VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1534/2016

CATCHWORDS

Costs – whether fair to make an order for costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*; offers of compromise made under Division 8 of the *Victorian Civil and Administrative Tribunal Act 1998;* whether offers complied with s 112; whether enhanced costs order should be made; whether a *Bullock* or *Sanderson* order should be made - relevant principles.

APPLICANT	Margaret Anderson
FIRST RESPONDENT	Holden Peel Projects Pty Ltd (ACN 006 727 073)
SECOND RESPONDENT	Owners Corporation PS603262H
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	7 October 2019
DATE OF ORDER	24 March 2022
CITATION	Anderson v Holden Peel Projects Pty Ltd (Building and Property) (Costs) [2022] VCAT 324

ORDER

1. The second respondent must pay the applicant's costs of the proceeding from 29 June 2017 to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

2. The second respondent must pay 67% of the first respondent's costs of the proceeding to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

3. The applicant must pay 33% of the first respondent's costs of the proceeding to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

4. In addition, the applicant must pay the first respondent $8,412.91 being her share of the preparation of the Tribunal Book.

S Kirton
Senior Member

APPEARANCES:

For the Applicant	Ms M. Anderson in person
For the First Respondent	Mr B. Reid of counsel
For the Second Respondent	Mr J. Wilkinson of counsel

REASONS

1 On 5 May 2020 I handed down my substantive decision in this proceeding (the Reasons).[1] On 1 October 2020 the parties appeared in front of me to make submissions on costs. I formed the view that at that time the proceeding had not been concluded, for the reasons set out below. It was ultimately concluded by an order made by a Vice President of the Tribunal on 28 June 2021. Regrettably, delays in the Tribunal has meant this decision was not published sooner.

BACKGROUND

2 Ms Anderson owned an apartment which was extensively damaged by water. She brought a claim against the builder of the apartment complex (HPP) and the Owners Corporation (the OC) for damage to her property.

3 As against HPP, she claimed a breach of the warranties given by the *Domestic Building Contracts Act 1995* (Vic) (DBC Act) and under the *Water Act 1989* (Vic) (Water Act) for causing an unreasonable flow of water.

4 As against the OC she claimed a failure to maintain the common property and breach of its obligations under the *Owners Corporations Act 2006* (Vic) (OC Act) and for causing or allowing an unreasonable flow of water under the Water Act.

5 In respect of those allegations, I dismissed all claims against HPP, but found the OC liable for breaches of the OC Act and under the Water Act and ordered it to pay Ms Anderson damages in the sum of $135,316.86.

6 In the original Reasons, I also noted the applicant had sought to amend the particulars of loss and damage to include a personal injury claim for $2,460,000 for loss of future income. I made the following Order:

> 3. If the applicant wishes to pursue a claim for damages for loss of future income under the Owners Corporation Act 2006 in the Tribunal, she must advise the Principal Registrar in writing by 30 June 2020. If such advice is received, the proceeding is to be referred to a judicial member of the Tribunal for consideration under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998* as to whether the County Court or Supreme Court would be a more appropriate forum to deal with the claim.

7 Ms Anderson made such notification and her request was referred to a Vice President of the Tribunal who heard and determined the application for orders under section 77.[2] Her Honour considered the application and made the following order in June 2020:

> That part of the applicant's claim which claims damages for personal injury is struck out.

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[1] *Anderson v Holden Peel Projects Pty Ltd* [2020] VCAT 538.
[2] *Anderson v Holden Peel Projects Pty Ltd* [2021] VCAT 407.

8 Although it was argued before me at the costs hearing that the applicant's proceeding as against HPP had concluded as at October 2020, since the personal injury claim was only being put against the OC, I was not satisfied that the applicant had definitively 'nailed her colours to the mast' at that time. This view was supported by the comments of the Vice President noting that the applicant had not taken the necessary procedural steps to pursue a claim and was still seeking the opportunity to obtain further legal advice in 2021. Further, as some of the costs orders sought by HPP will involve an assessment of costs as between the OC and Ms Anderson, I considered it necessary to wait until the proceeding had concluded before determining costs.

THE APPLICATIONS – SUMMARY

9 HPP seeks the costs it has incurred in this proceeding as against each of Ms Anderson and the OC, and says that this would be fair within the meaning of s 109. Its defence of the proceeding was totally successful. It relies on offers of compromise made. It also says that a '*Sanderson'* order or a '*Bullock'* order could be made in relation to any costs ordered in its favour.[3]

10 The OC applies for its costs of the proceeding as against Ms Anderson from 1 July 2019 on an indemnity basis. It relies on an offer made to her on that date.

11 Ms Anderson disputes that any costs order should be made against her. She seeks her costs of the proceeding against HPP and against the OC, and although she does not specify the legal basis, the matters she relies on are relevant to an assessment under s 109. She relies on the fact she was self represented for much of the proceeding and refers to the findings made against the OC: its egregious conduct towards her, its breaches of the OC Act and its liability under the Water Act. She acknowledges the assistance given to her by the solicitors and counsel for HPP during the running of the hearing.

COSTS UNDER THE VCAT ACT

12 The applicable power to award costs is contained in sections 109 and 112 of the VCAT Act.

13 Section 109 provides relevantly:

> s.109:
>
> (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-

[3] *Sanderson v Blyth Theatre Company Limited* [1903] 2 KB 533, *Bullock v London General Omnibus Company* [1907] 1 KB 264.

(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.

14 As emphasized by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group Pty Ltd* [4], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

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

(ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

15 It is well-established that each application for costs is to be considered and assessed on its own circumstances[5] and that "fair" is defined in the dictionary as "just or appropriate in the circumstances".

16 There are also relevant provisions in the Act dealing with offers of compromise. Section 112 provides:

(1) This section applies if—

[4] [2007] VSC 117 at [20].
[5] For example: *Yan v Brown Bros. Cabinet Works Pty Ltd* (No 2) [2014] VCAT 177 at [15].

(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and

(b) the other party does not accept the offer within the time the offer is open; and

(c) the offer complies with sections 113 and 114; and

(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in subsection (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

(3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal—

(a) must take into account any costs it would have ordered on the date the offer was made; and

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

17 If an offer meets the criteria in section 112(1) then the offeror is entitled to a favourable costs order, unless the Tribunal is persuaded to order otherwise.[6]

18 The party who rejected the offer bears the onus of persuading the Tribunal that it should exercise the discretion to "otherwise order".[7]

19 There must be some aspect of the application that significantly distinguishes it from the ordinary to displace the clear presumption in favour of the offering party.[8]

20 The offeree must point to some feature of the case that distinguishes it from other cases.[9]

21 The Tribunal must take into account any costs it would have ordered on the date the offer was made, and must disregard any interest on costs.[10]

THE OFFERS OF COMPROMISE THAT WERE MADE

22 The relevant dates are as follows:

15 November 2016	Ms Anderson commenced proceeding against HPP
29 June 2017	The OC was joined to the proceeding
20 June 2019	HPP offered to pay Ms Anderson $46,000 all

[6] *Taylor v Trentwood Homes Pty Ltd* [2012] VCAT 1125 at [25].
[7] *Paleka v Suvak* [2000] VCAT 58 at [19].
[8] *Kamel v Transport Accident Commission* (unreported, VCAT, Galvin DP, 7 June 2001).
[9] *Commisso v Transport Accident Commission* [2001] VCAT 417 at [43].
[10] *Metricon Homes Pty Ltd v Sawyer* [2013] VSC 518 at [37]-[38].

	in
1 July 2019	The OC offered to pay Ms Anderson $300,000 all in
2 October 2019	A joint offer from HPP and the OC to pay Ms Anderson $83,901 all in

PRELIMINARY ISSUES

23 As a preliminary matter, I note that there was a separate proceeding between the OC and HPP (proceeding BP1093/2018) which was settled by terms of settlement dated 15 April 2019. This settlement did not restrict or modify HPP's rights to seek its costs in proceeding BP1534/2016 as against the OC.

24 Further, where I refer to 'costs', I mean this to include usual disbursements, including the cost of expert reports.

COSTS AS BETWEEN THE OC AND MS ANDERSON – S 112

The OC's submission

25 The OC relies on its offer made on 1 July 2019 to pay Ms Anderson $300,000 'all in' (the OC Offer). There is no dispute that Ms Anderson received the OC Offer and rejected it. The OC Offer complies with s 113 and s 114.

26 It acknowledges that while it may not have been possible to assess the benefit of the offer while part of the proceeding remained on foot (the foreshadowed personal injury claim), but says that issue has fallen away now that the proceeding has been finalised.

27 The OC submits that it was an offer to settle the whole proceeding. It says that the Tribunal's Order made at the conclusion of the proceeding is "not more favourable" than the OC Offer, in that the Order was for the OC to pay Ms Anderson $135,316.86.

28 Section 112 requires the amount of any costs that would have been ordered under s 109 to be included in the assessment of whether the Offer is more favourable than the Order. Ms Anderson gave evidence that her legal and expert costs up until 1 July 2019 total $117,890.59.[11]

29 The OC submits that it is unlikely that the full amount of $117,890 would have been ordered if a costs order were made under s 109 at that time. Nevertheless, even if the Tribunal had allowed all the costs on a full indemnity basis, and an order had been made as at 1 July 2019 for the OC to pay Ms Anderson's costs and disbursements under s 109, the total effect of the Order would be for the OC to pay Ms Anderson $135,316.86 plus $117,890.59. Basic arithmetic shows that the Order is not more favourable than the OC Offer.

[11] Applicant's Particulars of Loss and Damage 25 June 2019.

30 The OC Offer put Ms Anderson on notice that if she did not accept it, the OC would be seeking its costs on an indemnity basis.

Ms Anderson's submission

31 In her written submission, Ms Anderson makes the point that "this entire proceeding was based on water ingress into Lot 10 and that has not been stopped". She provides a chronology of events, including the following allegations:

a. in the final hearing days (i.e. October 2019) she requested the OC provide her with a copy of the report of plumbing works apparently undertaken in September 2019. Despite promises, that report was never provided.

b. In March 2020 she wrote to the Tribunal and the respondents seeking an order regarding evidence that the OC had stopped the flow of water into Lot 10.

c. On 5 March 2020 she received an email from the solicitors for the OC stating in part "I am instructed that works have been done so that any leakage into unit 10 has now been rectified".

d. She disputed that the water ingress had been stopped and on 9 July 2020 she received an email from the managing agent for the OC which stated "Viney Plumbing completed stage 2 of the major leaks last Friday…" and "… Stage 3 will consist of repairs that relate to your Lot, and I will confirm that with yourself once the Committee have received the quote for works".

e. As at the date of her written submissions (4 October 2020) she had not received any correspondence from the OC or its managing agent in relation to works for Lot 10.

Discussion and findings

32 The starting point is that if the OC Offer meets the criteria in section 112(1), then the OC is entitled to a favourable costs order, unless the Tribunal is persuaded to order otherwise.[12] Ms Anderson bears the onus of persuading the Tribunal that it should exercise the discretion to otherwise order.[13]

33 The claim originally brought by Ms Anderson was for orders including that the flow of water should be stopped. In the last iteration of her Points of Claim dated 17 December 2018, which was current as at the date of the offer, the orders she sought were set out in the prayer for relief and included the following:

> As against the Owners Corporation second respondent:

[12] *Taylor v Trentwood Homes Pty Ltd* [2012] VCAT 1125 at [25].
[13] *Paleka v Suvak* [2000] VCAT 58 at [19].

A. An order requiring the Owners Corporation to take all action necessary to prevent the flow of water from Common Property onto and into Lot 10 and in accordance with the scope in the attached Reports here to.

B. Alternatively, the sum of $767,802.

C. Alternatively, damages.

34 Following those Points of Claim, Ms Anderson filed numerous versions of her particulars of loss and damage. At no time did she withdraw the above prayer for relief.

35 I recall that at the end of the hearing in September 2019 the OC advised that it had recently taken steps to stop the flow of water. In August 2019 Ms Anderson advised that she had elected to seek damages calculated as a diminution in the value of her apartment. Accordingly, the final orders made by me did not include a mandatory order, and instead focused on the claim for damages.

36 Ms Anderson disputes that the OC actually took the steps it had advised (as set out in her submission). I have not received evidence about the conduct of the parties since the end of the hearing, but I do not need to make any determination about whether the matters submitted by Ms Anderson are correct or not. What is relevant for present purposes is whether or not the OC Offer addressed all matters in the proceeding.

37 In my opinion, it did not. As the claim included a claim that the flow of water be stopped, and this was not addressed by the OC Offer, I consider that it was reasonable for Ms Anderson to reject the offer. As at July 2019, there was no indication from the OC that it had stopped the flow of water. At that time, Ms Anderson was primarily concerned with the water entering her apartment. Her election to claim damages by reference to the diminution in value of her apartment (rather than seek an order that the flow of water be stopped) was not made until August 2019.

38 Accordingly, I am satisfied that this is not a case where s 112(2) should be applied. I am persuaded by Ms Anderson that I should exercise the discretion to order otherwise than in accordance with s 112.

39 Accordingly, the OC cannot rely on its Offer of 1 July 2019. As there is no other basis on which it seeks costs against Ms Anderson, its application for costs fails.

COSTS AS BETWEEN HPP AND MS ANDERSON – S 112

40 The HPP Offer of 20 June 2019 was to pay Ms Anderson $46,000 in full and final settlement of all claims made by her against it. It is unarguable that the offer complied with ss 112 to 114 of the VCAT Act.[14] It was open for 14 days and was not withdrawn.

[14] An offer does not need to specifically state it is made under ss 112-114; instead it needs to comply with those sections: *Maiden trading as MJM Excavations v Simmons* [2011] VCAT 1828 at [7]-[8].

41 HPP submits that it was not reasonable for Ms Anderson to reject the Offer, as the reasons why she should accept it were set out in the offer, and it was clearly more favourable to her than the orders made by the Tribunal at the conclusion of the proceeding.

42 As stated above, if the HPP Offer meets the criteria in section 112(1), then HPP is entitled to a favourable costs order, unless the Tribunal is persuaded to order otherwise. For the following reasons, Ms Anderson has not persuaded me that the Tribunal should exercise the discretion to "otherwise order".

43 Ms Anderson did not provide any submission specifically relating to the HPP Offer. Her submissions focused on the OC Offer. Accordingly, she offered me no grounds on which to exercise my discretion.

44 Further, I am satisfied that, unlike the OC Offer, the HPP Offer addressed squarely the claims made against it by Ms Anderson in her Points of Claim. Her prayer for relief against HPP was for payment of damages only. The orders made at the conclusion of the proceeding were less favourable to her than the terms of the HPP Offer.

45 Although Ms Anderson was not legally represented at the time the HPP Offer was made, the Offer set out in some detail the reasons why it should be accepted. Further, at the time it was made, the hearing had been underway for some days and Ms Anderson had heard opening submissions from each of the parties indicating that her remedy lay primarily against the OC.

46 Accordingly, I am satisfied that Ms Anderson must pay the costs of HPP from 5 July 2019 (being the date 14 days after the date of the offer, when the offer lapsed). However for the reasons discussed below, I am also satisfied that a *Sanderson* costs order should be made, so that the OC must pay a portion of those costs to HPP in place of Ms Anderson.

COSTS AS BETWEEN HPP AND THE OC AND/OR MS ANDERSON – S 109

47 Further and in the alternative, HPP also seeks its costs from both Ms Anderson and the OC under s 109.

48 I note that s 109 does not apply only to costs between an applicant and respondent; subsection (2) states "the Tribunal may order that a party pay all or a specified part of the costs of another party…". There is nothing in s 109 to prevent one respondent paying the costs of another respondent.

49 HPP submits that the Tribunal should depart from the general presumption in s 109(1) that each party should bear their own costs, and relies on relevant factors which may be taken into consideration, as set out in s 109(3). I will discuss each of the factors in turn.

Conduct of the proceeding causing unnecessary disadvantage: ss(3)(a)

HPP's submission

50 HPP submits that the conduct of both Ms Anderson and the OC has unnecessarily disadvantaged HPP. The hearing occupied a large number of days over any months. A number of hearing days were lost due to Ms Anderson's ill-health.

51 Further delays were caused by the OC having failed to prepare for the hearing, and making application to amend its Point of Defence, to file a witness statement and to rely on further documents. In the Tribunal's decision to refuse this application, the history of the OC's conduct was outlined.

52 It was HPP which prepared the Tribunal Book indexes (6 versions) and the Tribunal Book to assist Ms Anderson. The hearing would not have functioned as well as it did without HPP undertaking that role.

53 The OC has paid their portion of the cost of the preparation, but Ms Anderson has not. HPP seeks an order that Ms Anderson pay her share in the sum of $8412.91 in accordance with the VCAT orders on 27 March 2019.

54 Both Ms Anderson and the OC continually revised their case, filed expert material, sought leave to file further material during the course of the proceeding and during the hearing.

55 HPP did not know the scope of the case it had to meet until during the course of the hearing, when Ms Anderson filed her further and better particulars of loss and damage seeking in excess of $3 million. HPP acknowledges that the mental and physical impact of this case on Ms Anderson explains why she could not conduct the matter more efficiently. However, HPP has incurred significant cost and expense as a result of Ms Anderson:

a. amending her Points of Claim on a number of occasions

b. failing to comply with VCAT orders

c. making claims against HPP that were unable to be supported by evidence

d. being unable to attend or continue on allocated hearing days for various reasons.

56 The OC was either advising the parties it may not be proceeding, seeking to adjourn the matter or seeking to file further material. Its conduct included:

a. failing to issue the claim of the OC against HPP for over a year which caused the VCAT proceeding to be delayed and unable to progress: the special resolution to commence proceedings was issued by the OC on 28 August 2017 but the proceeding was not issued until July 2018

b. failing to file its Amended Defence on time

c. failing to file a Further Amended Defence in accordance with the orders

d. failing to file its expert reports on time

e. failing to file its affidavit of documents on time or at all

f. failing to file witness statements or witness statements in reply

g. on 29 March 2019 applying to adjourn the hearing scheduled to commence on 1 April 2019 as it was not prepared

h. on 15 April 2019 applying to file an Amended Defence, a witness statement and provide further documents, which was denied.

The OC's response

57 In response, the OC submits that delays in compliance with VCAT orders is not a sufficient ground to justify an order for costs, especially where cost orders have already been made for such delays. Further, there are instances where non-compliance with orders by the OC may have caused delay, but apart from two occasions (the OC's 29 March 2019 adjournment application and the 15 April 2019 application for leave to file documents), it is difficult to extrapolate when any delays were not caused or contributed to by delays occasioned by Ms Anderson.

58 While a party's conduct causing disadvantage may be relevant as between an applicant and a respondent, it is difficult to show prejudice or loss when the disadvantage is to a co-respondent.

59 Further, the answer to the costs of the builder's successful defence is a costs order against the applicant. It was the applicant's claim that caused HPP to be involved in the proceeding. It was the applicant's conduct which occupied most of the hearing time.

60 The applications brought by HPP at the commencement of the hearing (opposing the OC's application for leave to file an amended defence and further evidence) should properly have been brought by Ms Anderson. A costs order against her in favour of HPP will compensate it for these costs.

61 Further, the OC submits that HPP could have and should have protected itself earlier in the proceeding by making offers of compromise. The OC should not bear costs that HPP ought to have protected itself against with a well-considered offer of its own.

Ms Anderson's response

62 Ms Anderson says that much of the conduct of the proceeding was beyond her control. She had to represent herself because she had been 'financially crippled' by the behaviour of the OC and their advisers. The OC delayed the proceeding which caused her to have to constantly make changes to her claim, as her out-of-pocket expenses continued to be incurred.

63 She acknowledges the assistance she received from the solicitors and Counsel for HPP throughout the hearing, and says that the OC and or its

advisers continually attacked, bullied and tried to blame their inaction and shirking of responsibilities on her. She says the costs of the Tribunal Book should be borne totally by the OC.

64 She first contacted the OC manager in 2012 about the issues with her apartment; it was the OCs conduct which caused the proceeding to be long and drawn out. The physical and emotional stress she suffered by the OC's conduct caused her to be hospitalised four times during the hearing.

Prolonging unreasonably the time taken to complete the proceeding: ss(3)(b)

65 The conduct set out above was also relied on by HPP to demonstrate that each party prolonged unreasonably the time taken to complete the proceeding. The responses of the OC and Ms Anderson were similar.

The relative strengths of the claims made: ss(3)(c)

66 HPP submits that Ms Anderson's claim was always doomed to fail and this subsection supports an order of costs against her. HPP had no option but to defend the claim made by Ms Anderson given the quantum. In its Further Amended Points of Defence dated 10 October 2018 HPP stated that her loss and damage had been caused by the OC's failure to repair and maintain the common property. This was supported by the expert evidence. Ms Anderson did not present any evidence to support her claim that her loss and damage was caused by defective building works by HPP.

67 The claim of Ms Anderson against HPP was struck out in total. This shows that HPP was completely successful in its defence. Ms Anderson, if properly seized of the facts of the matter, should not have commenced proceedings against HPP.

68 In response, Ms Anderson submits that it was the OC manager, Strata Plan, which told her in 2012 that she needed to contact the builder about the water issues with her apartment. Further, there were some building defects identified by all experts, caused by the builder, and so HPP "should be responsible for repairs to defects that affect Lot 10".

69 She says that although HPP was not found liable to her, there are still defects in the building and she is in a worse situation than she was when the proceeding commenced, in that the water ingress has not been repaired, the common property defects have not been repaired, mould, water damage and pigeons continue to infest her apartment, it remains a health hazard and cannot be sold or rented.

The nature and complexity of the proceeding: ss(3)(d)

70 The subject of the proceeding involved complex factual and legal matters which required a significant number of hearing days. No party disputes that this is a relevant factor.

Other relevant matters: ss(3)(e)

Offers

71 HPP submits that the offers of compromise made by it and/or the OC may be taken into consideration under ss (3)(e) as 'any other relevant matter', whether or not they comply with s 112 or fall within the rationale of *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*:[15]

> At [23]: The critical question is whether the rejection of the offer was unreasonable in the circumstances. We see no justification for a more stringent test such as 'manifestly' or 'plainly unreasonable'.
>
> At [25]: The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of the Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
>
> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed at the date of the offer;
>
> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

72 As discussed above, the HPP Offer satisfies each of those matters. It submits that accordingly Ms Anderson should have accepted one or more of the offers and/or the OC should have taken steps to resolve the proceeding with Ms Anderson. She was legally represented from February 2017 until sometime in January 2019. Thereafter she was unrepresented. The OC was legally represented (apart from a period of one week in early 2019). Had each of them been given and accepted appropriate legal advice, they would not have continued with the proceeding and should have settled prior to the hearing.

73 Ms Anderson submits that the joint offer made on 2 October 2019 should not be given any relevance, and made the following general points:

a. the only offer that the Tribunal should take into consideration is the last offer, made on 2 October 2019, being a joint offer by both respondents to pay $83,901 when the applicant's claim was approximately $3 million.

[15] [2005] VSCA 298.

b. She said this offer does not comply with ss 112-114 as it was only open for five days. This was not a reasonable amount of time for her to consider or understand it.

Risk of double dipping

74 In response, the OC made similar submissions to those discussed above. It made a further submission that another relevant matter that should be taken into consideration is the risk of double dipping if costs are ordered against both Ms Anderson and the OC. It submits that an order should be made similar to that in *Gunston v Lawley*[16] where Byrne J held that:

> The Tribunal was mindful of the proportionate liability regime but it was well and truly entitled to allocate costs in terms of the time occupied in dealing with the different claims and their outcomes.

75 The OC submits that in the present case, almost all the hearing days were spent dealing with the applicant's case. Because the OC's lay evidence was excluded,[17] the overwhelming majority of Tribunal hearing time and outside preparatory work was taken up by the applicant's claim.

The apartment has not yet been fixed

76 Ms Anderson made submissions to the effect that as her apartment has not yet been fixed, it would not be fair to order her to pay costs of either party.

Discussion and findings

77 In assessing HPP's claims for costs under s 109, I must be satisfied it would be fair to depart from the starting point of s 109, that each party bear their own costs. As set out in *Vero v Gombac* (above) I must have regard to the specific matters stated in s.109(3)(a) – (d) and may also take into account any other matter that I consider relevant to the question under ss (e).

78 Having regard to the following matters, I am satisfied that it is fair to order that Ms Anderson must pay the costs of HPP. I am also satisfied that it is fair to order that the OC must pay the costs of HPP: Having said that, for the reasons set out below, I will order that a portion of Ms Anderson's liability to HPP is to be paid by the OC by way of a *Sanderson* order.

79 First, I am satisfied that the nature and complexity of the proceeding is such that a costs order should be made.

80 Second, both the OC and Ms Anderson conducted the proceeding in a way which caused unnecessary disadvantage to HPP. This conduct also caused the proceeding to be unreasonably prolonged. Ms Anderson's conduct included the following:

[16] [2008] VSC 97 at [71].
[17] This was the subject of my interlocutory decision: *Anderson v Holden Peel Projects Pty Ltd* [2019] VCAT 801.

a. while she was justified in commencing the proceeding against HPP, she maintained her claim even after the expert evidence indicated that her claim properly lay against the OC;

b. she caused the hearing to be long and drawn out. I recognise the emotional, physical and financial difficulties she faced representing herself, but I also recognise similar emotional and financial difficulties faced HPP. It would not be fair for HPP to have to bear the costs caused by Ms Anderson's difficulties;

c. she constantly amended her loss and damage and did not make an election on how she put her damages until late in the hearing, despite having been ordered to do so on several occasions;[18]

d. several days of the hearing were occupied in hearing evidence from the building and plumbing expert witnesses, which were wasted once Ms Anderson made that election;

e. she maintained a claim for damages of approximately $2.4 million in the nature of a personal injury in circumstances where she had been regularly warned by the Tribunal that the claim was ill conceived;[19]

f. she put HPP to the expense of preparing a separate Tribunal Book of documents related to that claim as she insisted they be kept confidential, and she was unable to prepare the Tribunal Book herself. I note orders have already been made that these costs should be shared equally;[20]

g. I have noted Ms Anderson's defence that she should not be penalised by being forced to represent herself. I accept that submission is relevant to some of the hearing days, but it is not applicable to the conduct of the proceeding from early 2017 to 1 March 2019 when she was legally represented. She also advised in mid 2019 that she had obtained legal advice about her personal injury claim.[21]

81 The conduct of the OC included its failures to act throughout the history of the proceeding (further details of which are contained in my interlocutory decision), and include:

a. failing to issue the claim of the OC against HPP for over a year;

b. failing to file its pleadings, expert reports, witness statements and evidence on time or at all;

c. its application on 29 March 2019 applying to adjourn the hearing scheduled to commence on 1 April 2019 as it was not prepared;

[18] Orders 18 July 2019, 19 July 2019.
[19] Including Order 18 April 2019; paragraphs 230-237 of the original Reasons.
[20] Including Orders 14 June 2019, 2 August 2019.
[21] See paragraphs 230-237 of the original Reasons.

d. its failure to resolve the proceeding with Ms Anderson in circumstances where the expert evidence was unequivocal that the OC's lack of maintenance had at the very least contributed greatly to the problems;

e. its failure to resolve the proceeding with Ms Anderson when it had a prima facie liability to her under the Water Act;

f. its failure to resolve the proceeding with Ms Anderson when it had obligations to her under the Owners Corporation Act.

82 Third, the relative strengths of the claims made weigh heavily in favour of HPP being awarded its costs. As stated above, HPP was completely successful in the proceeding. I accept that it was reasonable for Ms Anderson to commence the proceeding against HPP in 2016, particularly in light of the advice given to her by the OC Committee and manager since 2012 that that was where her remedy lay. However, once defences and expert evidence had been filed, it should have been obvious to both the OC and Ms Anderson that the appropriate claims were between each other.

83 Fourth, the HPP Offer militates strongly in its favour, in accordance with s 112 and the principles set out in *Hazeldene Chicken Farm*. I am not persuaded that the OC Offer is a relevant consideration, for the reasons discussed above in relation to s 112. It was reasonable for Ms Anderson to reject the OC Offer. I do not consider the joint offer made in October 2019 to carry any weight, because it failed to address Ms Anderson's prayer for relief that the water flow be stopped.

84 Fifth, I am not satisfied that the risk of double dipping outweighs the fairness of a costs order being made. If that is a risk, it can be managed by the Victorian Costs Court on taxation. Further, for the reasons discussed below, I intend to make a *Sanderson* order and so the risk of double dipping will not arise for a portion of the costs.

85 Sixth, while Ms Anderson may have ongoing concerns about the OC's conduct since the conclusion of the proceeding, this is not something I can take into consideration in determining the costs of the proceeding.

COSTS AS BETWEEN MS ANDERSON AND THE OC – S 109

86 Ms Anderson seeks an order that HPP and the OC jointly pay all her costs; alternatively that the OC pay all costs of HPP and herself.

87 While her claim for costs against HPP is misconceived, I am satisfied that it is fair to order that the OC must pay the costs of Ms Anderson under s 109(2).

88 Ms Anderson's submissions were broadly contained in the defences she raised to the claims made against her, as set out above. While she did not expressly refer to s 109, I consider it appropriate to take into account under ss (3) the matters she relied on.

89 In particular, she refers to the findings made against the OC of its egregious conduct towards her, and its complete liability to her for breaches of the OC Act and under the Water Act. I consider this relevant in terms of the relative strengths of the claims made.

90 I also agree with Ms Anderson that the conduct of the OC (discussed above and also in my interlocutory decision) has caused her unnecessary disadvantage and has prolonged unreasonably the time taken to complete the proceeding. For example, she commenced the proceeding in November 2016, after having complained to the OC since 2012 of water ingress to her apartment. The OC was joined to the proceeding in June 2017. It was legally represented until 27 March 2019. It delayed at least nine months in commencing its cross proceeding. It failed to comply with orders in this proceeding. It sought to amend its defence to raise new issues 11 days into the 13 day hearing. The prejudice Ms Anderson has suffered by the OCs conduct is set out in the interlocutory decision.

91 For those reasons, and again noting the nature and complexity of the proceeding, I consider it fair to order that the OC should pay Ms Anderson's costs of the proceeding.

SANDERSON / BULLOCK ORDER

92 Having regard to the findings set out above, I also consider it fair and appropriate to make a *Sanderson* costs order, so that the OC must pay to HPP a portion of the costs which I have ordered that Ms Anderson must pay to HPP. The Tribunal has power to make such an order.[22]

93 In *Civil Procedure: Victoria*,[23] the learned authors explain the difference between a *Bullock* and a *Sanderson* order as follows:

> If the plaintiff recovers judgment against one only of two defendants, under the usual order of costs the plaintiff gets costs from the losing defendant, and the winning defendant costs from the plaintiff…
>
> In some circumstances it may be appropriate to order that the losing defendant rather than the plaintiff bear the costs of the successful defendant. One way to relieve the plaintiff of liability is to require the losing defendant to pay to the plaintiff the costs which the plaintiff must pay the successful defendant. Another way is to order the losing defendant to pay the costs of the successful defendant direct to that defendant. An order in the first form is called a Bullock order, and one in the second form a Sanderson order.

94 I consider that a *Sanderson* order is more appropriate than a *Bullock* order in this case, noting the impecuniosity of Ms Anderson and the comparative hardship that would be experienced by the relevant parties.[24]

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[22] For example *Vero Insurance Limited v Eckberg & Ors* [2010] VCAT 373 at [15]; *Brown-Sarre v Australian Securities Limited & Ors* [2012] VCAT 1325 at [24].
[23] Lexis Nexis Butterworths, *Civil Procedure Victoria,* (online at 22.3.22) at [9.02.10].
[24] *Victoria v Horvath (No 2)* [2003] VSCA 24; BC200301489 at [15]–[19].

95 The Tribunal has made such orders in proceedings including *Monty Manufacturing Pty Ltd v Platt No 2*.[25] SM Riegler (as he then was) quoted the above explanation from *Civil Procedure: Victoria* and continued:

> [Counsel] correctly submitted that Bullock or Sanderson orders should only be made where it was reasonable and proper to join the successful defendant; and where it is shown that there was something in the conduct of the other unsuccessful defendant that makes it appropriate to exercise the discretion. He referred me to the judgment of Einstein J in *Furber v Stacey*, where his Honour said:
>
> > It is sufficient to justify the making of such an order if:
> >
> > (a) the costs have been reasonably and properly incurred by the plaintiff as between it and the unsuccessful defendant …; and
> >
> > (b) the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant or the conduct of the unsuccessful defendant shows that the joinder of the successful defendant was reasonable and proper to ensure the recovery of damages sought...

96 In other words, to justify an order, it is not sufficient that it was reasonable for the plaintiff to proceed against the defendant who wins; an order will not be made unless the conduct of the losing defendant in the litigation makes it just that he pay the costs of the co-defendant.[26]

97 Further, it may be proper to make the order if the losing defendant has defended the litigation by asserting that if anyone was liable to the plaintiff, it was the defendant who eventually was found not to be liable.[27]

98 In the present case, having regard to the defences filed by the respondents, I am satisfied that it was reasonable for Ms Anderson to bring claims against both respondents and that the costs have been reasonably and properly incurred by Ms Anderson as between her and the OC. Further, I am satisfied that the conduct of the OC has been such to make it fair to impose liability on it for a portion of the costs of the successful defendant, HPP.

99 Accordingly a *Sanderson* order may be made. For the following reasons, I consider that the OC is not liable to indemnify Ms Anderson for all of HPP's costs. I consider that it is liable for 67% and Ms Anderson must pay the other 33%, plus her share of the Tribunal Book which she has not yet paid.

100 First, s 109 allows the Tribunal to order that a party pay all or a specified part of the costs of another party.

101 Second, as stated in *Furber v Stacey*, 'the matter, rather, "sounds in what is fair and just between the parties by reference to their conduct in connection with the litigation"'.[28]

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[25] [2014] VCAT 58 at [51], citations omitted.
[26] *Gould v Vaggelas* (1984) 157 CLR 215 at 230; 56 ALR 31 at 41.
[27] *Altamura v Victorian Railways Cmrs* [1974] VR 33.
[28] [2005] NSWCA 242 at [119].

102 Third, The OC was not joined to the proceeding until a year after its commencement. It should not be liable for HPP's costs of that first year.

103 Fourth, as discussed above, Ms Anderson's conduct contributed to the length of the proceeding and the hearing. At an early directions hearing it was recommended to her:

> The Tribunal has suggested that the applicant seek legal advice as to what causes of action, and against whom, she has in respect of the leaking into her apartment, and that such advice be obtained prior to filing and serving points of claim…[29]

104 Between 2017 and 2019 she was legally represented. Once she became self represented in March 2019 she applied to amend her claim to include an increase in medical, legal and other costs. As set out above,[30] in April 2019 it was again recommended to her that she obtain legal advice. An order was made on 4 September 2019 requiring the applicant to 'file submissions in writing as to whether the Tribunal has jurisdiction to consider her claims for loss of earnings, inconvenience and personal injury in this proceeding.' A copy of a relevant authority was also provided to the applicant.

105 Her ill-conceived claims, late election and health issues caused many of the cost to be incurred. Her failure to accept the offer made by HPP in July 2019 meant it had to continue the hearing.

106 Fifth, on the other hand I recognise that the proceeding ran to its conclusion because of the conduct of the OC. Ms Anderson felt unable to accept the HPP Offer because it did not address her primary concern, stopping the flow of water. The OC settled its claims against HPP in March 2019 (proceeding BP1093/2018) but did not make an offer which addressed Ms Anderson's claims. Further, the conduct of the OC throughout the proceeding, as discussed above and in the interlocutory decision, caused many of the costs HPP incurred. Importantly also, the evidence before me of the conduct of the OC Committee and manager towards Ms Anderson throughout 2012 to 2018 (set out at paragraphs 104-151 of the original Reasons) is a relevant factor.

107 In conclusion, it will be impractical (if not impossible) to separate out which party is liable for each item of cost claimed by HPP throughout the five and a half years of litigation. As the OC submitted, it is difficult to extrapolate when any delays were not caused or contributed to by delays occasioned by Ms Anderson. I note the same can be said for delays caused or contributed to by the OC since it was joined. Having regard to my assessment of the impact of each party's conduct on the litigation, I consider it is appropriate to apportion the liability one third to Ms Anderson and two thirds to the OC.

[29] Order 17 January 2017.
[30] See footnote 21.

SCALE OF COSTS- INDEMNITY OR STANDARD

108 HPP submits that any costs ordered against Ms Anderson should be on an indemnity basis, rather than the usual party/party basis. It relies on the following conduct:

a. Ms Anderson was unsuccessful in all claims that were made against HPP

b. HPP was put to significant costs to defend the claim made by Ms Anderson

c. the claims made against HPP were made with no factual or evidentiary basis and were doomed to fail

d. Ms Anderson failed to accept the HPP offer which specifically stated that HPP would seek indemnity costs if the offer was not accepted.

109 Alternatively, costs should be ordered on an indemnity basis at least from the date of the HPP offer.

110 In relation to the OC, HPP submits that cost should be ordered on an indemnity basis because:

a. the OC was unsuccessful in apportioning responsibility to HPP; and

b. throughout the proceeding, the OC repeatedly breached the orders of the Tribunal and caused adjournments and delays.

111 HPP also submits that if indemnity costs are not ordered, then costs should be assessed on the Supreme Court scale rather than the County Court scale, as follows:

a. Anderson is to pay HPP's costs of the proceeding to be taxed on the standard basis in accordance with the Supreme Court scale up until 20 July 2019/2 October 2019 and thereafter on the higher basis

b. The OC is to pay HPP's costs of the proceeding to be taxed on the standard basis in accordance with the Supreme Court scale.

112 HPP relies on authorities[31] in support of the proposition that where a party has unreasonably or imprudently refused a "very handsome" offer, this may be sufficient to justify an award of costs on a special basis, other than on a party-party basis. As Her Honour Hollingworth J said in *Peet v Richmond*:[32]

> However an imprudent refusal of an offer of compromise may be sufficient to justify an award of costs on a special basis. The question must be whether the particular facts and circumstances of the case, as they existed at the time the offer was refused, justify an award other than on a party party basis.

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[31] including *Foster v Galea* [2008] VSC 331; *Charterarm Investments Pty Ltd v Roberts & Anor* [2013] VCAT 821.

[32] *Peet v Richmond (No 2)* [2009] VSC 585 at [170].

113 The authorities relied on by HPP were all decided at a time when costs were assessed on one of three bases: party-party, solicitor-client, or indemnity basis. The standard order for costs in the courts was that they be assessed on a party-party basis. Since 2013,[33] the three bases of costs were replaced by two bases, being costs on a standard basis and on an indemnity basis.

114 In *Bougainville Copper v RTG Mining*[34] Mukhtar AsJ recently summarised the differences:

> 15. Thus, the issue calling for a costs determination is whether [the plaintiff] should be ordered to pay 'costs on the standard basis' or 'costs on the indemnity basis' as that phraseology is used in the rules. To see what is at stake here, something should be said about the difference between the two. The two bases of costs were introduced into this Court's procedural rules in April 2013, and are better understood by the very well-known costs measures that preceded them.
>
> 16. Any costs order is a form of 'indemnity'. Under the previous base measure of taxation known as 'party/party' and under the more generous 'solicitor/client' basis of taxation, there could never be a complete indemnity because there would be costs which could not be reasonably charged to the other (losing) party even though such costs may have been incurred by the successful party. The usual example is the cost of 'luxuries' such as two counsel, or a team of solicitors on the case to enable the litigation to be conducted more conveniently. A complete indemnity for costs – and by that I mean a costs order to the last cent according to the costs incurred by the winning party according a pre-existing private costs agreement with its solicitor – could only be obtained on a specific order to that effect. I believe those to be a rarity.
>
> 17. All that has been replaced by the current rules. Rule 63.30 states that 'on a taxation on the standard basis, all costs reasonably incurred and a reasonable amount shall be allowed'. As I understand it, reasonable in that context does not mean what is reasonable to charge the client, but costs for which it is reasonable to charge the other side. Costs on the standard basis are said to more generous than the former 'party/party' basis and more likely to equate with the previous solicitor/client costs basis of taxation because a receiving party is not confined to costs on a strict test of what was only necessary or proper, but could be allowed all costs on a test of costs which may not have been strictly necessary but nevertheless were reasonable and were for a reasonable amount.
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> 18. As for 'costs on the indemnity basis' rule 63.30.1 states:
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> > (1) Subject to paragraph (2), on a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.

[33] Supreme Court Rules of Civil Procedure rules 63.28; 63A.28.
[34] [2021] VSC 348 at [15]-[22].

> (2) Any doubt which the Costs Court may have as to whether the costs were unreasonably incurred or were unreasonable in amount shall be resolved in favour of the party to whom the costs are payable.
>
> …
>
> 22. There are three points to be taken from this overview. First, taxation of costs on the standard basis ought not be regarded as a minimalist or an economising 'entry level' measure. It is more generous than that. It appears to equate with the previous solicitor/client basis of taxation. Secondly, whatever the basis of taxation, the costs still fall to be taxed according to the Scale, with a power in the Costs Court to increase amounts allowed under the Scale. Thirdly, taxation on the indemnity basis does not mean the client will be indemnified from being out of pocket.

115 Of course, the situation in the Tribunal for costs is different to the courts. The starting point in the Tribunal is that each party is to bear its own costs of the proceeding. Costs on a special basis would ordinarily be an order that costs be paid at all. I repeat the comments I made in *Platinum Construction (Vic) Pty Ltd v Straightline Contractors Pty Ltd*[35] and in *Waddell v JG King Project Management Pty Ltd:*[36]

> When offers are used in the courts, the starting point for costs there is that the unsuccessful party should pay the costs of the successful party on a standard basis. The public policy position that Calderbank offers should attract some greater benefit, means that costs on a higher scale should be ordered if the offer is wrongly rejected. Since the amendment to the Supreme Court costs rules in 2014, this now means costs on an indemnity basis. However, the so-called starting point in the Tribunal is that each party should bear its own cost of a proceeding. One step up from that (i.e. the greater benefit) is an order that the unsuccessful party should pay costs on a standard basis.

116 This view was expressed by Deputy President Lulham in *Stalteri v Traralgon Contractors Pty Ltd* as follows:[37]

> In Court proceedings where costs follow the event, the usual basis for assessing costs is the standard basis, previously called the party/party basis. So to give the offeree an incentive to accept the offer in a Court proceeding, it is appropriate for the offeror to say it will seek indemnity costs. However in the Tribunal, s.109 (1) of the VCAT Act makes clear that there is no presumption that costs follow the event, and so the incentive for an offeree to accept a Calderbank offer can be the offeree's exposure to an award of costs. The incentive is not that the offeree's exposure might increase from standard to indemnity costs, because the starting point in the absence of the offer would be that the parties would bear their own costs.

117 If costs are allowed, the usual order in the Tribunal is for them to be assessed on the County Court scale on the standard basis,[38] although of course the

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[35] [2021] VCAT 319 at [56]-[57].
[36] [2019] VCAT 435 at [28].
[37] [2016] VCAT 838 at [93].

Tribunal retains the discretion to determine how costs are to be assessed. As stated by Mukhtar AsJ "taxation of costs on the standard basis ought not be regarded as a minimalist or an economising 'entry level' measure. It is more generous than that." I am satisfied that an award of costs on the standard basis provides a fair indemnity to the winning party.

118 There are no circumstances in the present case that would lead me to conclude anything more than the usual order is warranted. For example, none of the circumstances listed in *Ugly Tribe Co Pty Ltd v Sikola*[39] or *Munday v Bowman*[40] exist; such as where it appears that an action has been commenced or continued in circumstances where a party properly advised should have known that he had no chance of success. There is no basis to presume that the present action must have been commenced or continued for some ulterior motive or because of some wilful disregard of the known facts.

119 Accordingly, I will order that the costs should be assessed by the Victorian Costs Court on the standard basis pursuant to the County Court scale.

ORDER

120 For the reasons set out above I will make the following orders:

a. The OC must pay Ms Anderson's costs of the proceeding from 29 June 2017 (being the date it was joined to the proceeding) to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

b. The OC must pay 67% of HPP's costs of the proceeding to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

c. Ms Anderson must pay 33% of HPP's costs of the proceeding to be assessed by the Victorian Costs Court on the County Court scale on the standard basis in default of agreement.

d. In addition, Ms Anderson must pay HPP $8,412.91 being her share of the preparation of the Tribunal Book.

S Kirton
Senior Member

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[38] *Victorian Civil and Administrative Tribunal Rules 2018* r.1.017 and V*elardo v Andonov* [2010] 24 VR; [2010] VSCA 38 at [47] which held that "all costs" would ordinarily mean party-party (now standard) costs, but that it would be open to the Tribunal in an appropriate case to award costs on a more favourable basis.

[39] [2001] VSC 189.

[40] (1997) FLC 92-784.