

SUPREME COURT OF VICTORIA  
COURT OF APPEAL

S APCI 2019 0048

TANAH MERAH VIC PTY LTD (ACN 098 935 490)

Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS  
[No 3]

Respondents

S APCI 2019 0051

GARDNER GROUP PTY LTD (ACN 056 178 262)

Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS

Respondents

S APCI 2019 0053

ELENBERG FRASER PTY LTD (ACN 081 961 855)

Applicant

v

OWNERS CORPORATION NO 1 OF PS613436T and ORS

Respondents

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JUDGES:

BEACH, OSBORN JJA and STYNES AJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

7 June 2021

DATE OF JUDGMENT:

7 June 2021

MEDIUM NEUTRAL CITATION:

[2021] VSCA 155

JUDGMENT APPEALED FROM:

[2019] VCAT 286 (Judge Woodward)

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PRACTICE AND PROCEDURE - Final orders - Costs - *Calderbank* offers - Applicant consultants ordered to pay Owners' costs on standard and then indemnity basis in each proceeding - Applicant consultants ordered to pay builder's costs on standard basis in each proceeding - Respondent consultants ordered to bear own costs in each proceeding, except fire engineer ordered to pay 15 per cent of building surveyor's costs in building surveyor's application for leave to appeal and appeal.

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APPEARANCES:

Counsel

Solicitors

For Tanah Merah Vic Pty Ltd in all proceedings

Mr T J Margetts QC with Mr J B Waters

Clyde & Co Australia

For the Owners in all proceedings

Mr W Thomas

Wotton & Kearney

For Gardner Group Pty Ltd in all proceedings

Mr C M Caleo QC with Ms V Blidman

DLA Piper Australia

For LU Simon Builders Pty Ltd in all proceedings

Mr P B Murdoch QC with Mr R Andrew

Colin Biggers & Paisley

For Mr A Galanos in proceeding S APCI 2019 0053

Mr C M Caleo QC with Ms V Blidman

DLA Piper Australia

For Elenberg Fraser Pty Ltd in all proceedings

Mr J A F Twigg QC with Mr C F E Dawlings

Clyde & Co Australia

BEACH JA  
OSBORN JA  
STYNES AJA:

1 On 26 March 2021, the Court published reasons in the applications for leave to appeal brought by Thomas Nicolas, Gardner Group and Elenberg Fraser against orders that had been made in the Victorian Civil and Administrative Tribunal ('VCAT') in relation to a fire that occurred on 24 November 2014 in the Lacrosse apartment tower.<sup>1</sup> In those reasons, we rejected all of the grounds of appeal advanced by Thomas Nicolas and Elenberg Fraser, and all but one of the grounds of appeal advanced by Gardner Group (ground 3). In relation to ground 3, we accepted Gardner Group's submission that the judge's finding, of a causal link<sup>2</sup> in respect of the second of two bases upon which the judge found that Gardner Group had breached the Gardner Group Agreement, had to be overturned.

2 On 12 May 2021, the Court published reasons in support of our conclusion that the Tribunal's apportionment of the damages payable by LU Simon to the Owners should be varied.<sup>3</sup> In the Apportionment Reasons, we concluded that the damages payable by LU Simon to the Owners should be reapportioned:

- Gardner Group: 30 per cent
- Elenberg Fraser: 25 per cent
- Thomas Nicolas: 42 per cent
- Mr Gubitta: 3 per cent

3 The remaining issues in these proceedings concern questions of costs and the form of final orders.

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1 *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T* [2021] VSCA 72 ('Appeal Reasons'). We shall use the same abbreviations in these reasons as in the Appeal Reasons.

2 At Reasons [564].

3 *Tanah Merah Vic Pty Ltd v Owners' Corporation No 1 of PS613436T [No 2]* [2021] VSCA 122 ('Apportionment Reasons').

***Substantive orders***

4 The success or otherwise of each party in each application is a relevant matter in relation to costs. Accordingly, we deal first with the orders that should be made having regard to our conclusions already expressed.

5 In its application for leave to appeal, Thomas Nicolas enjoyed no success. We will make an order, in Thomas Nicolas's application for leave to appeal, that the application will be refused.<sup>4</sup>

6 In its application for leave to appeal, Elenberg Fraser enjoyed no success. We will make an order, in Elenberg Fraser's application for leave to appeal, that the application will be refused.<sup>5</sup>

7 As we have already said, Gardner Group had limited success in its application for leave to appeal. As a consequence of its success, the following orders will be made in its proceeding in this Court:

- (1) Leave to appeal is granted on ground 3, and refused on all other grounds.
- (2) The appeal is allowed.
- (3) Paragraph 2 of the orders made by the Tribunal on 7 March 2019 (as varied by orders made by the Tribunal on 14 October 2019) is varied by replacing the sum of '\$1,896,916.98' in sub-paragraph (a) with the sum of '\$1,724,469.98'; and by replacing the sum of '\$2,241,810.99' in sub-paragraph (c) with the sum of '\$2,414,257.98'.
- (4) The orders made by the Tribunal on 1 April 2019 (as varied by orders made in the Tribunal on 14 October 2019 and 27 November 2019) are varied as follows:
  - (a) in paragraph 4(a), by replacing '\$2,309,899.99' with '\$2,099,909.08';

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4 Appeal Reasons [272].

5 Ibid [272].



- (b) in paragraph 4(c), by replacing '\$2,729,881.80' with '\$2,939,872.71';
- (c) in paragraph 6(a), by replacing '33%' with '30%';
- (d) in paragraph 6(c), by replacing '39%' with '42%';
- (e) in paragraph 9(a), by replacing '34%' with '31%'; and
- (f) in paragraph 9(c), by replacing '40.25%' with '43.25%'.

### *Offers passing between the parties*

8 Between 24 July 2019 and 29 March 2021 various written offers passed between the parties. These offers, and responses to them, were put together in a 60-page bundle and provided to the Court to assist us in determining the appropriate orders for costs which should be made. We do not propose to set out or describe all of that correspondence. It is sufficient for present purposes to observe that offers of potential significance were made by the Owners and LU Simon.

9 On 24 July 2019, the Owners sent a *Calderbank*<sup>6</sup> letter to each of the applicants for leave to appeal, in which they offered that each application be discontinued on the basis that each party bear its own costs. The offer was open for acceptance until 21 August 2019, and the letter set out reasons why each applicant was bound to fail against the Owners. A further *Calderbank* offer was made in the same terms on 14 July 2020. Neither offer was accepted by any of the applicants.

10 On 7 July 2020, LU Simon sent a letter to each of the applicants for leave to appeal, in which it offered:

- to pay the applicants (jointly) \$1,274,793.02, representing a 10 per cent contribution towards the damages awarded in favour of the Owners;
- a 10 per cent reduction in the amount the applicants had each been ordered by the Tribunal to contribute towards the costs

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<sup>6</sup> *Calderbank v Calderbank* [1976] Fam 93; [1975] 3 WLR 586; [1975] 3 All ER 333.

LU Simon was required to pay the Owners; and

- a 10 per cent reduction in the costs the applicants had each been ordered by the Tribunal to pay LU Simon.

11 Initially, Elenberg Fraser sought to accept LU Simon's offer. Subsequently, Elenberg Fraser and Thomas Nicolas both sought to accept the offer when the offer was put again by LU Simon some months later. Gardner Group did not accept LU Simon's offer, and indicated that it would not agree to the offer being accepted by the applicants unless it (Gardner Group) received the entire benefit of the offer.

### *Resolution of costs issues*

12 In each application for leave to appeal, the applicant should be ordered to pay the Owners' costs on a standard basis up to 21 August 2019, and thereafter on an indemnity basis. The applications against the Owners, and specifically in relation to the orders made in the Owners' favour against LU Simon, were totally without merit. There was no realistic basis upon which any of the applicants could have expected to set aside orders made between the Owners and LU Simon, being orders which neither of those parties sought to disturb. It was unreasonable for each applicant not to accept the Owners' first *Calderbank* offer.

13 In relation to LU Simon, our view is that it should have its costs on a standard basis in each application. That is, each applicant should be ordered to pay LU Simon's costs of their own application for leave (and the appeal in the case of Gardner Group) on a standard basis.

14 We are not persuaded that it was unreasonable for Gardner Group to reject LU Simon's offer.<sup>7</sup> That being the case, neither LU Simon nor the other consultants (Elenberg Fraser and Thomas Nicolas) have any basis for being awarded indemnity costs against Gardner Group.

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<sup>7</sup> See generally, *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435.

15 With one exception, we think that in each proceeding the consultants who were respondents should bear their own costs of being respondents in those proceedings. So, in Thomas Nicolas' application for leave to appeal, there will be an order that Gardner Group and Elenberg Fraser bear their own costs; and in Elenberg Fraser's application for leave to appeal, there will be an order that Gardner Group and Thomas Nicolas bear their own costs.

16 Gardner Group enjoyed some success in its application for leave to appeal. That success was enjoyed wholly against Thomas Nicolas. In the circumstances, we think it is appropriate that Thomas Nicolas be ordered to pay 15 per cent of Gardner Group's costs of its application for leave to appeal and appeal. Thomas Nicolas and Elenberg Fraser will otherwise bear their own costs of Gardner Group's application for leave to appeal and appeal.

### *Conclusion*

17 We will invite the parties to submit draft minutes of orders in each proceeding, conforming with the reasons set out above.

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