VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

civil DIVISION

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| building and property LIST | vcat reference No. BP 350/2016 |
| CATCHWORDS | |
| PRACTICE AND PROCEDURE – Damages in the nature of interest under s53 the *Domestic Building Contracts Act 1995* (Vic) – rate to be applied – relevance of principles applied to s60 of the *Supreme Court Act 1986* (Vic) – whether a predisposition for the rate under s2 of the *Penalty Interest Rates Act 1983* (Vic) – finding that interest involving a penalty component was not “fair” – costs orders in complex and substantial building disputes – application for indemnity costs – *Calderbank* offer – offer open ended and conditional on written settlement terms – costs on the standard basis only – whether Supreme Court or County Court scale appropriate | |

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| APPLICANTs | Owners Corporation No.1 of PS613436T (and others according to the schedule on the Tribunal file entitled “Schedule of Parties as at 8 August 2018”) |
| RESPONDENTs | L.U. Simon Builders Pty Ltd (ACN 006 137 220) (and others according to the schedule on the Tribunal file entitled “Schedule of Parties as at 8 August 2018”) |
| WHERE HELD | Melbourne |
| BEFORE | His Honour Judge Woodward, Vice President |
| HEARING TYPE | Costs application |
| DATE OF HEARING | 1 April 2019 |
| DATE OF ORDER | 1 April 2019 |
| DATE OF REASONS | 9 April 2019 |
| CITATION | Owners Corporation No.1 of PS613436T v Lu Simon Builders Pty Ltd (No. 2) (Building and Property) [2019] VCAT 468 |

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| **APPEARANCES:** |  |
| For the Applicants: | Mr W Thomas of counsel |
| For the First Respondent: | Mr P Murdoch QC with Mr R Andrew of counsel |
| For the Second and Third Respondents | Mr J L Evans QC with Ms V Blidman of counsel |
| For the Fourth Respondent | Mr J Twigg QC with Mr J M Forrest |
| For the Fifth Respondent | Mr T Margetts QC with Mr J B Waters of counsel |
| For the Sixth Respondent | No appearance |
| For the Seventh Respondent | No appearance |
| For the Eighth Respondent | No appearance |
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**REASONS**

### Background

##### I delivered my detailed reasons in this matter dealing with liability and aspects of loss and damage on 28 February 2019 (“my earlier reasons”). These reasons should be read in conjunction with my earlier reasons. In particular, terms used in these reasons have the meanings given in those reasons. In paragraphs [7] and [647] of my earlier reasons, I noted that I would hear further from the parties on the appropriate form of orders giving effect to my findings to date, on the progress of negotiations to finalise the outstanding loss and damage issues and on any further orders and directions that should be made to bring those issues to finality.

##### At a directions hearing on 7 March, I made orders for the payment of sums representing the loss and damage agreed and determined to that point, and set a timetable for the filing and exchange of affidavit material and written submissions on all outstanding matters. I fixed the further hearing of final submissions on the outstanding questions relating to loss and damage, interest and on costs, for 1 April 2019. At the hearing that day, I heard oral submissions and pronounced my orders (after giving brief reasons) in stages. I said that I would finalise orders that afternoon, and deliver more considered reasons in due course. These are those reasons.

1. By the time the matter came on for hearing on 1 April 2019, almost all of the outstanding questions on loss and damage had been agreed, as noted in the orders made that day. A sum of $5,189.09, representing further damages in respect of interest payable by the applicants under the Lannock Loan, had not been agreed, but the Owners’ claim for that sum was not opposed. The issues thus raised for consideration at the hearing on 1 April 2019 were as follows:
   * Are the Owners entitled to interest on the sums awarded in their favour and, if so, at what rate and over what period?
   * Are the Owners entitled to an order that LU Simon pay their costs of the proceeding and, if so, should any part of those costs be assessed on an indemnity basis?
   * Is LU Simon entitled to be reimbursed by the other respondents for any costs it is ordered to pay to the Owners and, if so, how much and how should those costs be shared among the respondents?
   * Is LU Simon entitled to an order that the other respondents pay its costs of the proceeding and, if so, should there be any adjustment to the costs it is entitled to claim because of its failure to settle the proceeding with the Owners or with Elenberg Fraser?
   * What orders should be made between the other respondents in relation to any order that they pay LU Simon’s costs?
   * Should any costs ordered to be paid be assessed on the County Court or Supreme Court scale?
   * Are the Owners entitled to an order facilitating a possible application for damages in respect of any increase in the cost of recladding works?

## Interest

##### The Owners seek $1,785,754.72 in interest on the various sums awarded to them. This figure is calculated on the value of those sums from the date of commencement of the proceeding, or when the sums were first expended (whichever is later), at the rate fixed from time to time by s2 of the *Penalty Interest Rates Act 1983* (Vic) (“PIR Act”). That rate was 9.5% from 23 March 2016 and 10% from 1 February 2017.

##### There is no provision in the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) for awarding interest. However, the Tribunal has the power to award damages in the nature of interest in domestic building cases under s53 of the DBC Act, which relevantly provides as follows:

“(1) VCAT may make any order it considers fair to resolve a domestic building dispute.

(2) Without limiting this power, VCAT may do one or more of the following—

(a) refer a dispute to a mediator appointed by VCAT;

(b) order the payment of a sum of money—

(i) found to be owing by one party to another party;

(ii) by way of damages (including exemplary damages and damages in the nature of interest);

(iii) by way of restitution;

…

(3) In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** or on any lesser rate it thinks appropriate.”

### Should interest be awarded?

##### Neither LU Simon nor the Gardner Group sought to argue against an order for interest. The focus of their submissions was on the rate to be applied, as discussed below. Elenberg Fraser (with the apparent endorsement of Thomas Nicolas) submitted that s53 of the DBC Act “does not expressly or by implication permit VCAT to award of interest, in the nature of damage (sic), on damages and properly read is intended to give the VCAT power to order payment of common law damages”. It argues that s53 “is not expressed in the same or similar terms to [s60 of the *Supreme Court Act 1986* (Vic) (“SC Act”)] and the purpose for the Tribunal to have such a power is different; namely to resolve the dispute and not to award interest on damages”.

##### Elenberg Fraser next argues that damages in the nature of interest is payable (on the principles in *Hungerford v Walker* (1990) 171 CLR 125) only upon the proof of foreseeable loss. It asserts that the Owners have adduced no evidence that they were put out of the use of their money as a consequence of the breach of warranties or the late payment of damages. And it further argues that LU Simon cannot simply “tunnel ball” the Owners’ loss to the other respondents and must independently adduce evidence that an award of interest to the Owners would cause loss to LU Simon.

1. In my view, the contrast that Elenberg Fraser seeks to draw between s53 of the DBC Act and s60 of the SC Act, is a distinction without a difference. The sections are relevantly expressed in similar terms (both refer simply to “damages in the nature of interest”). The principal difference is that the former section mandates an order for interest “unless good cause is shown”, whereas the latter requires only that any order for interest must be “fair”. But any qualification on the scope of the discretion is not relevant to the purpose of the sections. As the authorities on both sections make clear, that purpose is to qualify the common law by empowering the court to award interest on damages recovered.
2. I refer below in discussing the interest rate to be applied to several of the applicable authorities on s53 of the DBC Act. Having regard to those authorities, I adopt with respect the historical analysis of s60 of the SC Act undertaken by Gillard J in *Johnson Tiles Pty Ltd and Ors v Esso Australia Pty Ltd and Ors* (No. 3) 2003 VSC 244 at [20] to [25] (“*Johnson Tiles*”) as equally applicable to s53 of the DBC Act. And, subject to obvious differences in wording which I will come to, I also adopt Gillard J’s discussion in *Johnson Tiles* of the purpose of giving courts the power to award interest on damages.
3. In particular, in the course of discussing whether the plaintiff’s delay provides a basis for refusing or reducing interest, Gillard J observed (at [51]-[52]) that:

“But in practice delay is rarely a justifiable basis for refusing interest for any period, because of the self-evident observation that the defendants have had the use of the money since the commencement of the proceeding. This was the approach taken by this court in the early years following the introduction of the new power to award interest in damages cases in 1962.

In *Marsh v Ruby*, [[1975] VR 191 at 193] Gowans J said –

‘The policy behind the new provisions is that in the cases specified the defendant is, on judgment being pronounced or entered, to be treated as having kept the plaintiff out of his money and in doing so had the use of it himself so that he ought to compensate the plaintiff accordingly. …

Since the rule is that interest is to be allowed the defendant has the onus of showing why he should not be required to pay according to the tenor of the section for the benefit he has derived from his use of the money since it was first claimed against him in the action. As I see it, such discretion as is conferred is not intended to be directed to penalising the plaintiff but to alleviating the defendant in the proper case. He may be able to show that he has been disadvantaged in some way by the plaintiff’s conduct … . But in general the defendant will not establish that he has been disadvantaged by showing that he has had the use of the money for longer than he should have been allowed to keep it. He would need to show collateral effects of the delay to his disadvantage.’”

1. Thus I agree with the oral submissions by counsel for the Owners that:

“The authorities on s.53 don’t make good the proposition it’s not intended to allow damages in the nature of interest on loss of use of money. In fact, they’re to the opposite effect. It’s not the case that some specific proof of loss caused by deprivation of loss of use of money is required for an award of interest under that section. The cases which are cited in Elenberg Fraser’s submissions in support of that proposition, in my submission, don’t support it. But in any event, Your Honour, we say it’s self-evident the applicants have suffered loss due to the deprivation of the use of money which has been spent.”

1. Having said that, evidence clearly has a role to play in considering an order for interest under s60 of the SC Act and s53 of the DBC Act. This is particularly so in the case of the latter, where the discretion is unqualified, except by the requirement that the order be “fair”. In my judgment, the Tribunal will usually be assisted both on the question of whether an award of interest is “fair” and the appropriate rate to be applied, by some evidence of how the applicant has covered its expenses pending an award of damages in its favour. Absent such evidence, the Tribunal is left to rely on more imprecise concepts, such as were identified by counsel for the Owners in oral submissions as follows:

“Your Honour can take notice of the fact which is made clear in several of the authorities to which I've referred in my written submissions namely in *Caldwell* [*v Cheung* [2008] VCAT 1794], paragraph 4, and also the case of *Glenrich Builders* [*Pty Ltd v Modonesi* (Domestic Building) [2013] VCAT 543 at [9]], that money declines in value over time.”

### What rate of interest should be applied?

##### The Owners submit (citations omitted) that:

“Section 53 requires the Tribunal first to determine whether it is fair to award interest and, if so, then to award interest at the rate fixed under the *Penalty Interest Rates Act* or at any lesser rate it thinks appropriate. Interest ordered under s53 should be calculated according to the penalty interest rate unless the Tribunal considers that a lesser rate is appropriate in the circumstances of the case.”

##### In oral submissions, counsel for the Owners framed the submission as follows:

“[U]ltimately it goes back to the approach which we urge on the tribunal in light of the [penalty] interest rate being the starting point. In my submission, that rate has been specifically adopted in the legislation as an appropriate rate for the purpose of compensation unless there is some basis to depart from it and unless…there is evidence that some lesser amount is appropriate in order to adequately compensate the judgment creditor”

##### The Owners cite two authorities in support of this approach, namely, *Caldwell v Cheung* [2008] VCAT 1794 (“*Caldwell*”), at [5] and *TCM Building Group Pty Ltd v Mercuri* (Building and Property) [2017] VCAT 1057 (“*TCM Building*”) at [36]-[37]. They also note that the latter decision was the subject of a decision refusing leave to appeal, in *Mercuri v TCM Group Pty Ltd* [2018] VSC 604. However, the court in that case (Daly AsJ) was concerned with the range of factors that the Tribunal took into account in determining that interest ought to be paid at all. It did not consider the Tribunal’s approach to the determination of the rate to be imposed.

##### In Caldwell at [5], Senior Member Lothian held:

“Parliament could have chosen to have the Tribunal assume that interest would be awarded where money is awarded, but it did not do so. The test for entitlement to interest is whether it is “fair”, then the rate of interest is the PIR Act rate or any lesser rate I consider “appropriate”.”

1. The Senior Member went on in that case to make further observations, relied on before me. These were (at [7] and [8]—relied on by the Owners):

“Another consideration, which is also relevant to the award of costs, is the relative strengths of the claims of each party. This is not a dispute where a party has made a claim for an amount that has been awarded without deduction, or without substantial deduction. It is not a case where there is evidence that one party has done everything in its power to delay the inevitable day when it will have to pay the other. It occurs to me that such a case would be more deserving of interest at a penalty rate (as indicated by the title of the PIR Act) than the case in hand.

This is also not a dispute where, either before or after lodging the application, one party has obviously acted fairly and reasonably whereas the other has not. In particular I consider each party acted unfairly and to some degree dishonestly towards the other.”

1. And (at [9] and [10]—relied on by LU Simon):

“Nevertheless, a substantial sum has been awarded to the Owner, the whole amount payable was due when the counter claim was lodged and it is reasonable that it should not be eroded by the passage of time. I have no evidence before me as to the source of the Owner’s funds - whether it was derived from his own savings or was sourced from a loan. Section 97 of the *Victorian Civil and Administrative Tribunal Act* 1998 (“VCAT Act”) requires the Tribunal to “act fairly and according to the substantial merits of the case …” and section 98(1)(c) entitles it to “inform itself on any matter as it sees fit”, subject, of course, to being bound by the rules of natural justice.

I consider in this case it would not be fair to award penalty interest, and also unfair to award no interest. Having regard to the rate I consider “appropriate” under s53(3) of the DBC Act, I allow interest on the lowest reasonable interest rate, which I find is a fixed term deposit rate. The current fixed term deposit rate at the Commonwealth Bank for amounts between$10,000.00 and $500,000.00 is 7.5%. I apply that rate.”

1. *TCM Building* was an action by a builder for recovery of sums owing under a major domestic building contract. The matter had originally come before Senior Member Walker some two or three years earlier, when the Senior Member had ordered that the owner pay to the builder the sum of $206,081.95 plus interest of $42,319.15, after taking into account the owner’s counterclaim for defects, in so far as it was successful. The owner later sought leave to appeal to the Supreme Court, but this application was settled on the basis of consent orders to the effect that the amount to be paid by the owner to the builder was reduced to $130,000 and the question of interest was remitted to the Tribunal for re-hearing by the Senior Member.
2. The Senior Member explained that the claim for interest was brought variously under s53 of the DBC Act, the terms of the building contract and s58 of the SC Act. He noted that the building contract provided for interest on overdue amounts at the rate of 10% per annum, compounding monthly. The Senior Member was referred to (and set out in his reasons) paragraphs of his earlier decision in *Quinlan v Sinclair* [2006] VCAT 1063. These paragraphs were also relied on by LU Simon before me. In my view (with respect), they correctly state the principles to be applied and conveniently explain the significance of the differences in wording between s60 of the SC Act and s53 of the DBC Act. After confirming s53 of the DBC Act as the source of the power to award interest, the Senior Member held (at [10]-[11]):

“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.

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.”

1. After later finding that he was satisfied in the circumstances of the case before him that it was fair to award damages in the nature of interest, the Senior Member held, in the passages relied on by the Owners before me, as follows:

### “The rate of interest

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.

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 9½% 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.”

1. There are two matters arising from these passages that have caused me some unease. The first is the statement that the section “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”. If the Senior Member was here reflecting only that such an enquiry is not a necessary pre-requisite for an order for interest, then I agree. Indeed, this is essentially the point I was seeking to make above in my consideration of Elenberg Fraser’s submission opposing any order for interest absent proof of foreseeable loss.
2. However, if the Senior Member is instead intending to convey that such an enquiry is either unhelpful or even irrelevant, then I would respectfully disagree. In my view, such evidence is probably the best evidence of what interest rate is “fair” in all the circumstances of the case, providing the applicant has acted reasonably and subject to the cap imposed under s53(3). I am inclined to think that the Senior Member was not intending the second approach, because a few sentences later he refers to “appropriate in the circumstances of the case” as potentially meaning “the rate of interest the Builder was paying on its overdraft”. To me this would be evidence of actual loss suffered by an applicant.
3. Similarly, Senior Member Lothian refers in the passage from *Caldwell* above to her having “no evidence before me as to the source of the Owner’s funds - whether it was derived from his own savings or was sourced from a loan”. I read the passage as conveying two things. First, that the Senior Member would have been assisted by such evidence. And, second, despite the lack of such evidence, she considered it would be unfair to order penalty interest and also unfair to order no interest. In the result, she awarded interest “on the lowest reasonable interest rate, which I find is a fixed term deposit rate”.
4. The second matter arising from the above passages from *TCM* *Building* that has caused me some unease, is the statement that “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”. This statement (and the Owners’ submissions to similar effect) appears at first blush to echo the observation by Gillard J in *Johnson Tiles* (emphasis added) that s60(1) of the SC Act requires the court to fix a rate “not exceeding” the rate fixed by s2 of the PIR Act “and it is a question of discretion as to what is the appropriate rate. As a general rule, *the starting point* is that rate”.
5. However, Gillard J goes on to discuss the apparent tension between, on the one hand, the principle that an award of interest is not to punish the defendant and, on the other, the fact that: “As the name of the [PIR] Act suggests, there is a penalty component included in the rate” (at [27]. In particular, His Honour observes (at [68]-[69]):

“There is a penalty component in the rate; is a penalty a form of punishment? No defending litigant in this day and age properly advised by his lawyer could be under any misapprehension about paying a penalty interest component if unsuccessful.

In *Grincelis v House*, [(2000) 74 ALJR 1247 and 1251] the High Court referred to the *Penalty Interest Rates Act* 1983 in Victoria and stated –

‘As was noted in *Gogic*:

‘The function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period: *Batchelor v Burke*’

There is no doubt that this is a very important purpose of statutory provisions providing for the award of interest on the amount of a debt or damages in respect to the period between the cause of action accruing (or, in some statutory provisions, the commencement of the proceedings) and the date of judgment. It may be, however, that statutory provisions for interest serve not only that purpose, but also a purpose of encouraging early resolution of litigation.’”

1. After re-stating that the rate fixed from time to time under the PIR Act “contains a penalty component determined by the Attorney-General after consultation with the Treasurer…[t]hat is the plain meaning of s.2(2) of the [PIR Act]”, His Honour discusses evidence before him of base interest rates on bank overdrafts to commercial borrowers. He then affirms that the rate of interest and the period during which interest is calculated are matters of discretion for the court and finds on the facts before him that it would be unjust to award the full penalty interest rate. Those facts included that full details of the extent of the claims that ultimately succeeded were not known until relatively late in the proceeding.
2. His Honour concludes on this issue as follows (at [73]-[75]):

“If the claimants are given interest at a rate which is compensatory, they are compensated for the period during which they were out of their money. The penalty aspect which is aimed at encouraging settlements and deterring defendants from delaying the proceeding in my opinion does not apply in relation to these claims.

Mr Collins SC sought to counter this argument by submitting that the general rule was that the penalty rate was the starting point, and secondly that Esso, by contesting the property damage claim, delayed the resolution of claimants’ claims. But this submission overlooks the facts that the claimants were not parties and the quantum of their claims was not in issue until they were permitted to participate in the proceeding.

In my opinion, justice would be well served if the rate of interest was fixed at a rate which was compensatory and not including a penalty. The only evidence I have is the overdraft rates and I propose to act on that evidence. I invited Mr Collins SC, if he so desired, to place other evidence before me as to the appropriate rate of interest during the period. No other material was placed before the court.”

1. Having regard to Gillard J’s reasons as a whole, it seemed to me at least arguable that His Honour’s initial reference to “the starting point” should not be understood as suggesting that the determination of an appropriate rate should be approached with a predisposition towards the penalty interest. Rather, His Honour is referring to the “starting point” in a more literal sense, namely, that the first step in the analysis is to ask whether the rate fixed under s2 of the PIR Act (which includes a component of penalty) is *or* is not appropriate.
2. There are two further factors that attracted me to this argument. First, on one view, the language in s53 is more permissive than that used in s60 of the SC Act. In particular, under s53 of the DBC Act, it might be posited that the “starting point” for determining interest under that Act is found in s53(1), which imposes the overarching condition that any order (including in respect of interest) must be “fair”. Second, in the current climate of historically low interest rates, the “penalty” component of an interest rate currently fixed at 10%, appears to dwarf what might reasonably be regarded as compensatory.
3. However, as I have already observed (but with one minor reservation referred to below), the better view is that the differences in language between s60(1) of the SC Act and s53(3) of the DBC Act are more apparent than real, particularly in relation to the expression of discretion applying to the selection of the penalty interest rate. And it is clear that the weight of authority on the former section supports the view that (at least in Victoria) there is a predisposition in favour of the rate fixed under the PIR Act, or at least that the penalty rate is “routinely awarded”. That authority is conveniently summarised in the recent decision of Garde J in *Minister for Energy, Environment and Climate Change v Morton* [2017] VSC 774 at [101]-[106].
4. The reservation is that there is some suggestion in the authorities discussed by Garde J that courts considering s60(1) of the SC Act read the expression “unless good cause is shown” as qualifying both whether interest should be awarded at all, and the application of the penalty rate. For example, in *Hartley Poynton v Ali* (2005) 11 VR 568 at [107], Ormiston JA reasoned: “…the pattern in Victoria has been that, unless good cause be shown, successful plaintiffs are ordinarily awarded interest at the rate prescribed under the Penalty Act”. I am not convinced that the section should be so read (see, for example, Gillard J in *Johnson Tiles* at [45]). If it is, this would stand as a material distinction between s60(1) of the SC Act and s53(3) of the DBC Act.
5. But unless and until others who might share my reservations and can speak with greater authority weigh into the issue, I accept that Senior Member Walker in *Caldwell* correctly states the law concerning the selection of the interest rate. The calculation should be at the rate fixed by the PIR Act, unless I find that a lesser rate is appropriate in the circumstances of the case. I do so. And in reaching that conclusion, I am assisted by the reasoning of Gillard J in *Johnson Tiles*. In this case (as in *Johnson Tiles—* seeat [72]), I consider that it would not be fair to award the full penalty interest rate in respect of the claims.
6. In urging a contrary view, the Owners note that “[i]n a case in which ‘one party has done everything in its power to delay the inevitable day when it will have to pay the other’, the injured party will be more deserving of an award of interest at the penalty interest rate” (citing *Caldwell* at [7]). They then refer to my earlier reasons where I found in substance that the Owners’ entitlement to an award of damages for breach of the warranties by LU Simon under the DBC Act was unarguable. Finally, they submit that it was open for LU Simon to resolve the Owners’ claims well before the trial and to have proceeded against the other respondents for indemnity, resulting in the Owners having the use of the money previously spent on rectifying the building after the fire.
7. In reply, LU Simon submits that this is not a case where a party has done everything in its power to delay the inevitable. It relies for this purpose on a comprehensive summary in the affidavit of Marcus Saw affirmed 28 March 2019 (“Saw affidavit”), of the steps taken by LU Simon since commencement of the proceeding to bring the matter to hearing. It also refers to the fact that the Owners’ claims were arguably apportionable, including as against LU Simon. After setting out authority discussing the limitations in any preliminary determination of apportionment questions, LU Simon submits:

“In the circumstances of this case LU Simon would have taken an unnecessary risk had it admitted liability to the Applicants, because it would then have lost the opportunity to rely on the proportionate liability provisions of the *Wrongs Act* 1958. This risk was made all the more real by the defences of each of the consultants, especially the defence of Gardner Group and Galanos which sought to argue that the use of ACP in the exterior walls of the building was compliant with the BCA.”

1. I agree. I discuss in my earlier reasons (at [579]-[580]) what was in dispute in relation to proportionate liability. In particular, I note that my task was made easier by my findings that LU Simon’s breaches of the warranties implied by the DBC Act did not arise from a failure to take reasonable care. Had I found otherwise (as the other respondents urged I should), the ultimate resolution of the Owners’ claims (including as against LU Simon) would have been far from straightforward.
2. I also refer, in my earlier reasons to the claims for contributory negligence against the Owners in respect of their alleged failure to police the covering of smoke detectors and the storage of flammable materials on the balconies. These claims essentially turned on the facts and expert evidence. While they were ultimately found in the Owners’ favour, contrary findings were pressed by a number of the respondents, including during final submissions, and the outcome was not certain.
3. As I observed during oral submissions, it is self-evident that this proceeding had many moving and interconnected parts. Further, there were material amendments to pleadings being canvassed and made right up to and during the hearing, and both lay and expert evidence was also continuing to surface both shortly before and in the early stages of the hearing. And, finally, significant elements of the Owners’ claims for loss and damage were unresolved both during and after the hearing, with the result that the full extent of LU Simon’s exposure in the proceeding was far from clear.
4. Against that background, I consider that LU Simon should not be penalised for its forensic decision to defer conceding or seeking to settle the Owners’ claims until the evidence had concluded. Further, it should not be discouraged by the risk of exposure to a penal interest order, from deciding in closing submissions to concede or not press claims that it has by then determined are unlikely to succeed. In those circumstances, I am satisfied the penalty aspect of the penalty interest rate aimed at encouraging settlements and deterring respondents from delaying the proceeding, does not apply in this case. It would thus be unfair to award the penalty interest rate in respect of the claims in the proceeding.
5. Gardner Group raises a number of other considerations against an order for interest at the rate fixed by s2 of the PIR Act which also have considerable force. It submits that:

* the evidence establishes that almost all of the payments in respect of which interest is sought were not in fact made by the Owners, but by their insurer Chubb Australia;
* “an award of interest to the [Owners’] insurer at the penalty interest rate would go beyond providing a compensatory measure of damages in the form of interest. The [Owners] have not tendered any evidence as to the actual loss suffered by reason of loss of use of funds over the relevant time – notwithstanding the fact that such calculations ought to be readily available to an insurer”; and
* “the awarding of damages in the nature of interest at the penalty interest rate (10%) for a period of more than 3 years would give the relevant insurer a windfall benefit which would be in the order of 4 times more than what it appears could have been earned on the funds if the insurer had not been required to pay out the claims to the [Owners] in this proceeding”.

1. Partly in response to this submission, counsel for the Owners referred me to extracts from Enright WIB & Merkin RM, “Sutton on Insurance Law”, Volume 2 (4th Ed, Thomson Reuters 2015). These include the long established principle that a subrogation action must be brought in the name of the insured and “the fact that insurers are involved is to be disregarded for all purposes” (at [18.170]). Under the heading “Interest of Subrogation Recoveries” at [18.340], the learned authors confirm that, while a plaintiff cannot be compensated for being kept out of money that it has received as insurance money, “the subrogation veil is lifted to the extent of recognising that the plaintiff’s insurer has not had the benefit of the money to which he was entitled by subrogation, while the defendant’s insurer has had the use of it until date of judgment”.
2. This clearly provides an answer to any suggestion that the involvement of an insurer is a basis for making no order for interest. But, in my judgment, it does not answer Gardner Group’s submission to the effect that the involvement of an insurer provides an added basis for ensuring any order is compensatory, but not penal.
3. I am satisfied that the beneficiary of any order for interest that I make in this proceeding is a large commercial enterprise that is likely to have access to substantial funds, either from its own resources or at highly competitive interest rates. They can also be fairly described as a professional litigant. In the circumstances of this case (including no evidence of undue delay or impropriety), I can see no rational basis for an award of interest in the Owners’ insurer’s favour that does any more than compensate it for being deprived of its funds since the commencement of the proceeding or payment (whichever is later).
4. Turning to the interest rate to be applied, like Gillard J in *Johnson Tiles*, I invited the Owners (by email from my chambers sent late morning on the Friday before the hearing the following Monday) to file additional evidence in response to the matters raised in the Gardner Group’s submissions set out above. They declined to do so. So again, like Gillard J, I propose to act on the evidence I have. That evidence comprises lists of cash target rates and retail deposit and investment rates over the relevant period set out in paragraphs 132 to 137 of the Saw affidavit. Having considered those rates, I determined to select a mid-point in those rates, being 2% per annum. I suspect that this is a percentage point or two lower than the Owners’ insurer’s cost of funds, but I was not prepared to base my order on speculation.

## Costs

### Should LU Simon pay the Owners’ costs?

1. Section 109 of the VCAT Act provides to the effect that the parties shall bear their own costs unless the Tribunal is satisfied that it is fair to do otherwise, having regard to specified matters. Consideration of the question whether to order costs requires a step-by-step process. In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J at [20] set out the step by step process required to be undertaken before any order for costs could be made under that section.
2. LU Simon submitted that costs are commonly awarded by the Tribunal in domestic building disputes, due to the nature and complexity of the claims, citing Justice Morris, President in *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 at [15], [16] and [19]. It would not be an overstatement to suggest that this is a paradigm example of the type of proceeding the learned President had in mind in recognising that it is fair to make an order as to costs in certain categories of case.
3. Unsurprisingly, therefore, LU Simon indicated that it “would not oppose an order that it pay the [Owners’] costs of the proceeding on the standard basis on the Supreme Court Scale, including all reserved costs, to be assessed by the Costs Court in default of agreement”. That concession was appropriately made.

### Should LU Simon pay any of the Owners’ costs on an indemnity basis?

1. The Owners seek an order that LU Simon pay their costs of the proceeding prior to 27 April 2017 on the standard basis in accordance with the Supreme Court Scale and on an indemnity basis on and from that date. Indemnity costs are sought on the basis of the rejection of a written offer of compromise sent to LU Simon’s solicitors on 23 March 2017, which expired on 27 April 2017. The terms of the offer were relevantly that the Owners would accept from LU Simon in full and final satisfaction of their claims:

* $7 million for loss and damage incurred to that date (which the letter said to then be approximately $7.34 million); and
* LU Simon’s agreement in writing to meet directly all costs and expenses in connection with the compliance with the building orders issued on or around 23 October 2015 (requiring removal and replacement of the unburnt cladding), or any variation to those building orders. The letter included an estimate of the costs of complying with the existing orders of $8,666,944.

1. Section 112 of the VCAT Act in substance provides that:

* where an offer is made in writing and complies with certain other technical requirements;
* the other party does not accept the offer; and
* “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”,

the party who made the offer is entitled to an order that the party that did not accept the offer pay all the costs incurred by the offering party after the offer is made.

1. As the owners submit, s112 creates a prima facie entitlement to payment of “all costs”. They further submit that:

* “Whilst such costs are ordinarily awarded on a standard basis, the Tribunal is empowered to order costs on a more favourable basis under that section, including an indemnity basis”, citing *Velardo v Andonov* (2010) 24 VR 240, 249 [47]”;
* “Apart from the regime created by ss 112 to 114 of the VCAT Act, the unreasonable rejection of a *Calderbank* offer is a relevant consideration to which the Tribunal may have regard in ordering costs on an enhanced basis, for the purposes of s 109(3)(e) of the Act”, citing *Velardo v Andonov* (2010) 24 VR 240, 247 [39];
* “Sections 112 to 114 of the VCAT Act do not constitute a code, such that an offer is capable of being relevant to the question of costs outside the scope of the statutory regime”, citing Pizer, *Annotated VCAT Act* (5th Ed, 2015) [VCAT.109.40];
* “The critical question is whether, in all the circumstances, it was unreasonable for the offer to have been rejected. The matters set out in *Hazeldene’s Chicken Farm Pty Ltd v Victorian Workcover Authority*”(2005) 13 VR 435, [25]; and
* for the reasons set out in detail in their submissions by reference to the considerations in *Hazeldene*, it was unreasonable for LU Simon to reject the Owners’ offer.

1. LU Simon submits that the Owners’ reliance on the *Calderbank* letter is misconceived. First, LU Simon says that the Owners have not achieved a result in the proceeding which is better than the offer contained in their *Calderbank* letter. The Saw affidavit includes a table comparing two different approaches to calculating the result in the proceeding, which purport to demonstrate that the result fell short of the offer by at least $250,000. For their part, the Owners rely on a table exhibited as RMS-7 to the affidavit of Robin Shute sworn 22 March 2019, that shows the result bettered the offer by approximately $243,000. As counsel for the Owners explained in oral closing submissions, the differences between the two sets of calculations largely derives from the treatment of the increase in insurance premiums.
2. It is unnecessary for me to determine which of these approaches to prefer, for two reasons. First, even accepting the Owners’ figures at face value, once the interest amount is adjusted to take account of my findings above, the result falls short of the offer by a little over $200,000. The calculation of that result ($6,792,460.69) was kindly provided to me by counsel for the Owners after a short adjournment, following the pronouncement of my decision on the interest rate. The second reason is that I would have rejected the Owners’ application for indemnity costs even if the result had exceeded the offer by the amount of the Owners’ calculation in RMS-7, for the reasons below.
3. In addition to the $7 million cash payment, the *Calderbank* offer also required LU Simon to agree to meet directly the Owners’ costs and expenses in connection with their compliance with the building orders. In relation to this aspect of the offer, LU Simon submits to the effect that:

* “[t]hose words are of enormous breadth and uncertainty. Furthermore, the offer does not specify what steps the [Owners] proposed concerning compliance, let alone what costs and expenses might be involved ‘in connection with’ compliance” (noting that the letter estimated those costs to be $8,666,944);
* the lack of detail in the letter about what work was involved meant that: “The offer required LU Simon to assume direct liability on an open-ended basis for all costs and expenses in connection with an unspecified scope of work”;
* “[i]f the offer were to have been accepted, (and that was all LU Simon could do), LU Simon would have had no input into what works were to be undertaken” or the magnitude of the costs and expenses to be paid in connection with securing compliance—“LU Simon would have had to pay directly whatever contractors and consultants were retained by the Applicants, with no ability to effectively challenge the costs”;
* this difficulty is exemplified by the fact that at one point in the trial, the Owners were proposing to engage Merkon Constructions Pty Ltd for $8,666,944 to replace the unburnt cladding, but later negotiated terms with LU Simon at a total cost (including consultants fees and contingencies) of $5,645,355—had it accepted the terms of the *Calderbank* offer, LU Simon would have been obliged to accept liability for a cost more than $3 million higher than it has ultimately incurred; and
* any change in the building orders could have varied the scope of the compliance works and LU Simon would have had no entitlement to participate in any process leading to such a variation.

1. Disregarding the hyperbole in the description of the breadth and uncertainty of these terms, I accept these submissions. This aspect of the offer was indeed open ended and uncertain, and would have involved LU Simon committing to multi-million dollar payments with little or no capacity to negotiate and limit its total potential exposure. Further, if it had (for example) negotiated to cap the expenses at the Owners’ estimate at the time of the offer, it would have thereby committed to a figure close to $3 million higher than the sum ultimately ordered to be paid for compliance costs. For these reasons alone, I would have determined that LU Simon’s failure to accept the offer was reasonable.
2. In oral submissions, counsel for the Owners argued in respect of these matters that:

* both parties knew what needed to be done in order to comply with the building orders, which set out quite prescriptively what needed to be done in order to achieve compliance; and
* the compliance costs which were ultimately spent in pursuance of that objective were ultimately agreed with LU Simon and produced a contract with a defined scope of works for the recladding for a particular figure and there is no reason why that same arrangement would not have taken place if this offer had been accepted.

1. There are several difficulties with these submissions. First, they do not allow for the possibility of a variation in the building orders. Second, they ignore that the terms of the offer made no allowance for LU Simon to maintain any control over deciding who did the work and for what cost. Third, had LU Simon accepted the offer without any such control, the Owners would have had little obvious incentive to explore ways to reduce the cost of the compliance work. In those circumstances, and contrary to the Owners’ submissions, there is reason to doubt whether the arrangement ultimately agreed with LU Simon would have been pursued. There is a real possibility that the Owners might have chosen to proceed with the engagement of Merkon Constructions Pty Ltd.
2. LU Simon also notes that the offer required it to “enter into an agreement” to give effect to the offer in respect of compliance costs, and was “subject to formal release satisfactory to the parties, including, if required, confidentiality”. It then relies on:

* *Pearson v Williams* [2002] VSC 30 at [15] to argue in effect that the offer falls foul of the requirement that a *Calderbank* letter must be certain and, on acceptance, give rise to a binding contract; and
* *Little v Saunders* [2004] NSWSC 655 at [45] and [46] for the proposition that an offer that contains a term that the parties are to enter into a deed of settlement would result in a contract which was void for uncertainty.

1. I accept that (as counsel for the Owners argued in oral submissions), these propositions are not inflexible and there may be circumstances where it can be found that refusal of an offer is unreasonable, despite the offer contemplating execution of terms of settlement (see *Sim Development Pty Ltd v Greenvale Property Group Pty Ltd* [2018] VSCA 201 at [74] to [77]). However, in my view, this is not such a case. Essentially for the reasons above relating to the uncertainty associated with future compliance costs, the process of documenting an agreement to manage the payment of those costs was potentially problematic and uncertain. This provides a further discrete basis for finding that LU Simon’s decision not to accept the offer was not unreasonable.
2. Finally, the factors discussed above supporting my conclusion that the order for interest should not include the penal component, also provide further discrete grounds for a finding that it was not unreasonable for LU Simon not to accept the offer in the *Calderbank* letter. I so find, essentially for the reasons submitted on this issue by LU Simon in its written submissions at [30] to [38] together with the additional matters referred to above concerning penalty interest (including my remarks concerning the potential effect of the contribution claims against the Owners).

### Is LU Simon entitled to pass through the Owners’ costs to the second to fifth respondents?

1. The submissions of Gardner Group, Elenberg Fraser and Thomas Nicolas on this issue were primarily directed at resisting any order to the effect that LU Simon was entitled to pass through the indemnity component of costs it was obliged to pay to the Owners. As no such order was made, the resistance to the pass through of costs mostly fell away, leaving only the question of what (if any) order should be made for the apportionment of those costs as between the second to fifth respondents.
2. I say “mostly”, because there was some resistance on a full pass through in written and oral submissions on behalf of Gardner Group, with some support in the written submissions of Elenberg Fraser and Thomas Nicolas. The extent of the limitation argued by Gardner Group was that LU Simon should bear all of the costs associated with the Owners’ participation in the trial, except in respect of the quantum evidence and arguments. The Gardner Group submitted that, in circumstances where LU Simon ultimately failed to assert any substantive defence to the warranty claims, it was unreasonable for it not to have settled those claims against the Owners. Doing so would have limited the Owners’ need to participate in a substantial portion of the trial and would not have precluded LU Simon from pursuing its claims against the other respondents.
3. The arguments advanced by Gardner Group in support of these submissions largely mirror those by the Owners in support of their claim for interest at the rate fixed by the PIR Act. And I reject the arguments for the same reasons (see [36] to [39] above). As I there explain, factors such as late developments in pleadings and evidence and the potential implications of both the proportionate liability and contribution claims, tell against any finding that LU Simon acted unreasonably in not conceding the Owners’ warranty claims earlier in the proceeding. They also demonstrate that it is far from clear that such concessions would have greatly reduced the Owners’ involvement in the hearing.
4. The consensus among the parties on the issue of the apportionment of costs (using that term in a non-technical sense), was that the apportionment should match the formal orders for apportionment made in respect of the loss and damage claims. In the circumstances, I ordered that Gardner Group (including Mr Galanos), Elenberg Fraser and Thomas Nicolas reimburse LU Simon for the costs it is obliged to pay the Owners in proportions 33%, 25% and 39% respectively. I noted that (as with the loss and damage claims) this left LU Simon bearing 3% of those costs.

### Should the other respondents pay LU Simon’s costs of the proceeding?

1. The only substantive resistance to an order that the other respondents pay LU Simon’s costs of the proceeding, came from Elenberg Fraser and relied on a letter dated 30 July 2018 making an offer to settle the proceeding. But as senior counsel for Elenberg Fraser conceded, it is clear that offer fell short of what Elenberg Fraser has ultimately been ordered to pay. Senior counsel nevertheless submitted in substance that its genuine and bona fide effort to achieve a settlement by making a substantial offer in circumstances where the full extent of the claims was elusive, should not go unrewarded.
2. As I observed during oral submissions, I can understand Elenberg Fraser’s frustrations in being unable to pin down figures for the total claims and that its efforts to pursue a resolution were laudable. However, these matters alone are in my view not a sufficient basis for departing from the usual order that costs ordered should follow the event. I therefore ordered that the second to fifth respondents (inclusive) pay the first respondent’s costs of the proceeding, including reserved costs.

### What orders should be made between the second to fifth respondents?

1. In my view, there was no justification for LU Simon not recovering 100% of its costs and none of the other respondents advanced any substantive argument to the contrary (except for those discussed and rejected above). However, Gardner Group submitted (and I agreed) that, as between the second to fifth respondents, orders should be made so that they bear the burden of LU Simon’s costs in equivalent proportions to the orders made on apportionment. In the absence of such orders, the second to fifth respondents would be jointly and severally liable for LU Simon’s costs. Gardner Group noted that this would give rise to a potential unfairness, given that it comprises two parties in the proceeding.
2. I therefore ordered that, as between the second to fifth respondents (inclusive), they pay to each other such sums as are necessary to ensure that they bear the costs of the first respondent in proportions as follows:

* the second and third respondents: 34%;
* the fourth respondent: 25.75%; and
* the fifth respondent: 40.25%.

1. No other orders were sought as between the second to fifth respondents in respect of their costs of the proceeding or otherwise.

### Should costs be assessed on the County Court or Supreme Court scale?

1. Senior counsel for Elenberg Fraser argued that costs should be on the County Court scale. He noted that the County Court has unlimited jurisdiction with respect to commercial matters and that I had been appointed noting my “skill and ability at managing a case of this complexity”. He submitted that there was no reason why it should have been heard in the Supreme Court as opposed to the County Court. Counsel for the Owners countered that, if this had not been a domestic building dispute, there was no question that it would have been filed in the Supreme Court. He noted that the proceeding was one of the largest building disputes heard in this Tribunal and the level of representation was consistent with cases ordinarily run in the Supreme Court.
2. Perhaps most relevantly, counsel for the Owners drew attention to paragraph 20 of the Owners’ written submissions where the Owners submitted that: “It is common for the Tribunal to award costs on the Supreme Court Scale in proceedings involving significant complexity and quantum”. The cases cited in support of that proposition were *Williamson v Melbourne Water Corporation* (No 2)[2013] VCAT 1811, [12]; *Architectural Building Project Management Pty Ltd v Monty Manufacturing Pty Ltd* [2014] VCAT 57, [23]; *LJ Constructions Pty Ltd v Four Six Two Beach Road Pty Ltd* [2003] VCAT 1345, [22]; *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 (noting this was incorrectly cited by the Owners as[2005] VCAT 617), at [20]; *Beamish v Rosvoll* [2004] VCAT 2537, [18]-[20]; *Cappellin v Brondolino* [2011] VCAT 2163, [25]-[26]; and *Lewis v Threadwell* [2004] VCAT 750, [6] and [14].
3. In oral submissions, counsel for the Owners added that all of these cases were significantly less complex and involved significantly less quantum that this case, concluding that: “This was for all intents and purposes a Supreme Court case”. These submissions were endorsed by senior counsel for LU Simon, who added that: “it was inevitable that this matter would have been issued in the Supreme Court had it not been before the Tribunal and for the reasons that were advanced by Mr Thomas, we thought that the sensible approach in the circumstances was to concede that the scale ought to be the Supreme Court scale”.
4. With some hesitation, but mindful of the weight of the authority identified in the Owners’ submissions involving less complex cases with smaller sums involved, I determined that the costs should be assessed at the Supreme Court scale. I ordered accordingly.

### Should the Owners be entitled to claim further sums for the recladding works?

1. On the morning of the hearing on costs and interest, the Owners filed a further affidavit explaining that there were early signs that the re-cladding works may take up to two months longer than originally contracted for, with the result that the Owners were likely to incur additional costs in respect of superintendent services of around $60,000. The Owners sought an order that: “The Applicants have liberty to apply to the Tribunal within 21 days of practical completion of the Recladding Contract regarding any further claim for additional costs in connection with the delay in completion of the Recladding Contract works”.
2. Counsel for the Owners conceded that there was no evidence about the cause of the delay and that, if the problem was with access, it might be that the Owners were the cause. He nevertheless submitted that:

“Assuming that it's outside the control of the applicants and it is due to the infrastructure in the building and the rate at which apartments are being done – it wouldn't be a just outcome if the applicants were required to bear those costs, bearing in mind that they do form part of the claim which the applicants have made in relation to compliance costs through the proceeding.”

1. I disagree. The Owners have entered into contracts for the recladding works, the parties have agreed the quantum of the Owners’ loss and damage based on those contracts, and those sums have been awarded accordingly. As senior counsel for LU Simon submitted, to the extent that issues arise in relation to compliance with those contracts, then the Owners may have rights to seek relief under those contracts. However, those matters are outside the scope of these proceedings. I also agree with the submission by counsel for Thomas Nicolas that to allow an applicant to come back at a later time because its costs have changed, would defeat the principle that damages are assessed as once and for all. The Owners’ application for liberty to apply for further damages was refused.

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| Judge Woodward  **Vice President** |  |  |