VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC2728/2019

CATCHWORDS

Cross-application by the Applicants and the Respondent on costs pursuant to section 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), where the proceeding was dismissed save for the issue of costs.

FIRST APPLICANT:	Yanek Bogusz
SECOND APPLICANT:	Sophie Edwards
THIRD APPLICANT:	Roslyn Mitchell
FOURTH APPLICANT:	Kylie Oberin
FIFTH APPLICANT:	Frances Milici
SIXTH APPLICANT:	Tom Au
RESPONDENT:	Prestige Strata & Property Solutions Pty. Ltd. (ACN: 146 524 067)
WHERE HELD:	Melbourne
BEFORE:	Member D Kim
HEARING TYPE:	Costs Application on the papers
DATE OF ORDER:	1 September 2020
CITATION:	Bogusz v Prestige Strata & Property Solutions Pty Ltd (Owners Corporations) [2020] VCAT 922

ORDER

1. The applicants' application for costs is dismissed.
2. The respondent's application for costs is dismissed.

D Kim
Member

REASONS

INTRODUCTION – THE PARTIES AND THE PROCEEDING

1 This proceeding concerns the appointment of the respondent, Prestige Strata & Property Solutions Pty Ltd (**Prestige**), as the manager of owners corporation 1 and 2 of the registered plan of subdivision 616846G (**OCs**), in respect of common property situated in the suburb of Maidstone, Victoria.[1] At the time of issuance of the proceeding, Mr Matthew Wrigley was the sole director and secretary of Prestige, positions he had held from 1 October 2019. Prior to Mr Wright's appointment, Ms Andrea Ranca had been the director and secretary.

2 The applicants are members of the OCs. The first applicant is the Chairperson of the OCs and the second applicant is the Secretary of the OCs.

3 Both parties were legally represented throughout the proceeding.

4 The following facts have been obtained from the documents the parties provided to the Tribunal:

a. On 10 September 2019, the committee members of the OCs (**Committee**) passed a resolution to revoke the appointment of Prestige as the manager of the OCs. The Committee's decision was due to what the Committee considered were Prestige's continued failure to perform its duties and to remedy its breaches despite numerous requests and formal notices that the OCs had served on Prestige.

b. By letter dated 14 October 2019 from the applicants' lawyers, Prestige was notified of its termination as manager. It was alleged in the letter that the management contracts between the OCs and Prestige which had been signed were invalid and unenforceable as:

i. There had been no reference to the contracts at the Annual General Meeting of the OCs on 17 November 2016 (**AGM**) and no resolutions were passed for the OCs to enter into the contracts.

ii. There was no reference to the contracts in the minutes of the AGM.

iii. The contracts were signed by, among other people, a person who was not a member of the Committee and who was not an owner of a particular lot as purported.

iv. None of the people who signed the contracts on behalf of the OCs had the authority to do so.

c. Contrary to the alleged termination notice, Prestige continued to carry out actions and represented itself as the manager of the OCs. Prestige disputed that the termination notice was valid.

---

[1] Prestige was also at one time the manager of other owners corporations but the applicants' substantive claim against Prestige in the proceeding was in respect of owners corporation 1 and 2.

d. On 25 October 2019, the applicants issued this proceeding against Prestige seeking:

   i. Declarations that:
      1. Prestige's position as manager was revoked or the manager contracts were terminated effective from 10 September 2019 or 14 October 2019.
      2. The management contracts are invalid and of no force or effect.
      3. Prestige's actions as manager after receipt of notice of termination are invalid and of no force.

   ii. Orders that Prestige:
      1. cease to hold itself as manager of the OCs;
      2. deliver to the Committee a full copy of the register of lot owners and contact details of the owners, and all records and funds of the OC;
      3. allow the applicants to inspect the register of lot owners of the OCs; and
      4. pay legal costs for and in respect of the application on an indemnity basis.

e. In addition to the final relief sought as stated above, the applicants sought an interlocutory injunction against Prestige to prevent the AGMs of the OCs scheduled for 29 and 30 October 2019 that Prestige had organised from going ahead.

f. The application for temporary injunctive relief was heard by the Tribunal on 28 October 2019.

g. On 28 October 2019, the Tribunal made the following findings that:

   i. Prestige was not properly authorised pursuant to the *Owners Corporations Act 2006* (Vic) (**OC Act**) to convene the proposed AGMs scheduled for 29 and 30 October 2019.
   ii. Insufficient notice had been given to lot owners in respect of the proposed AGMs scheduled for 29 and 30 October 2019.

h. The Tribunal noted in its orders of 28 October 2019 that at the hearing, Mr Wright had given an undertaking on behalf of Prestige that Prestige:

   i. would make available for inspection the register of lot owners for the OCs;
   ii. would not conduct the proposed AGMs;
   iii. would immediately notify all members of the OCs that the proposed AGMs would not proceed;
   iv. would not seek to convene any further meetings of the OCs until the substantive disputes in this proceeding were heard and determined; and
   v. would not accept nominations to conduct ballots for any of the OCs until the determination of the proceeding.

i. Given Prestige's undertaking, the Tribunal decided that injunctive relief was not required and gave directions as to interlocutory steps to be undertaken by the parties, including the filing and serving of a Points of Claim, a Points of Defence and list of documents, with costs reserved. The proceeding was listed for hearing on 20 January 2020 for two days.

j. Notwithstanding Prestige's undertaking, on 29 October 2019, Ms Ranca, on behalf of Prestige, sent an email to members of the OCs indicating that, among other things, there would be a special general meeting of the OCs on 14 November 2019, seeking, among other things, for a motion that the proceeding be ceased and for the removal of certain members of the Committee (**Proposed SGM**).

k. On 30 October 2019, the applicants' solicitor, Ms Heeps, sent a letter by email to Prestige's then lawyers stating that Ms Ranca's actions were a disregard of Prestige's undertaking. In reply, Prestige's then lawyers confirmed that the Proposed SGM would be cancelled and notice would be provided to the OCs of the same.

l. What transpired from November 2019 to December 2019 were without prejudice correspondence between the parties' lawyers in an attempt to settle the proceeding. Offers were exchanged but there was no agreement on the terms of any proposed settlement.

m. On 15 November 2019, Ms Heeps emailed the Tribunal that the parties were engaged in communications as to a possible settlement of the proceeding and had agreed to an extension of time for filing of the Points of Claim to avoid legal costs being incurred unnecessarily.

n. According to Mr Wrigley in his affidavit sworn 24 March 2020, Prestige delivered all records of the OCs when they were collected by the new manager of the OCs on 20 December 2019. The new manager was provided with a handover sheet to sign.

o. On 20 December 2019, Ms Heeps emailed the Tribunal that the substantive issues which were the subject of the application had been largely resolved with the appointment of a new manager. She indicated that what was left in dispute was:

   i. whether Prestige had properly delivered up the OCs' records, which the parties would continue to endeavour to resolve; and

   ii. the issue of costs of the application.

p. Ms Heeps indicated that the applicants sought to be heard on costs on 20 January 2020 and stated the hearing on costs would take no more than 1 to 2 hours.

q. On 24 December 2019, the Tribunal emailed Ms Heeps seeking confirmation from her as to whether the applicants were seeking leave to withdraw their application against Prestige and for the matter to be listed for a cost hearing on 20 January 2020.

r. On 13 January 2020, Ms Heeps provided an email response to the Tribunal and indicated that Body Corporate Services Pty Ltd had been appointed as the new manager of the OCs and Prestige had failed to deliver up all the books and records of the OCs. She stated that the applicants consequently sought a directions hearing on 20 January 2020. On the same day, Prestige's lawyers emailed the Tribunal indicating that they agreed that the proposed hearing for 20 January 2020 should be converted to a directions hearing.

s. On or about 16 January 2020, the applicants filed an affidavit of the second applicant wherein it was indicated that the applicants sought directions and orders, including whether an authorising order under s.165(1)(ba) of the OC Act allowing the applicants to continue on with the proceeding should be made. The applicants did not file any Points of Claim in the proceeding.

t. On 20 January 2020, the parties appeared before the Tribunal where the Tribunal dismissed the proceeding save for the issue of costs. Although the orders do not state that they were made by consent, it is undisputed that the parties agreed to the Tribunal making the orders. The orders provided for the parties to file and serve affidavit material and written submissions in respect of costs and for the matter to be determined in chambers unless otherwise ordered.

u. Subsequently, the parties filed affidavits and written submissions and provided written consent for me to determine the issue in chambers based on the materials they have filed.

THE APPLICANTS' CLAIM FOR COSTS

5 The applicants submit that the Tribunal should exercise its discretion under sections 109(3)(a)(i), 109(3)(a)(ii) and 109(3)(e) of the *Victorian Civil and Administrative Tribunal Act 199*8 (Vic) (**VCAT Act**) by ordering that Prestige pay:[2]

a. all of the applicants' costs of this proceeding; or

b. costs on an indemnity basis (taxed in default of agreement); or

c. costs in accordance with Scale D of the County Court Civil Scale of Costs.

6 In essence, the applicants rely on the following matters in seeking costs against Prestige:[3]

a. Prestige's alleged breach of the order of the Tribunal made on 28 October 2019 in that within one day of Prestige giving the undertaking on 28 October 2019, Prestige had circulated a new notice and agenda

---

2 Applicants' written submissions on costs dated 24 March 2020 (**Applicants' Submissions**) at paragraph 1. See also Applicants' Further Written Submissions on Costs dated 7 April 2020 (**Applicant's Further Submissions**).

3 Applicants' Submissions at paragraph 2.

for the Proposed SGM. The applicants submit that Prestige's breach is a matter relevant for consideration under ss.109(3)(a)(i) and 109(3)(e) of the VCAT Act.

b. Prestige's alleged breach of s.127 of the OC Act as it did not return the OCs' records within 28 days upon its termination as the manager of the OCs. The applicants submit that Prestige's breach is a matter relevant for consideration under ss. 109(3)(a)(ii) and 109(3)(e) of the VCAT Act.

c. Pursuant to s.109(3)(e) of the VCAT Act, given:

i. the nature of the proceeding;

ii. the fact that the applicants had little option but to issue the proceeding due to Prestige's conduct; and

iii. the bringing of the proceeding resulting in the Committee becoming aware of Prestige's failure to ensure compliance with s.34(2) of the OC Act in that there were no audited financial statements for owners corporation 1,

it is fair that the Tribunal order costs in favour of the applicants.

7 In response, Prestige submits that the Tribunal ought not to award the applicants any costs as:[4]

a. The applicants did not have standing to maintain the proceeding as an authorising order had not been sought or obtained under s.165(1)(ba) of the OC Act.

b. Section 127 of the OC Act does not require Prestige to "manufacture documents" but that Prestige return to the Secretary of the OCs all records and funds that Prestige possessed, which Prestige did.

c. The applicants had commenced the proceeding when the 28 days requirement on Prestige under s.127 of the OC Act to return records and funds had not expired.

d. The applicants' failure to comply with the orders of the Tribunal in not filing and serving a Points of Claim without reasonable excuse caused unnecessary disadvantage to Prestige.

PRESTIGE'S CLAIM FOR COSTS

8 In antithesis to the applicant's cost claim, Prestige relies on ss.109(3)(a)(i) and 109(3)(c) of the VCAT Act in seeking an order that the applicants pay its costs of, and incidental to, the proceeding on a standard basis.[5] The reasons given by Prestige in seeking costs are in effect its rebuttal of the applicants' grounds for costs, which I have set out in the preceding subparagraphs.

---

4 Respondent's submissions in support of application for costs dated 24 March 2020 (**Respondents' Submissions**) at paragraph 13.

5 Ibid at paragraphs 1 and 2.

9 For the reasons that I have set out in some detail below, I dismiss both the applicants' and Prestige's claims for costs.

10 Before I consider each party's claim for costs, it is necessary that I consider the relevant powers of the Tribunal to award costs.

THE TRIBUNAL'S POWER TO AWARD COSTS UNDER S.109 OF THE VCAT ACT

11 It is important to note, and for reasons that will be apparent later in these reasons, that when considering the issue of costs, the Tribunal does not engage in the re-litigation of the merits of a case. It may be trite to state the obvious but when considering a cost application for the entire proceedings, rather than for an interlocutory step, it is presumed by the Tribunal that the merits of the case have already been determined. Indeed, it is difficult to imagine a situation where a costs application for the entire proceedings could ever be heard and determined when the proceedings are still on foot and the parties are awaiting the Tribunal to decide on the merits of the case.

12 Section 109 of the VCAT Act relevantly states:

> **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. [My emphasis in italics]

13 As the parties have noted in their written submissions, unless the Tribunal finds that s.109(3) of the VCAT Act applies in a given matter, each party in the proceeding must bear its own costs in the proceeding.[6] Should the matters stipulated under s.109(3) apply in a given proceeding, the Tribunal has the discretion - not an obligation - to order that a party pay all or a specified amount of the costs of the other party.[7]

14 In order for the Tribunal to exercise its discretion and make any order for costs, the Tribunal must find that, in the circumstances, "it is fair to do so". Sections 109(3)(a) to (e) are matters that the Tribunal considers in determining whether it is fair to award costs, in a given situation.[8]

15 I now consider each of the applicants' claims for costs under s.109(3) of the VCAT Act.

THE APPLICANTS' CLAIM FOR COSTS UNDER S.109(3)(a)(i) OF THE VCAT ACT

16 The applicants have correctly identified that in order for them to be awarded costs in consideration of s.109(3)(a)(i) of the VCAT Act, I must be satisfied that Prestige's conduct in the proceeding has "unnecessarily disadvantaged" them in the proceeding.[9]

17 The applicants allege that despite the undertaking provided by Prestige to the Tribunal on 28 October 2019, in contravention of that undertaking, on 29 October 2019 Prestige attempted to convene the Proposed SGM on 15 November 2019 so that certain resolutions could be passed prior to the determination of the proceeding. In support of the allegation, the second applicant has filed an affidavit deposing to what transpired after 28 October 2019. Prestige has not provided any affidavit material refuting the applicants' allegation that Prestige had attempted to organise the Proposed SGM.

18 The applicants contend that they have been unnecessarily disadvantaged by Prestige's breach of the undertaking as:[10]

a. The reason why the Tribunal refused to grant the applicants the injunctive relief that they had sought on 28 October 2019 was because Prestige had given the undertaking.

b. Had Prestige not given the undertaking, the applicants would have succeeded in their application for injunctive relief.

c. Prestige's breach of its undertaking caused the applicants to incur unnecessary costs in the proceeding. They refer to the fact that in late

---

6 Section 109(1) of the VCAT Act.
7 Sections 109(2) and (3) of the VCAT Act.
8 See *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20] per Gillard J.
9 Applicants' Submissions at paragraph 12.
10 Ibid at paragraph 19.

October 2019, Ms Heeps had to contact Prestige's then solicitors regarding Prestige's breach of the undertaking.

19 The applicants also contend that Prestige's breach of the Tribunal's orders of 20 January 2020 in filing and serving their material regarding costs late has caused unnecessary disadvantage to them.

20 Based on the materials provided to the Tribunal, I am satisfied that Prestige's attempts at organising the Proposed SGM and to carry out the proposed resolutions were a breach of its undertaking of 28 October 2019. The orders of the Tribunal made on 28 October 2019 clearly set out what Prestige could not do. If the proposed resolutions had passed, they would have undermined the premise of the applicants' claim in the proceeding. Prestige has failed to identify any reasonable excuse for breaching its undertaking to the Tribunal.

21 Having found that Prestige breached its undertaking, the next issue I must consider under s.109(3)(a)(i) of the VCAT Act is whether or not Prestige's breach resulted in the applicants suffering unnecessary disadvantage in the proceeding.

22 It does not follow that if a party (the offending party) breaches an undertaking it has given to the Tribunal that that will entitle the other party (the aggrieved party) to seek costs against the offending party. Rather, properly considered, a breach of an undertaking by a party would be subject to a finding of contempt against that party by the Tribunal with possible sanctions imposed by the Tribunal on that party. It may also enable the aggrieved party to seek damages against the offending party that may have flowed from the offending party's breach of the undertaking. That is not to say that a breach of an undertaking is not relevant for the purposes of s.109(3)(a)(i) of the VCAT Act.

23 I am not satisfied that Prestige's conduct, while a clear breach of its undertaking, caused unnecessary disadvantage to the applicants in the proceeding. The only damage or loss that I can ascertain from the material provided by the applicants is that the applicants had to put Prestige on notice that it was precluded from scheduling the Proposed SGM and this resulted in further legal costs for the applicants. It appears that the additional cost related to a relatively short correspondence from the applicants' lawyers and their review of Prestige's response that it would not pursue the Proposed SGM.

24 Whilst I accept that the applicants did incur some additional costs because of Prestige's breach that they otherwise would not have, I am not satisfied that Prestige's breach and the resultant costs to the applicants unnecessarily disadvantaged them in the proceeding. It does not automatically follow that because an applicant incurs costs due to a breach by a respondent the applicant has been unnecessarily disadvantaged in the proceeding. I am not satisfied that the applicants have established how any additional cost has disadvantaged them in the proceeding. Aside from additional costs, the applicants have failed to identify any other detriment they suffered in the proceeding.

25 Although Prestige initially sought for the Proposed SGM to take place, upon the applicants' lawyers rightly reminding Prestige of its obligations, the Proposed SGM was cancelled. I do not consider that the applicants' attempts at seeking an interlocutory injunction was futile or wasted as despite the Tribunal not granting injunctive relief, it resulted in Prestige giving the undertaking and the Tribunal making findings of fact in respect of Prestige's attempts at holding the AGMs, which were favourable to the applicants.

26 The applicants submit that in addition to the inconvenience, anxiety and further costs which resulted from Prestige's breach of its undertaking, the breach "was a factor that enabled [Prestige] to continue its involvement in the Proceeding on an equal footing with the Applicants."[11] I do not understand this submission. Whilst it is clear that Prestige breached its undertaking, the Proposed SGM never took place and the proposed resolutions by Prestige were never put to vote. I am therefore perplexed as to what is meant by the applicants' submissions that by its breach, Prestige had an equal footing with the applicants. There is no evidence to find that Prestige was able to obtain any advantage over the applicants in the proceeding.

27 The applicants further submit that due to Prestige filing its written submissions on costs 22 days late in breach of the Tribunal's orders of 20 January 2020, it has caused unnecessary disadvantage to the applicants in that they have had to incur further costs in providing further written submissions.[12] The applicants also take issue with the late filing by Prestige of its affidavit material in respect of costs.

28 Upon Prestige belatedly providing the applicants with its affidavit material and written submissions in respect of costs, the applicants sought from the Tribunal the opportunity to file documents in reply, which Prestige consented to and the Tribunal granted.

29 Accordingly, I do not understand what disadvantage the applicants suffered due to Prestige's late filing and serving of its material. The fact is, the Tribunal granted the applicants the right to respond in light of Prestige's delay. Based on the fact that the applicants did file responding material, even if Prestige had complied with the initial timeframes set by the Tribunal on 20 January 2020, presumably the applicants would have filed material in response.

30 In essence, the applicants' grievance in Prestige filing its material late is not that the delay has impeded their ability to make submissions but that Prestige breached the Tribunal's directions.

31 Given the above considerations, I am not satisfied that it would be fair for me to order costs based on the matters under s.109(3)(a)(i) of the VCAT Act.

---

11 Applicants' Submissions at paragraph 38.
12 Applicants' Further Submissions at paragraph 5.

THE APPLICANTS' CLAIM FOR COSTS UNDER S.109(3)(a)(ii) OF THE VCAT ACT

32 Before I consider the applicants' claim for costs under s.109(3)(a)(ii) of the VCAT Act, it is important that I explain the scope of that provision and how it operates.

33 Section 109(3)(a)(ii) of the VCAT Act envisages a situation where a party may have caused unnecessary disadvantage to another party by "failing to comply with this Act, the regulations, the rules or an enabling enactment".

34 The reference to "*this* Act" of course is to the VCAT Act (my emphasis in italics). Likewise, the references to "*the* rules" and the "*the* regulations" are those that apply to the Tribunal regarding its powers and procedures. Consistent with this interpretation, the remaining reference to an "*enabling* enactment" is a reference to any statute that applies to the Tribunal insofar as that statute affects the Tribunal's jurisdiction in respect of particular matters. In my opinion, it follows that for the purposes of s.109(3)(a)(ii) of the VCAT Act, the reference to "an enabling enactment" is not a reference to all aspects of an enabling enactment but that which relates to the Tribunal's powers. It is not, for example, a reference to provisions that give a party a cause of action against another party.

35 The applicants submit that Prestige breached s.127 of the OC Act and this entitles the applicants to a cost order against Prestige under ss.109(3)(a)(ii) and 109(3)(e) of the VCAT Act. Prestige refutes that it breached s.127 of the OC Act.

36 Section 127 of the OC Act requires a manager of an owners corporation who ceases to be a manager to return to the owners corporation's secretary all records relating to the owners corporation or funds of the owners corporation held or controlled by the manager within 28 days of the termination of the manager's appointment. A breach by a manager of this provision may expose the manager to a maximum of 60 penalty units.

37 The applicants refer to the Tribunal's comments in *Jenkins v OCVM Commercial Pty Ltd (Owners Corporations)* [2019] VCAT 1078 (***Jenkins***) that s.127 of the OC Act:[13]

> Does not entitle the manager to retain the records and funds on the grounds that a termination has not taken place. A demand for delivery up of the records and funds of an owners corporation must be complied with immediately, unless there has been a termination of appointment, in which case, the manager has up to 28 days to return the records and funds. A breach of section 127, attracts a penalty of up to 60 penalty units.

38 It is important to consider the above statement and the operation of s.127 of the OC Act in its proper context.

---

[13] *Jenkins v OCVM Commercial Pty Ltd (Owners Corporations)* [2019] VCAT 1078 at [60].

39 I do not consider the operation of s.127 of the OC Act or the statements by the Tribunal in *Jenkins* supports the applicants' claim for costs for the following reasons:

a. The applicants cannot rely upon s.127 of the OC Act in its cost application. Section 127 of the OC Act is not what is contemplated under s.109(3)(a)(ii) of the VCAT Act when considering an enabling enactment.

b. Properly considered, the applicants' allegation in respect of s.127 of the OC Act ought to have formed part of its substantive claim against Prestige. Not only that, in order for me to be able to consider Prestige's alleged breach of s.127 of the OC Act for the purposes of costs under s.109(3) of the VCAT Act, the Tribunal had to have found that Prestige had breached s.127 of the OC Act, rather than dismissing the applicants' claim entirely.

c. Section 109(3) of the VCAT Act does not permit an applicant to add further causes of action that the applicant did not include in the applicant's claim or to re-litigate a cause of action at the costs stage of a proceeding which has been dismissed.

d. For example, if an applicant issues proceedings against a respondent for breach of contract regarding services provided by the respondent, and during the proceedings the applicant further argues that the respondent has also now breached a statutory obligation to render due skill and care to the applicant, the additional allegation would form part of the applicant's causes of action against the respondent. The further allegation would not be one that falls within the "enabling enactment" category under s.109(3)(a)(ii) of the VCAT Act. If that was the case, then any cause of action under statute raised by an applicant would fall under s.109(3)(a)(ii). Section 109(3) would therefore effectively allow parties to litigate or re-litigate causes of action at the costs stage after the substantive proceeding was determined. That cannot be the correct construction of s.109(3)(a)(ii).

e. The applicants submit that Prestige's appointment was terminated by email on 14 October 2019 from the applicants' lawyers and Prestige failed to provide the records and funds within 28 days of the termination. The assumption in their submission is that the termination was valid, which is a position that formed part of its claim against Prestige in the proceeding. There is a fundamental problem with their contention: how can the Tribunal make findings as the applicants assert, which would result in the Tribunal determining that the applicants would have at least partly succeeded in its claim against Prestige, if, on 20 January 2020, the Tribunal dismissed the proceeding? The simple answer is that the Tribunal cannot.

f. It should not be lost to the applicants that, for whatever reason or underlying motivations of the parties in allowing the Tribunal to make

the order, a dismissal of the applicants' claim means that the Tribunal determined that the applicants did not prove its case against Prestige. The Tribunal did not order that the applicants' claim was struck out, withdrawn or discontinued. The applicants did not seek such an outcome.

g. The applicants further submit that had Prestige complied with s.127 of the OC Act, it was highly likely that the parties would have settled on or around 11 November 2010 because the "OCs would have had control of their financial affairs and possession of their documents" and Prestige "would have had no leverage over the OCs".[14] However, the applicants have failed to provide satisfactory evidence for me to make such a finding. The applicants' submission is premised on the hypothesis that the Tribunal would have found in favour of the applicants had the proceeding not been dismissed.

h. In essence, the applicants' submission is that the Tribunal should now determine that Prestige breached s.127 of the OC Act when the Tribunal has dismissed the entirety of the applicants' claim, save for costs. Even if I disregard the restrictions imposed on me by the legal doctrine of *res judicata* and the possibility of a finding that would be inconsistent with the Tribunal's order of a dismissal of the proceeding, such an argument faces the unsurmountable problem that I would be required to effectively determine the merits of the applicants' case in a cost application based on affidavit material without the parties having the right to cross-examination and test the evidence. That would be contrary to the rules of natural justice including the principle of procedural fairness.

i. The applicants rely on the outcome in *Jenkins* as a form of precedent that I should adopt. The case of *Jenkins* does not assist the applicants. Although *Jenkins* concerned the appointment of the manager of the relevant owners corporation, the validity of a resolution and obligations on the manager to deliver up records and funds, the Tribunal's decision to order costs was based on the Tribunal's determination on the merits of the case that the respondent had breached the OC Act by wrongfully retaining the records and funds of the owners corporation, which then formed the foundation for the Tribunal's order for costs.

j. Contrary to *Jenkins*, in the applicants' case:

   i. If their primary case included a claim under s.127 of the OC Act, they had failed to properly set out their claim as directed by the Tribunal;

   ii. the Tribunal did not make any findings that Prestige had breached s127 of the OC Act when dismissing the claim; and

[14] Applicants' Submissions at paragraph 38.

iii. the applicants seek to rely on s.127 of the OC Act after the Tribunal has dismissed their claim.

40 Given the above reasons, it would not be fair for me to order costs under s.109(3)(a)(ii) of the VCAT Act.

THE APPLICANTS' CLAIM FOR COSTS UNDER S.109(3)(e) OF THE VCAT ACT

41 The applicants submit that:

a. Although the Tribunal should not consider matters that occurred before the proceeding commenced for the purposes of s.109(3)(a) of the VCAT Act, that does not mean that the Tribunal cannot look at conduct of a party before the commencement of the proceeding for the purposes of s.109(3)(e) of the VCAT Act.

b. The test of fairness under s.109(3)(e) of the VCAT Act should be read as "just or appropriate in the circumstances". The applicants refer to the case of *Filippou Management Pty Ltd v MREEF Project Company No 11 Pty Ltd* [2010] VCAT 1261 (***Filippou***) where that phrase was used by the Tribunal.

c. Matters that favour a cost order under s.109(3)(e) against Prestige are:

i. Prestige's breach of s.127 of the OC Act.

ii. Prestige's breach of its undertaking provided on 28 October 2019, including its intention to stop the legal proceeding, the nature of the notice given by Prestige on 29 October 2019 in breach and the fact that the breach occurred a day after the undertaking had been given.

iii. The nature of the proceeding

iv. Applicants having no choice but to issue the proceeding.

v. Subsequent to issuing the proceeding, the applicants' discovery of Prestige's mismanagement of the OCs' documents.

42 I now turn to each of the above submissions.

Applicants' submission that the Tribunal can consider pre-litigation matters under s.109(3)(e) of the VCAT Act

43 Whilst I accept the applicants' submission that, in principle, the breadth of what can be considered under s.109(3)(e) of VCAT Act include, where appropriate, the pre-litigation conduct of a party, such an approach must be applied cautiously and carefully, and in my view, restrictively. To do otherwise risks the Tribunal:

a. diminishing the effectiveness of the matters under s.190(3)(a) to (d) of the VCAT Act and placing an overly heavy or preferential weight on matters under s.109(3)(e), regardless of the circumstances;

b. engaging in idiosyncratic notions of justice when determining costs, which is contrary to the nature of s.109 of the VCAT Act; and

c. using its power to award costs based on an underlying reason or purpose which is to punish a party rather than to compensate the successful party of its costs if it is fair to do so.

44 Section 109(3)(e) of the VCAT Act gives the Tribunal the flexibility to consider other matters when determining the issue of costs. It is not a section that overrides the other subsections under s.109(3) nor do matters that fall under 109(3)(e), in principle, have greater weight than matters under s.109(3)(a) to (d).

45 Based on the material provided by the applicants, I am not satisfied that any pre-litigation conduct by Prestige establishes that it would be fair to order costs. The premise that the applicants appear to be relying on is that Prestige ought not to have resisted the proceeding in the first place as the termination of its appointment by the OCs was valid and it failed to comply with the OCs' demands. That may be what the applicants believe but it is not a finding that the Tribunal made in dismissing the applicants' claim on 20 January 2020.

Applicants' reliance on what is "appropriate" for s.109(3)(e) of the VCAT Act

46 The applicants have referred to the case of *Filippou* to contend that the meaning of what is "fair" can be synonymous with what is "just or appropriate in the circumstances".[15] I do not see any particular relevance or importance of the applicants' reliance on the previous comments of the Tribunal.

47 As I have stated, one must to careful when considering previous comments made by the Tribunal to subsequent cases, especially in respect of costs, given that the Tribunal's discretion under s.109(3) of the VCAT Act is heavily reliant upon the facts of the particular case.

48 Whilst it is true that the Tribunal in *Filippou* considered that "fair" for the purpose of s.109 could be defined as "just or appropriate in the circumstances",[16] it is clear from reading the case that the Tribunal's determination on costs was based on the Tribunal's finding that in the circumstances, it was fair to order costs. Indeed, the Tribunal in *Filippou*, on a number of occasions, referred to the express words of the s.109 of the VCAT Act and cited passages from cases where courts have emphasised the requirement that it must be just for the Tribunal to exercise the discretion on costs. I consider the use of the word "appropriate" in *Filippou* as the Tribunal's attempt to give some practical assistance or guidance for the parties.

---

15 The applicants in their submission referred to *Filippou Management Pty Ltd v MREEF Project Company No 11 Pty Ltd* [2010] VCAT 1261 at [20].

16 Ibid at [20]. See also *Owners Corporation No. 1 PS542645C v Filippou Management Pty Ltd (Civil Claims)* [2010] VCAT 2085 at [34].

49 It is not entirely clear from the applicants' submissions whether they are relying on the Tribunal's comments in *Filippou* to contend that all that they need to establish is that it would be appropriate to order costs in their favour. If they do, I reject that submission. I do not consider that *Filippou* stands for that proposition. It is incorrect to contend that a party need only prove that it would be appropriate for the Tribunal to award costs under s.109(3) of the VCAT Act. The requirement under s.109 of the VCAT Act is that it is "fair", not that it is "appropriate", to award costs.

50 However, that does not mean that the appropriateness of a party's action cannot be considered when determining costs – it may prove to be crucial. Indeed, s.109(3)(e) allows the Tribunal to consider "other matters".

51 But it would be erroneous to hold that the word "just" under s.109(3) could be used interchangeably with "appropriate" in all circumstances when determining whether it is just to order costs. It may be that in certain circumstances what is "just" as under s.109(3) may be what is also appropriate. Alternatively, the level of appropriateness in making a cost order may be such that justice would be done. But it would be erroneous to conclude that because it is appropriate to take a particular course of action, it must be fair. Such an approach, in my view, would render the determination of costs to be more akin to how courts deal with costs, such as having costs follow the event.

52 In the case before me, there is no need for me to consider whether or not it would be appropriate to order costs. I am satisfied that there are sufficient facts for me to determine the question of costs based on the guidance given to me under the words of s.109 of the VCAT Act – that is, whether it would be fair to do so in the particular circumstances.

Applicants' reliance on s.127 of the OC Act

53 For the reasons that I have already set out, I am not satisfied that it would be fair to award costs to the applicant based on their allegation that Prestige breached s.127 of the OC Act.

54 I note that in addition to submissions mentioned above, the applicants contend that Mr Wrigley's conduct on Prestige's behalf of not communicating with the OCs after 21 November 2019 while at the same time holding funds and records, which Prestige had a statutory obligation to return by 11 November 2019, is a factor the Tribunal should consider when considering s.109(3)(e).[17]

55 The applicants' argument is problematic in that:

a. it assumes as an undisputed fact that the 28-day deadline for Prestige to provide funds and records under s.127 of the OC Act was 11 November 2019 when the Tribunal did not make any such finding and Prestige disputes the fact; and

[17] Applicants' Submissions at paragraph 40.

b. it presumes that it was a proven fact that the OCs had validly terminated Prestige's position as manager in October 2019 when their claim was dismissed by the Tribunal.

Applicants' reliance on Prestige's breach of its undertaking

56 Whilst I have found that Prestige did breach its undertaking to the Tribunal, for the reasons that I have already set out when considering the applicants' claim for costs under s.109(3)(a)(i) of the VCAT Act, I am not satisfied that it would be fair to award costs to the applicant based on Prestige's breach.

Applicants' submissions as to the nature of the proceedings

57 The applicants submit that the "Tribunal should consider the fact that the Proceeding was not commercially or privately motivated".[18] With respect, it is not clear what the applicants' argument is. If they are contending that they did not issue the proceeding to obtain a commercial gain for themselves or for private intentions or objectives, such as out of spite or revenge, then I do not understand why that is relevant for the issue of costs. I would expect that all applicants would issue proceedings to the Tribunal based on *bona fide* reasons.

58 The applicants further argue that they had to issue the proceeding as Prestige had not accepted that its appointment as manager had been terminated. Whether or not Prestige had a strong or weak claim to resist its removal as manager, the fact is, it had resisted the termination of its appointment. If the applicants wanted the Tribunal to find that the termination was indeed valid, in the absence of an admission from Prestige, they were required to prove their case in order to have the Tribunal make such a finding by having the Tribunal hear and determine the merits of their claim. For the reasons I have already raised, I cannot now make findings of fact that go to the merits of the claim.

The applicants' submission that they had no choice but to bring the proceeding

59 The applicants have raised the rhetorical question, "What choice did the Applicants have but to bring the Proceeding?" In my view, it is an irrelevant question to ask in respect of their claim for costs. It is also premised on a number of assumptions of fact that the Tribunal did not decide on at the directions hearing on 20 January 2020.

60 Nevertheless, in answering their rhetorical question, where Prestige refused to accept the termination of its appointment, whether wrongly in the applicants' view, the applicants were required to issue this proceeding to *prove* its claim that the termination was valid (that is, the process was correctly followed and the resolutions were valid) and to seek orders from the Tribunal to compel Prestige to comply with the termination notice. Although the fact that Prestige chose to ignore the notice resulted in a dispute that required the intervention of the Tribunal, I cannot simply accept the

[18] Ibid at paragraph 41.

applicants' submission that Prestige was not entitled to challenge the validity of the notice of termination.

61 The applicants also contend that Prestige's breach of its undertaking was an attempt to "shore up its commercial position during settlement negotiations",[19] and this is a matter that I should consider under s.109(3)(e) in their favour. Whilst Prestige did breach its undertaking, I am not satisfied that this enabled Prestige to shore up its commercial position in settlement negotiations. In fact, once the applicants' lawyers challenged Prestige on its attempts to organise the Proposed SGM, Prestige notified the OCs' members that it would not go ahead with the Proposed SGM. I am therefore at a loss as to what leverage that Prestige had in negotiations by breaching its undertaking. I would have thought that a breach by a party of its obligations to the Tribunal would be disadvantageous for that party rather than an advantage, given the potential finding of contempt and sanctions that could be imposed on that party.

The applicants' submission that they discovered mismanagement by Prestige

62 The applicants submit that:[20]

a. Prestige has breached s.34(2) of the OC Act as upon the handover of documents to the new manager on 6 December 2019, Prestige had failed to provide any audited financial statements for owners corporation 1 or any general ledgers for the OCs;
b. Prestige had a contractual duty to ensure that owners corporation 1 complied with s.34(2) of the OC Act (I note that part of the applicants' claim in the proceeding was that the contract appointing Prestige as the manager was invalid); and
c. Prestige by its breach of contract has caused, at the least, owners corporation 1 to be in breach of the OC Act,

and these matters ought to be taken into account in weighing up whether I should award costs in the applicants' favour under s.109(3)(e) of the VCAT Act.

63 Section 34 of the OC Act requires an owners corporation to prepare annual financial statements in accordance with the standards required by the regulations.

64 Similar to the reasons I have given for the applicants' reliance of s.127 of the OC Act, the applicants are not able to rely on any alleged breach by Prestige of s.34(2) of the OC Act to seek costs in the proceeding.

65 The issue of s.34(2) of the OC Act has only been raised by the applicants for the purposes of the cost application. If Prestige has indeed breached s.34 of the OC Act, then appropriate proceedings can be instigated by the OCs in the future. But I cannot in effect summarily determine the merits of a breach of

---

19 Ibid at paragraph 42.
20 Ibid at paragraphs 43 and 44.

s.34(2) of the OC Act claim when determining costs in this proceeding, which until the cost application, was not part of the applicants' claim. To do so would undermine the operation of ss. 98 (natural justice provision) and 109 of the VCAT Act as it would enable parties to attach additional causes of action against other parties after the Tribunal has determined the substantive dispute.

66 Accordingly, when considering s.109(3)(e) of the VCAT Act, I am not satisfied that there are any "other matters" which are relevant and which form a basis to order costs in favour of the applicants.

67 In summing up the applicants' overall position as to costs, it appears that the applicants were content in having the Tribunal dismiss their claim and yet now wish for the Tribunal to order costs as if it had been successful in all aspects of its claim. Given that the Tribunal has dismissed their claim and the applicants have not appealed or made any submissions challenging the Tribunal's order of 20 January 2020, I cannot see how I could possibly make any findings that the applicants' claim would have hypothetically succeeded if the Tribunal had not dismissed the proceeding.

68 I now turn to Prestige's claim for costs.

THE RESPONDENT'S CLAIM FOR COSTS UNDER S.109(3)(a)(i) OF THE VCAT ACT

69 Prestige submits that:[21]

a. By order of the Tribunal made on 28 October 2019, the applicants were required to file and serve their Points of Claim by 18 November 2019.

b. Despite Prestige consenting to an extension of the time for the applicants to provide their Points of Claim to 25 November 2019, the applicants failed to provide their Points of Claim.

c. Due to the applicants' breach, Prestige was unable to file its Points of Defence.

d. The applicants were also provided all funds and records of the OCs and yet have prolonged the proceedings by seeking the hearing on 20 January 2020 to be converted into a directions hearing, for the Tribunal to determine a number of matters, including whether the Tribunal should make an authorising order, how to proceed with holding an annual general meeting, delivery of further books and records by Prestige under s.127 of the OC Act, and hearing on costs. These steps by the applicants increased Prestige's costs.

e. The applicants unnecessarily sought a directions hearing for 20 January 2020 when delays of the OCs receiving the records and funds from Prestige was due to the new manager refusing to sign the handover sheets that Prestige had provided pursuant to s.127 of the OC Act. In

[21] Respondent's Submissions at paragraphs 29 and 30 (erroneously numbered as "20" in the document).

terms of Prestige's submissions concerning s.127 of the OC Act, I have addressed this matter below when considering Prestige's claim under s.109(3)(c) of the VCAT Act.

70 Prestige argues that the above conduct by the applicants unnecessarily disadvantaged Prestige.

71 For the following reasons, I am not satisfied that it would be fair to award Prestige costs in consideration of the matters it has raised under s.109(3)(a)(i) of the VCAT Act:

a. I am not satisfied that the applicants' conduct in the proceeding, including their failure to file and serve their Points of Claim caused any unnecessary disadvantage to Prestige. It appears that the opposite is true.

b. The fact that the applicants failed to file any Points of Claim not only negated the need for Prestige to file any Points of Defence, it gave Prestige the opportunity to apply to the Tribunal to strike out the applicants' claim or to seek a summary dismissal of the proceeding, if it was adamant that the applicants had no standing. Prestige did neither. The applicants' failure gave Prestige more opportunities – not less – to have the proceeding determined in its favour even before the directions hearing on 20 January 2020.

c. I am not satisfied that the fact that Prestige incurred additional costs in granting the applicants an extension of time and in the parties' lawyers corresponding with each other regarding this issue unnecessarily disadvantaged Prestige in the proceeding. As I mentioned in respect of the applicants' claim for costs, the fact that a party has incurred costs due to another party's conduct does not, in and of itself, establish that the party has suffered unnecessary disadvantage in the proceeding. To construe s.109 of the VCAT Act in such a manner would undermine the scope and operation of s.109(1) and (2) of the VCAT Act, and the default position that each party must bear their own costs.

d. It appears that the parties agreed to have the proceeding conclude by the Tribunal ordering the dismissal of the applicants' claim. By the parties' agreement, it negated the need for both parties to continue with the proceeding and have the Tribunal determine the various issues, for the applicants to file and serve a Points of Claim, and for the parties to incur further costs. In these circumstances, I do not understand how Prestige suffered unnecessary disadvantage by having the proceeding conclude on 20 January 2020.

THE RESPONDENT'S CLAIM FOR COSTS UNDER S.109(3)(c) OF THE VCAT ACT

72 Prestige submits that pursuant to s.109(3)(c) of the VCAT Act, the relative strengths of the claims made by each party favour the awarding of costs.

73 Prestige contends that:

a. under s.165(1)(ba) of the OC Act, the applicants had no standing to issue the proceeding as they had not obtained an authorising order from the Tribunal prior to issuing the proceeding. Its submission assumes that the applicants would not have been able to obtain an authorising order had the proceeding continued; and

b. it had complied with its obligations to return the records and funds of the OCs under s.127 of the OC Act.

Prestige's claim under s.165(1)(ba) of the OC Act.

74 Section 165(1)(ba) of the OC Act states:

> 165 What orders can VCAT make?
>
> (1)In determining an owners corporation dispute, VCAT may make any order it considers fair including one or more of the following—
>
> …
>
> (ba) an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation;

75 Prestige relies on a number of decisions of the Tribunal in submitting that the effect of s.165(1)(ba) of the OC Act is that the applicants had no prospect of success in the proceeding.

76 I reject Prestige's submission for the following reasons:

a. Prestige submits that at the directions hearing on 20 January 2020, it made submissions to the Tribunal that the applicants had no standing under s.165(1)(ba) of the OC Act. I have no reason to question that the arguments were put by Prestige then. But Prestige has failed to indicate whether at the directions hearing the applicants conceded that they had no standing or whether the Tribunal made any determination that the applicants had no standing.

b. Based on the material provided to me, I am satisfied that at no time did the applicants concede to the Tribunal or that the Tribunal determined that the applicants had no standing in the proceeding.

c. It appears that the first time that Prestige raised the applicants' alleged lack of standing with the Tribunal was when the matter came before the Tribunal on 20 January 2020. This is despite the fact that Prestige had an opportunity to raise the issue on 28 October 2019 when the Tribunal determined the applicants' application for temporary injunctive relief. Rather than challenging the applicants' standing, Prestige gave an undertaking that it would abide by certain conditions until the end of the proceeding.

d. Even though Prestige was not able to file and serve a Points of Defence, Prestige was not powerless to pursue its claim that the applicants had no standing prior to the directions hearing on 20 January 2020. There were a number of options available to Prestige – it could have made an application to strike out the applicants' claim, for summary dismissal of

their claim, or for a stay of the proceeding until the applicant obtained an order of the Tribunal under s.165(1)(ba) of the OC Act. Prestige did not seek any of those options. The Tribunal did not dismiss the proceedings on 20 January 2020 in response to any application made by Prestige.

e. The various past decision of the Tribunal that Prestige has referred to in relation to the operation of s.165(1)(ba) of the OC Act do not assist Prestige.

f. Among the cases it referred to, Prestige relies upon the case of *Noonan v Owners Corporation No 2 PS 409115E and Anor (Owners Corporation)* [2011] VCAT 1934 (***Noonan***). *Noonan* was a case where, among other things, the respondents had applied for summary dismissal of the applicant's claim arguing that the applicant, a lot owner, had no standing under s.165(1)(ba) of the OC Act. Accordingly, the Tribunal in *Noonan* considered the issue of standing before it determined the issue of costs of that application. That is not the situation for the parties in this proceeding.

g. In *Wong v Network Pacific Real Estate Pty Ltd (Owners Corporation)* [2012] VCAT 791 (***Wong***), the respondent applied to have the applicant's claim summarily dismissed based on the applicant having no standing. Notably the applicant had issued proceedings against the manager of the owners corporation and then the manager applied for summary dismissal. Rather than dismissing the proceeding, the Tribunal subsequently gave the applicant the opportunity to apply for an authentication order under s.165(1)(ba) of the OC Act. Upon the applicant making an application under that section, the Tribunal made an order authorising the applicant to prosecute the proceeding on behalf of the owners corporation – that is, to continue with the proceeding.

h. What is clear from the outcome of *Wong* is that the Tribunal can grant authorising orders for an applicant to continue a proceeding rather than to require an application to first seek an authorising order before issuing the proceeding. Another instance when the Tribunal made an authorising order after an applicant issued the substantive proceedings is the case of *Grima v Quantum United Management Pty Ltd (Owners Corporation)* [2016] VCAT 1960 (***Grima***).

i. In my view, the decisions of *Wong* and *Grima* correctly recognise that there is no temporal limitation imposed on the Tribunal under s.165(1)(ba) of the OC Act in respect of when the Tribunal can make an authorising order. The powers available to the Tribunal under s.165 of the OC Act are inclusive and the prerequisite for the Tribunal exercising its powers is that there is an "owners corporation dispute".

j. Considering the parties' circumstances, it is by no means certain that had the proceeding continued and the applicants made an application

for an authorising order under s.165(1)(ba) of the OC Act, the Tribunal would have dismissed that application.

Prestige's submission that it had complied with s.127 of the OC Act

77 Prestige argues that due to the new OC manager's refusal to sign the handover sheets of all documents Prestige delivered pursuant to s.127 of the OC Act, the applicants sought unnecessary directions from the Tribunal on 20 January 2020. I do not understand how this event supports Prestige's argument: why is the fact that the new OC manager failed to sign the handover sheet disentitle the applicants from a cost order and in turn entitle Prestige to a costs order? If Prestige did return all records and funds within the requisite time but the new OC manager simply failed to sign off on the handover sheet, it may have meant that a part of the applicants' claim against Prestige would have failed. For the reasons I have provided for the applicants' reliance on s.127 of the OC Act, I am unable to determine whether or not Prestige complied with that section.

78 Further, in respect of Prestige's submission that the hearing of 20 January 2020 was unnecessary given that it had complied with s.127 of the OC Act, the applicants submit that they agreed for the proceedings to be dismissed "based, in part, on admissions made by [Prestige] at the directions hearing" in respect of documents and registers.[22]

79 The situation with the parties' reliance on s.127 of the OC Act and how that issue influenced the parties' decision to have the Tribunal dismiss the proceeding is far from being clear or certain. Importantly, it is inappropriate that I interfere with the Tribunal's order of 20 January 2020 by determining the issue of whether or not Prestige breached s.127 of the OC Act.

80 In conclusion, I am not satisfied that it would be fair for me to order costs in favour of Prestige pursuant to s.109(3)(c) of the VCAT Act.

CONCLUSION

81 In conclusion, and as my overall observation of the parties' claim for costs, both parties' claims suffer the following flaws, in that they include arguments which:

a. properly belong in the realm of determining the merits of the claim at a final hearing and not ones that ought to be raised subsequently for the first time when the Tribunal is determining the issue of costs;

b. are based on hypotheticals which are irrelevant and which colour, rather than clarify, the issues of costs; and

c. are based on assumptions of fact which the Tribunal did not make any findings on when the Tribunal decided to dismiss the proceeding. If I were to make findings of fact on such matters, it would mean that I would be conducting, in effect, a subsequent and mini-trial on some

[22] Applicants' Further Submissions at paragraph 22 to 23.

aspects of the parties' substantive claims in the proceeding. In my view, that is not what I am permitted to do when considering costs. I cannot speculate or hypothesise on what findings the Tribunal would have made if it had been left to decide the proceeding on the merits.

82 For the reasons I have provided, I am not satisfied that it would be fair to order any costs in favour of any party. Accordingly, both the applicants and Prestige are to bear their own costs of the proceeding.

D Kim
Member