the Owner pay to the Builder the sum of $206,081.95 plus interest of $52,319.15. The amount awarded took account of the Owner's counterclaim, insofar as it was successful. Costs were reserved for further argument.

3. After this decision was handed down, the Owner sought leave to appeal to the Supreme Court of Victoria. The application for leave was listed for hearing in October last year but before that hearing, the parties agreed upon consent orders to the following effect:

   (a) The Owner's application for leave to appeal was granted and the appeal was allowed;

   (b) The question of interest as referred to in "question of law 1" and "ground of law 1" referred to in the Owner's proposed amended notice of appeal, which was Exhibit MJT-9 to the affidavit of Michael John Telford sworn 22 February 2017, was remitted to the Tribunal for re-hearing by me;

   (c) The amount to be paid by the Owner to the Builder as ordered by me in the decision dated 17 February 2016 was reduced from $206,081.95 to $130,000.00.

### The current hearing

4. Following the making of these orders the matter returned to me on 19 May 2017 for consideration of the question of interest and the Builder's claim for an order that the Owner pay its costs of the proceeding.

5. Mr Hellyer of Counsel appeared for the Builder and Mr Reid of counsel appeared for the Owner. Lengthy written submissions were prepared on both sides which were supplemented by oral submissions made by counsel on that day.

6. At the conclusion of oral submissions I informed the parties that I would provide a written decision.

### Power to award interest

7. The claim for interest is brought variously under:

   (a) s.53 of the *Domestic Building Contracts Act* 1995 ("Domestic Building Contracts Act");

(b) the terms of the contract; and also

(c) s.58 of the *Supreme Court Act* 1986 ("Supreme Court Act").

8. The relevant parts of s.53 relied upon by Mr Hellyer are as follows:

> "53. Settlement of building disputes
>
> (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, the Tribunal may do one or more of the following –
>
> ……
>
> (b) order the payment of a sum of money -
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest);
>
> (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983 (Vic) or on any lesser rate it thinks appropriate."

9. Mr Hellyer submitted that the award of interest on a judgment sum is to compensate a party for the reduced value of money over time and the loss of the use of the money from the time the party was entitled to payment until the date the money was paid. He referred me to the Tribunal's decisions of *Glenrich Builders Proprietor Limited v. Modonesi* [2013] VCAT at para. 9 and *Quinlan v. Sinclair* [2006] VCAT 1063 at para. 11.

10. In the latter case, I said (at para 9 et seq.):

> "9. There is nothing in the Victorian Civil and Administrative Tribunal Act 1958 that empowers this Tribunal to award interest or damages in the nature of interest. In domestic building disputes there is the power in s.53(2)(b)(ii)]of the Domestic Building Contracts Act 1995 referred to and there is a similar power in s.108(2)(b)(ii) of the Fair Trading Act 1999 in regard to claims brought under that Act. In the presence case I can only have recourse to the former section and that allows the award of damages in the nature of interest.
>
> 10. In the Supreme Court there is a statutory entitlement to interest "unless good cause is shown to the contrary' (see *Supreme Court Act* 1986 s.58(1), s.59(2) and s.60(1)) and the sum awarded becomes part of the damages awarded. It is an additional head of damages (see *Williams v Volta* [1982] V.R.739 at p.746). In domestic building disputes the Tribunal "may" award damages in the nature of interest (s.53(1) & (2)). There is no requirement for the unsuccessful party to show "good cause" why they should not be awarded but the use of the permissive "may' would suggest that they will not necessarily

be awarded in all cases. There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be "fair" to do so.

11. It cannot be "fair" to make any order that is not in accordance with the evidence and established legal principles. The Tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is "fair" must be determined in each case."

### Interest pursuant to the contract

11. Interest is also sought under the contract. Mr Hellyer pointed out that, by Clause N4.1 of the contract, the architect was required to assess a claim for a progress payment and issue a certificate to the Builder within 10 working days after receipt of the claim. By Clause N6, the Owner was then required to pay the progress certificate within seven days and, by Clauses N15.1 and 2 and by Item 22 of Schedule 1, the Builder was entitled to interest on the overdue amounts at the rate of 10% per annum, compounding monthly.

12. Clause N15.1 provided:

> "Each party must pay interest on any money that it owes to the other but fails to pay on time. In the case of the Owner, this includes any delay caused by the failure of the architect to issue a progress certificate on time."

13. How this was to work is unclear because, until such time as the certificate is issued by the architect, no monies are due to be paid by the Owner to the Builder under the Contract. If they are not due to be paid, how can they be said to be "owed"? The Builder's complaint is that the Owner did not ensure that the architect fulfilled its function and issue the certificate in accordance with the procedures set out in the Contract. By failing to assess the claim, the architect has prevented the Builder's entitlement to payment from arising. Nevertheless, on its face, Clause N15.1 contemplates that the Owner is to pay interest for the period of any delay caused by the failure of the architect to issue the progress certificate on time.

14. Whereas an award of interest under the Domestic Building Contracts Act appears to be discretionary, an award of interest under the Contract is a contractual entitlement. However, if interest is payable, even though this claim was not assessed and no certificate was issued, I find it impossible to calculate. In the first place, what is the principal sum upon which interest is to be calculated? Is it to be the whole of the amount of the progress claim that the Builder was seeking or, as seems more likely, the amount for which

the architect should have issued a certificate? Should I assume that it is the amount that was ultimately awarded to the Builder, later reduced by agreement to $130,000.00? On the evidence that I have I am unable to make that calculation. The amount of the final award was arrived at after deducting amounts due to the Owner on her counterclaim and making various other adjustments. It was then reduced by agreement to $130,000.00 which might well have been an arbitrary figure arrived at following a process of negotiation. I cannot say that it was the amount of Progress Claim 13C that the architect ought to have been certified.

15. Further, in its prayer for relief in the Points of Claim, the Builder seeks damages in the nature of interest, not interest pursuant to the terms of the Contract.

### Interest pursuant to the Supreme Court Act

16. In the alternative, Mr Hellyer seeks an award of interest under s.58 of the Supreme Court Act. That section provides, in essence, that, if in a proceeding "a debt or sum certain" is recovered, "the Court" must on application, unless good cause is shown to the contrary, allow interest to the creditor in accordance with the section. Section 3 of the Supreme Court Act provides that the word "Court" means the Supreme Court.

17. It has been said that the purpose of an award of interest under s. 58 is to compensate parties who have been obliged to take proceedings to recover a money sum and, in the meantime, have been kept out of monies which they would otherwise have used, or upon which they could otherwise have earned interest (see *Williams Supreme Court Practice* 1986 para 670.12 and the cases there cited).

18. Mr Reid referred me to go with the judgment of Gillard J. in *Johnson Tiles Pty Ltd* v. *Esso Australia Pty Ltd* (No.3) [2003] VSC 244. In that case, his Honour said (at paras.61 & 62):

> "61. There are three main objectives of the award of interest. First, as compensation to the judgment creditor for being out of the funds from the date of commencement of the proceeding until judgment; secondly, to deter judgment debtors from delaying proceedings and thereby having the use of the money for a longer period; and finally, to encourage defendants to make realistic assessments of their liability in a case and to take bona fide steps to compromise the claim.
>
> 62. Speaking of s.79A (the predecessor of s.60), Barwick CJ in *Ruby v Marsh* [1975] HCA 32 had this to say -
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> "The purpose of giving courts the power to award interest on damage is to my mind twofold, and neither aspect of the purpose should be lost sight of. In the first place, the successful plaintiff, who by the verdict has been turned into an investor by the award of a capital sum, and whose claim in the writ has been justified to the extent of a verdict returned, ought in justice to be placed

> in the position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of the action. In the second place, the power to award interest on the verdict from the date of the writ is to provide a discouragement to defendants, who in the greater number of actions for damages for personal injuries are insured, from delaying settlement of the claim or an early conclusion of the proceedings so as to have over a longer period of time the profitable use of the money which ultimately the defendant agrees or is called upon by judgment to pay."

19. However these comments were in regard to the Supreme Court Act and equivalent legislation, not s.53 of the Domestic Building Contracts Act. In *Linegrove v. J.G. King Pty Ltd* [2004] VCAT 1653, Deputy President Aird said (at para. 9):

> "9. Mr Lapirow has also submitted that I should make an order for damages by way of interest and referred me to s58 of the *Supreme Court Act* 1986. I am not persuaded that s58 imposes any obligation on the Tribunal..."

20. I respectfully agree. This Tribunal is not the Supreme Court. Moreover, it is a creature of statute and only has the powers that Parliament has given it. The power to award interest in a case such as this is to be found in s.53 of the Domestic Building Contracts Act, not the Supreme Court Act. Nevertheless, the observations made in the authorities concerning interest under the Supreme Court Act provide useful guidance when considering an application for interest under s.53.

### Whether it is fair to award interest

21. Mr Hellyer submitted that, in determining whether it was fair to award interest, the following findings of fact that I made should be considered:

    (a) the performance of the architect in failing to administer the construction in accordance with the terms of the contract. It was for the architect to assess claims and issue certificates and he did not do so. Progress claim number 13 was never assessed by the architect and I did not accept the explanation given for that omission. Further, no variations were paid after the issue of that claim despite promises to pay for them. The Owner was responsible for the architect under the terms of the contract.

    (b) the failure of the Owner, without any explanation, to pay the retention monies into the retention account;

    (c) the failure of the Owner to release one half of the retention monies until three months after they ought to have been released, in order to apply pressure on the Builder to attend to a list of defects she had prepared;

22. Mr Reid submitted that I should not award interest because:

(a) the Builder failed to rectify defects which it knew existed and had agreed to rectify:

(b) the Builder's lay witnesses argued against admitted defects during the proceeding;

(c) the Builder sought credits in regard to matters previously allowed;

(d) the Builder asserted that some items were outside the contractual scope of works despite documentation to the contrary;

(e) the Builder made submissions as to interest when an agreement had been reached that any such submissions would be made after final orders had been made;

(f) the Builder changed its position concerning the treatment of prime cost and provisional sum items during the course of the hearing.

23. The first of these considerations relates to negotiations that took place between the parties in relation to various complaints as to defects and incomplete work that were made by the Owner after the architect failed to assess the last progress claim, which was Progress Claim 13C. It is not suggested that there was any agreement between the parties that interest on any amount ultimately awarded would not be claimed for that period.

24. Those negotiations concerned what had to be done, access to the site by the Builder and demands by the Owner for a written scope of remedial work and the identity of the tradesmen who were to carry it out. Negotiations broke down and the scope of works the Builder had proposed was not completed but nor was the necessary access provided.

25. Mr Reid pointed out that, during these negotiations, the Builder was not making demands for payment of Progress Claim 13C but was putting the final reconciliation of figures to one side while the work was to be done. However these negotiations took place in a context whereby the Builder was unable to obtain payment of monies that were properly due to it for the work done because of the position the Owner had adopted. I do not see that that is relevant to the question whether interest should be awarded. The extent to which the Owner's complaints were justified is reflected in the ultimate award which has now been reduced by agreement to $130,000.00.

26. The other matters Mr Reid referred to are also reflected in the ultimate result. The proposed rectification work was not all carried out and so, insofar as the complaints were justified, the assessed cost of having that work carried out by another Builder were allowed in favour of the Owner in the course of arriving at the amount awarded to the Builder. I also note that, throughout the period during which the Owner was withholding payment there was an amount of $36,231.03 in the retention account which was available to be applied on account of the cost of rectifying the remaining items.

27. During the hearing, both parties raised matters concerning which they were ultimately unsuccessful but the end result was that the Builder was found to be owed a great deal of money which the Owner should have paid.

28. Ultimately, it must be borne in mind that I am concerned, not with abstract concepts of fairness, but with compensation for wrongfully withholding money that should have been paid to the Builder. I think that if money is wrongfully withheld it is fair that interest on it should be paid.

29. It was clear from the evidence that the Owner was withholding payments of money towards the end of the construction in order to apply pressure to the Builder to attend to her various complaints.

30. For example, as Mr Hellyer pointed out, the Builder was entitled under the contract to receive one half of the retention monies upon achieving practical completion, which occurred on 30 March 2012. The Owner did not release that one half of the retention monies until almost three months later. She gave as her reason the fact that she wanted the Builder to attend to a defects list she had prepared.

31. I accept that the Owner was not justified in doing that but an award of interest under s.53 is on the amount awarded and the amount Mr Hellyer referred to was not part of the final award. Hence it is not part of the money upon which an award of interest is now sought.

32. More relevant is an email sent by the employee of the architect, Mr Mani, to the Builder dated 8 October 2012, in which she said:

> "I spoke to Vince *[the Owner's husband]* this morning and he mentioned that they will not release any fund unless all defects and incomplete works are done. They have a list of items that they will send to me by the end of the week to clarify some of the credits that are due to them and items claimed incorrectly."(sic.)

33. The task the architect had to perform was the assessment of a progress claim, not a final claim. Under the terms of the Contract, it was not for the Architect to accept instructions from the Owner or her husband about whether or not she would "release funds" and it was not for the Owner or her husband to give any such instructions.

34. The appropriate course was for the Owner to allow the architect to assess Progress Claim 13C and issue a certificate for the amount properly allowable. The Owner should then have paid the amount of the certificate to the Builder. She should not be able to profit from her wrongful interference in the claims assessment process by holding onto money that should have been paid earlier.

35. I am satisfied that it is fair in this case to award damages in the nature of interest.

### The rate of interest

36. Although the section speaks of damages in the nature of interest, it does not appear to contemplate an enquiry into the actual loss that was suffered by an applicant by reason of having been deprived of the money. Rather, it appears to be the intention that an interest rate is to be applied to the sum awarded, which may be the interest rate fixed from time to time under s.2 of the Penalty Interest Rates Act or any lesser rate the Tribunal thinks appropriate. The term "appropriate" would seem to mean "appropriate in the circumstances of the case". It may be that regard could be had to such things as the rate of interest fixed by the terms of the major domestic building contract or the rate of interest the Builder was paying on its overdraft. The object of any award is compensatory not punitive.

37. I think the calculation should be at the rate fixed by the Act unless I find that a lesser rate is appropriate in the circumstances of the case. In the present case the interest rate fixed by the Contract was 10% per annum, compounding monthly, whereas the rate fixed by the Act for the relevant period was simple interest, fluctuating between 10% and 9 ½% and rising as high as 11½% for a period in 2014. There is no evidence as to the actual loss suffered by the Builder by reason of being deprived of the money during the period in question. In these circumstances I do not find that a lesser rate than that fixed by the Act is appropriate in the circumstances.

### The principal sum

38. Mr Reid said that the principal sum upon which interest should be awarded should be calculated by deducting from the sum of $130,000, the retention monies of $36,231.00. Mr Hellyer submitted that interest should be calculated on the whole of the sum of $130,000 but that a credit should be given to the Owner for the interest actually earned on the retention monies. Mr Reid said that it had been agreed by the parties that the retention monies would be held in the retention account earning only limited interest and that is true.

39. It seems to me that the money has sat in the retention account for an inordinately long period and that this was as a result of the Owner's actions. Since the purpose of the award of interest is to compensate the Builder for the loss of use of its money, I think Mr Hellyer's approach is more appropriate.

### The date from which interest should be calculated

40. There was disagreement as to the date from which interest should be calculated.

41. Mr Hellyer said that progress claim 13 was sent to the architect by email on 1 June 2012 and ought to have been assessed within 10 working days namely, by 15 June 2012 and the Owner would then have been required to pay the certificate within seven days, that is, by 22 June 2012. Consequently, he said that interest should be calculated from this date.

42. Mr Reid's primary submission was that any interest should only be allowed from the date of the commencement of the proceeding because the proper entitlement of the Builder was resolved by the proceeding. In that regard, he referred me to s.60 of the Supreme Court Act. However the claim for interest is to be determined in accordance with s.53 and that contains no such limitation.

43. Further, he said that Progress Claim 13C was not a demand for payment and that the Builder through its solicitors acknowledged thereafter that the Builder would only be entitled to the amount properly payable under the contract. He pointed out that it was not until 6 December 2013 that the Builder submitted its final claim for the work, which was in the sum of $310,998.16. Even then, he said, there were defects existing in the work.

44. Mr Reid referred me to the case of *Peet Ltd v. Richmond (No.2)* [2009] VSC 585 in which Hollingworth J limited the plaintiff's recovery of statutory interest from the date upon which it quantified its claim. That was a case in which the claim was brought on a quantum meruit basis and the learned Judge considered that the respondent could not effectively assess the quantum meruit claim until it had been properly articulated. In the present case, although there was an alternative claim for quantum meruit pleaded, the award was made on the claim brought under the contract.

45. Mr Reid said that the Builder did not articulate its claim until it issued its final claim on 6 December 2013 and it was only at that time that a demand for payment was made. He said that if pre-trial interest is to apply, it should apply only from that date. I think that the issues were always fairly clear. The Owner had advice from her architect, building consultant and solicitor and was in a position to assess the claim brought under the contract.

46. There were two further versions of Progress Claim 13, one sent on 26 September 2012 and the third on 14 December 2012. All three claims were for different amounts. It was the third of these, Progress Claim 13C, that formed the bulk of the claim that was ultimately made.

47. Mr Hellyer said that, if interest was to be calculated in accordance with Progress Claim 13C, that claim was submitted on 14 December 2012 and it ought to have been assessed by 2 January 2013 and paid by 9 January 2013. As a consequence, he said that any interest should be allowed from that date.

48. It seems to me that, since I held that each iteration of progress claim 13 was intended to replace its predecessor, and since the final order made in favour of the Builder was largely based upon the amounts set out in Progress Claim 13C rather than its predecessors, Mr Reid is right and if interest is to be awarded, it should be calculated from the date that Progress Claim 13C ought to have been paid that is, 9 January 2013. All of the other work with respect to which the ultimate award was made had been done by that date and the Owner had been in possession of the house since March the preceding year.

### The overpayment

49. The Owner paid the Builder $206,081.95 on 17 June 2016 and it was subsequently agreed that the amount of the award would be reduced to $130,000. Mr Reid said that the Builder had had the benefit of the use of the difference, being $76,081.94, from 17 June 2016 until 1 December 2016, the day upon which that amount was refunded. He said this amount should also attract interest at the rate fixed by the Penalty Interest Rates Act and the amount, which he calculated at $3,287.15, should be deducted from the interest allowed to the Builder. Since the award that I am making is compensatory in nature that would seem appropriate.

### Conclusion as to interest

50. For the foregoing reasons, interest will be calculated on the principal sum of $130,000.00 at the rate fixed from time to time by the Penalty Interest Rates Act, and deducting from that the interest earned on the money in the retention account and also interest on the amount refunded to the Owner. The result is $39,547.53, which is calculated as follows:

| | | |
|---|---|---|
| Interest from 9 January 2013 to 17 June 2016 | | $46,052.46 |
| less: interest earned in retention account | $3,217.78 | |
| interest on overpayment refund to Owner | $3,287.15 | $ 6,504.93 |
| Interest allowed | | $39,547.53 |

### Costs

51. The Builder seeks an order that the Owner pay its costs of the proceeding. The general power to award costs is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998. Where relevant, that section is as follows:

> "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.

……"

52. Mr Hellyer referred me to the judgment of Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where the learned judge gave some guidance as to how a claim for costs should be approached. His Honour said (at para 20 et seq.):

> "20. In approaching the question of any application for 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.
>
> (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."

53. His Honour added (at para 22):

> "22. Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but

when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule."

### The nature and complexity of the proceeding

54. Mr Hellyer referred to a number of authorities, including the judgment of Morris J in *Sweetvale v. Minister for Planning* [2004] VCAT 2000 in which the learned judge said (at para 19):

> "19 What can be said is this. It is more likely that the nature and complexity of a proceeding will make it fair to make an order as to costs if:
>
> - the proceeding was in the tribunal's original jurisdiction, not its review jurisdiction;
> - the proceeding involved a large number of issues, or a small number of particularly complex issues;
> - the proceeding involved a large sum of money or a major issue affecting the welfare of a party or the community;
> - the proceeding succeeded and was a type which was required to be brought, either by reason of a statutory duty or by reason of some unlawful or improper conduct by another party which warranted redress;
> - the proceeding failed and was a type where a party has asserted a right which it knew, or ought to have known, was tenuous;
> - a practice has developed that costs are routinely awarded in a particular type of proceeding, thus making an award of costs more predictable for the proceeding in question."

55. The development of a practice that costs should be routinely awarded in a particular type of proceeding was disapproved of by Ormiston J in *Pacific Indemnity Underwriting v. Maclaw* [2004] VSCA 165, where his Honour said (at para 35):

> "Now it does not follow that particular factors in building disputes, especially building insurance disputes of this kind, cannot activate the Tribunal's power to award costs as laid down by s.109, such as the "nature and complexity" of some building disputes or the unreasonableness of a Builder's or insurer's conduct, but it should be borne in mind at all times that the scheme of the VCAT legislation is that prima facie each party is to "bear their own costs in the proceeding". Why Parliament saw this to be appropriate in cases such as the present and why it chose not to vary s.109 so far as domestic building disputes, or at least claims against insurers, are concerned, may, to some eyes, be hard to fathom. If the same disputes were still able to be litigated in one of the ordinary courts of this State, there would be the conventional "bias" in favour of the conclusion that costs should follow the event, even if only on a party/party basis. But that is

not the presumption of the present legislative scheme, as represented in particular by s.109."

56. In each case where costs are claimed, the Tribunal must assess the nature and complexity of the case before it and then decide what weight to give that factor in determining whether or not to make an order for costs.

57. Mr Hellyer described the proceeding as having all the hallmarks of a major piece of commercial litigation. However labelling the case is of no assistance. I accept that the hearing occupied 13 sitting days, that there were 1,680 pages of transcript, that the Tribunal book was in excess of 2,000 pages and that the submissions that I received at the conclusion of the case amounted to several hundred pages. All those matters indicate a very large case in terms of time taken and material presented and I made a comment to that effect in the reasons for decision. Apart from the very large amount of factual material there were some complex contractual issues to be determined. There was also lengthy cross-examination.

58. This was a case that could not have been adequately conducted without each of the parties spending a great deal of money on legal representation and expert witnesses.

59. I am satisfied that the nature and complexity of this proceeding would normally support an application for an order for costs in favour of the successful party.

### The relative strengths of the parties' claims

60. Mr Hellyer relied on the following factors which he said indicated that the relative strengths of the parties' claims favoured the making of an order for costs in favour of the Builder. He said that:

    (a) the amount recovered according to the original decision was 90% of the amount claimed in its Points of Claim, before taking into account the amount of the Owner's counterclaim.

    (b) the Owner claimed an amount of $127,706 with respect to defects which was later revised to $232,789, whereas in closing submissions, the amount sought on behalf of the Owner for the cost of rectification was $65,549.00. The amount awarded for cost of rectification was $33,649.54.

    (c) the Owner claimed credits of $47,941.69 in regard to 21 items and the credits then progressively increased to an amount of $86,987.90 for 36 claimed credits. In the final determination, I allowed credits of $18,833.21 of which the Builder had conceded $15,683.20.

    (d) the total allowed on the counterclaim with respect to defects and credits was $52,482.75, being less than a quarter of the amount claimed by the Owner.

61. Mr Hellyer submitted that, in the circumstances, the Builder was substantially successful in the proceeding and the Owner was substantially

unsuccessful. Consequently, he said that it was appropriate that the Owner be ordered to pay the Builder's costs.

62. Mr Reid objected to the percentages referred to by Mr Hellyer and said that success should be measured against the reduced amount of the award which was $130,000. I think that is right. He said that represented only 45% of the Builder's claim set out in its Points of Claim although it was 53% of the amount sought in its rejoinder of 19 March 2015.

63. Mr Reid submitted that both parties had some success in the proceeding. He said that:

    (a) the Builder had sought damages of $313,043.08;

    (b) the Builder had an alternate claim for quantum meruit which was initially $371,864 and was later reduced to $350,495.80. He pointed out that the invoices to support the alternate claim by the Builder in quantum meruit were served on the first day of the hearing;

    (c) the Owner counterclaimed for $170,979.50, comprising defects of $64,549, credits of $86,979.90 and liquidated damages of $31,104, provisional and prime cost adjustments of $41,547.89 less variations properly due to the Builder of $53,247.78.

64. Mr Reid said that if one were to look at the differences between the maximum sought in the points of claim and the maximum sought in the counterclaim and rejoinder and compare these figures with the amount of the award it appears that the Owner has had more success than the Builder. I do not accept his analysis. If, apart from her own claim, she was admitting the Builder's claim, she should have paid it or at least paid the difference. If she was not admitting the Builder's claim then, from a positive position of $170,979.51 that she asserted, the Owner has moved to a negative of $130,000, a difference of over $300,979.51 whereas from a positive of $288,320.00 the Builder has moved to a positive of $130,000, a difference of $158,320.00. Moreover, by the time of the hearing the claim was reduced to a difference of $111,868.72.

65. Mr Reid referred me to the following passage from the Court of Appeal decision of *Chen v. Chan* [2009] VSCA 233 (at para. 10):

> "10 The contentions of the parties raise a number of questions relevant to costs orders on appeal. The principles relevant to these questions can be summarised as follows:
>
> (1) The general rule is that costs should follow the event. Absent disqualifying conduct, the successful party should recover its costs even where it has not succeeded on all heads of claim.
>
> (2) The Rules of Court permit significant flexibility in determining questions of costs. In particular, the Court is entitled to examine the realities of the case and will

attempt to do 'substantial justice' as between the parties on matters of costs.

(3) Where there is a multiplicity of issues and mixed success has been enjoyed by the parties, a Court may take a pragmatic approach in framing the order for costs, taking into consideration the success (or lack of success) of the parties on an issues basis. Generally, if such an order is made, it is reflected in the successful party being awarded a proportion of its costs but not the full amount.

(4) A Court may, when fixing costs in a claim where there has been mixed success, take into account complications which it considers will arise in the taxation of costs, as part of its consideration of the overall interests of justice.

(5) Where a Court determines to make an order apportioning costs, then it does so primarily as 'a matter of impression and evaluation,' rather than with arithmetical precision, having considered the importance of the matters upon which the parties have been successful or unsuccessful, the time occupied and the ambit of the submissions made, as well as any other relevant matter.

(6) Where a number of parties have had the same representation, there is a 'rule of thumb' as to the apportionment of costs, namely that, where some of those parties have been successful and others have not, each successful party is only entitled to his or her proportion of the costs incurred on behalf of all, plus the costs, if any, incurred exclusively on his or her behalf. The primary issue for determination in such a case is that of fairness as between the parties, having regard to the manner in which the trial, or appeal, has been conducted.

(7) Usually, an order for costs will be made on a party/party basis. But an order for costs on a solicitor/client or indemnity basis may be made where special or unusual circumstances have been demonstrated, for example, by establishing misconduct in the proceeding, that the proceeding was brought for an ulterior purpose, or that it was patently unreasonable to institute, or maintain, the proceeding. Special circumstances may also include the making of an allegation of fraud which is not proved."

66. In the case of *GT Corporation Ltd v. Amare Safety Pty Ltd* [2008] VSC 296 Robson J examined the authorities in regard to the making of costs on an issue by issue basis and said (at para. 31):

> "The following authorities establish that costs are a matter for the discretion of the judge but that discretion must be exercised judicially. Although it is said that costs follow the event, where a successful party has failed with respect to an issue of law or fact, any costs order in favour of the successful party may be adjusted to reflect that fact,

> particularly where the issue of law or fact can be regarded as discrete. In substance, the court may, in its discretion, order costs on an issue by issue basis and should, in exercising its discretion on costs, bear in mind these general principles."

67. Mr Reid said that the Builder had failed in its quantum meruit case and after purporting to determine the contract for repudiation it then sought to reinstate it and these matters took up substantial time. I do not think that much time at all was taken up with the alternate claim in quantum meruit which was hardly pursued at all. The purported termination was something raised in the overall factual matrix.

68. The mere fact that a successful party raises matters that might not ultimately succeed does not mean that there should necessarily be an adjustment of costs. In the case of *Cretazzo v Lombardi* (1975) 13 SASR 4, Jacobs J said (at para. 16):

> "But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues."

69. All of the passages cited in regard to courts must be read in the context of the different regime for awarding costs under s.109.

70. Although I accept Mr Reid's submission that neither party was wholly successful, it is a very rare case where that occurs and on any view the success of the Builder was substantial whereas the success of the Owner was very slight indeed.

### Section 109(3)(b) other matters

71. Mr Hellyer said that I should find that the Owner had unreasonably prolonged the time taken to complete the proceedings by introducing new claims and claims for credits, many of which were lacking in merit or were untenable. Certainly, the claims for credits, many of which appeared late in the proceeding, added to the time but I think I should be slow to find that, by raising an issue in a proceeding that was unsuccessful a party has unreasonably protracted the hearing. It is important to achieve finality of litigation and so any issues between the parties or claims that either of them wishes to raise should be included and be finally ruled upon, even though a number of them might ultimately fail.

72. Mr Reid said that, rather than attempt to resolve the matter by rectifying all of the defects in the work and then seeking payment of the outstanding amount, the Builder elected to commence proceedings. He said that it did this for its own reasons despite there still being defects in the work. I do not think that is an accurate representation of what occurred. I think the Builder made a real attempt to resolve the dispute and ultimately commenced these proceedings to obtain payment.

### Conclusion of the claim under s.109

73. Weighing up the foregoing matters I am satisfied that it would be fair in the circumstances to order the Owner to pay the Builder's costs of this proceeding. I must now consider the effect of the offers of compromise that have been made.

### The appropriate scale

74. Mr Hellyer argued that, because of the complexity of the proceeding, costs should be allowed on the Supreme Court Scale. He referred me to a number of cases in which such an order was made.

75. By rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, unless the Tribunal otherwise orders, the applicable scale of costs is the County Court Scale.

76. The rule reflects the general practice of this Tribunal to award costs on the County Court Scale and although costs have occasionally been awarded on the Supreme Court Scale, that is reserved for exceptional cases. There must be something about the case itself in terms of complexity, difficulty or importance in order to justify departing from the general rule and I am not satisfied that it is appropriate to do so in the present case. Although it was a long and difficult case, it turned mainly on factual disputes and weighing up expert evidence.

### The offers of settlement

77. The following offers of settlement were made on the following dates by one or other of the parties, either pursuant to s.112 of the Victorian Civil and Administrative Tribunal Act or as what are commonly called "Calderbank offers":

    (a) 1 April 2014

        The Builder offered to accept the sum of $260,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

    (b) 23 July 2014

        The Builder offered to accept the sum of $200,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

(c) 7 August 2014

The Owner offered to pay to the Builder $110,000 inclusive of costs, which sum included the amount in the retention account of $36,231.03;

(d) 19 August 2014

The Builder offered to accept the sum of $150,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

(e) 4 September 2014

The Builder offered to split the difference in regard to each item claimed on both sides, apart from the defects, which would remain to be determined.

(f) 16 September 2014

The Builder offered to accept the sum of $120,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

(g) 21 October 2014

The Builder offered to accept the sum of $115,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

(h) 27 October 2014

The Owner offered to accept payment of her costs on a solicitor-client basis plus an amount of $12,587.00 from the amount in the retention account, with the balance of the money in the retention account being paid to the Builder.

(i) 29 October 2014

The Builder offered to accept the sum of $80,000, payable within 30 days of the date of acceptance of the offer, plus party-party costs to be assessed on the County Court scale.

78. I accept Mr Reid's submission that the offer of 4 September was not an offer that would have resolved the proceeding. Each of the other offers made by the Builder purport to have been made pursuant to s.112 of the *Victorian Civil and Administrative Tribunal Act* 1998, except for the offer of 21 October, which was only open for acceptance for 7 days.

79. Sections 112-114 of the Act (where relevant) are as follows:

"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.

113. Provisions regarding settlement offers

……

(3) A party may serve more than one offer.

(4) If an offer provides for the payment of money, the offer must specify when that money is to be paid.

114. Provisions concerning the acceptance of settlement offers

(1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.

(2) The minimum period that can be specified is 14 days."

80. The orders made in this proceeding are:

(a) the order made in the Builder's favour in this proceeding on 13 August 2012 which has been reduced by agreement to $130,000.00; and

(b) the award of interest made in this order of $39,547.53.

81. Each offer was for the amount stated plus party-party costs which, in current parlance, is costs on the standard basis. In regard to each of these offers, I must decide whether I can make a finding that the outcome of the case was "not more favourable" to the Owner than the offer.

82. The outcome of the case was, by agreement, $130,000 to be paid to the Builder. This amount takes into account the Owner's counterclaim. I must also take into account any costs that I would have ordered on the date the offer was made. Having regard to the stage the interlocutory steps in the litigation had reached by August 2014, I am satisfied for the reasons given above that I would have made an order for costs on a party-party basis in favour of the Builder at or after that time and so it is only the amount offered that is relevant.

83. Mr Hellyer pointed out that the outcome of the case was less favourable to the Owner than the offers made on 19 August, 16 September, 21 October or 29 October and I accept that is the case. As a consequence, he said, the Builder is entitled to an order for payment of all of its costs incurred after the offers were made, pursuant to that section.

**"All costs incurred" after the offer was made**

84. Mr Hellyer sought costs on a full indemnity basis. He referred me to the case of *Duggan v. MGS Products Pty Ltd* [2002] VCAT 1764 where Deputy President Macnamara (as his Honour then was) said (at paragraph 25) that the expression "all costs" meant costs on a full indemnity basis.

85. However Mr Reid referred me to *Velardo v. Andanov* [2010] VSCA] 38, where the Court of Appeal said that the section creates a prima facie entitlement to payment of all costs assessed on a party-party basis, although it suggested that it would be open to the Tribunal in an appropriate case to award costs on a more favourable basis.

86. I have already found that the Builder is entitled to an order under s.109 for payment of its costs. I am also satisfied that the Builder is entitled under s.112 to an order for all of the costs that it incurred as from 19 August 2014. The question is whether they should be assessed on a more favourable basis than the standard basis.

87. In *Fountain Selected Meats (Pty Ltd ) - v.- International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397, Woodward J said (at p.401):

> "I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. When they occur, the court will need to consider how it should exercise its unfettered discretion."

88. The significance of an unsuccessful party failing to accept a Calderbank offer was considered in some detail by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298. The court said (at paragraph 17 et seq.):

"17. Calderbank letters and the consequences that flow from them have been considered by the Trial Division of this Court in a number of cases: see *M T Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No.3)* [2000] VSC 163; *Clarke v ABC* [2001] 274; *Pearson v Williams* [2002] VSC 30; *Nolan v* Nolan [2003] 136; and *Aljade & MKIC v OCBC* [2004] 361.

18. One of the seminal contributions to the law on indemnity costs was the judgment of Sheppard, J. in *Colgate Palmolive Company v Cussons Pty Ltd* [1993] FCA 936. Amongst the circumstances listed by his Honour as having been thought to warrant the exercise of the discretion to award indemnity costs was –

"an imprudent refusal of an offer to compromise".

So widely has this been accepted that the proposition has been advanced that a Calderbank offer gives rise to a presumption that the party rejecting the offer should pay the offeror's costs on an indemnity basis if the offeree receives a less favourable result (see for example, *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1996) 138 ALR 425).

19. In *Aljade and MKIC v OCBC* [2004] VSC 351 however, Redlich, J. rejected the notion of any such presumption, holding that the weight of authority –

"strongly points to an approach that involves no preconceptions about when the rejection of a Calderbank offer should lead to the making of a special costs order. It will do so where it is concluded that the rejection of the offer was unreasonable."

We respectfully agree with his Honour's conclusion. We note, as did his Honour, that the notion of such a presumption has been decisively rejected by the New South Wales Court of Appeal (most recently in *Brymount Pty Ltd v Cummins* (No.2) [2005] NSWCA 69), by the Federal Court and by the Queensland Court of Appeal.

20. The correct approach, in our view, is to treat the rejection of a Calderbank offer as a matter to which the Court should have regard when considering whether to order indemnity costs. As Gyles, J.A. stated in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 -

"In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rules as to costs..."

89. These comments are made in the context of court proceedings where the successful party is prima facie entitled to an award of costs. In this Tribunal, the prima facie position is that parties pay their own costs.

90. I reviewed some of the authorities as they then stood in *Paleka v Suvak* [2000] VCAT 58 and concluded as follows (at paragraph 29 et seq.):

> "29. I think the conclusion to be drawn from all of the authorities cited and the various quotes to be found in the judgements is that costs, where they are awarded, are normally ordered to be taxed on a party-party basis but that they may be awarded on some other basis in an appropriate case. It is in the unfettered discretion of the Tribunal to determine which basis should be adopted. In the exercise of this discretion the Tribunal will take into account the purpose for which provisions such as s. 112 are enacted but more importantly, it will have regard to the circumstances of the particular case. It is well recognised that party-party costs are usually considerably less than the costs that the successful party has actually spent in prosecuting or defending the application. Even solicitor / client costs, although more generous, fall short of a complete indemnity. Indemnity costs purport to provide a full indemnity but may (according to the terms of the order) not include costs that are unreasonably incurred.
>
> 30. Generally, party-party costs should be awarded. Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party-party costs if they are unsuccessful. Solicitor / client costs are ordered when the party against whom the order for costs has been made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy. That is, the circumstances justify a harsher order than even solicitor / client costs.
>
> 31. I think the foregoing represents the general thrust of the various authorities referred to but it is not intended to express any hard and fast rule. In each case it is for the Tribunal in its unfettered discretion to decide what order is appropriate in the circumstances of that particular case."

91 In *Arapolglou v. Shkolyar* [2012] VCAT 46 Senior Member Riegler took a similar view and stated (at para. 12):

> "The principal advantage in making an offer under the Act which is found to be more favourable than the determination of the Tribunal is that it affords the offeror an improved prospect of recovering costs. However, it does not guarantee that outcome, nor does it necessarily mean that an enhanced costs order will be made. Much will depend on the circumstances before the Tribunal in each particular case."

92 The learned Senior Member found that the rejection of the offer in the case before him was imprudent having regard to the nature of the claim

and counterclaim. Although he ordered costs on a solicitor client basis, he said (at para. 15):

> "I do not accept that it is appropriate to order those costs on an indemnity basis as I consider that such an order should be reserved for the most extreme cases. For example, where a party is shown to have acted vexatiously or there are other special or unusual features in the case to justify the Tribunal exercising its discretion in that way."

93 The two bases for awarding costs now is on a standard basis or on an indemnity basis. The Tribunal has an unfettered discretion as to the award of costs but if they are awarded on some other basis that might create difficulties of assessment. In considering whether to award costs at a higher rate than the standard basis because of the rejection of an offer of compromise, the determining factor is the reasonableness or otherwise of the offeree's rejection of the offer.

94 In the present case there were a very large number of issues indeed to look at when considering any offer but it must have been apparent to the Owner that there was a substantial balance to be paid to the Builder. The Owner was advised by her architect and also by lawyers and a building expert who were experienced in building disputes. Successive offers were made by the Builder over a relatively short period of time in an effort to resolve the matter. She therefore had a number of opportunities to properly assess her own case and the case presented by the Builder.

95 The question that I now must deal with is not whether the Owner has failed to achieve a better result than a particular offer. I have already found that I ought to make an award of costs in favour of the Builder pursuant to both s.109 and s.112. The question is, can I say, in regard to the failure to accept any of these offers, that such failure was so unreasonable that I should award costs on an indemnity basis?

96 It is a high bar for the Builder to get over but, although there may have been some doubt in regard to earlier offers, it seems clear to me that, properly advised, the Owner should have known that she had no chance of bettering the Builder's offer to accept $80,000.00 plus party-party costs. By rejecting that offer and continuing the proceeding she acted recklessly and caused needless expense to herself and the Builder. It is not fair in the circumstances that the Builder should suffer from her conduct.

97 There will therefore be an order that the Owner pay the Builder's costs of the proceeding, including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court on the County Court Scale on a standard basis up to and including 29 October 2014 and thereafter on an indemnity basis.

**SENIOR MEMBER R. WALKER**