

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1294/2018

CATCHWORDS

Validity of additional rules made under the *Subdivision (Body Corporate) Regulations*; whether conduct of the Owners Corporation in purported enforcement of those rules *ultra vires*; claim for damages for loss and damage caused by the actions of the Owners Corporation.

Costs – offer made by applicant pursuant to section 112 of the *Victorian Civil and Administrative Tribunal Act*; grounds for ordering otherwise than that the party who did not accept that offer pay all the costs incurred by the offering party after the offer was made.

Costs – sections 109 and 112 of the *Victorian Civil and Administrative Tribunal Act* whether consideration of factors there set out makes it fair to award costs to applicant.

APPLICANT

Building Services West Victoria Pty Ltd
(ACN: 124 313 168)

RESPONDENT

Owners Corporation PS507524P

WHERE HELD

Melbourne

BEFORE

Member L. Johnson

HEARING TYPE

Applicant's application for costs; and
respondent's application for costs

DATE OF HEARING

On written submissions of the applicant, dated
11 February 2022; of the respondent, dated 24
February 2022; and submissions in reply of the
applicant dated 31 March 2022

**DATE OF ORDER AND
WRITTEN REASONS**

10 May 2022

CITATION

Building Services West Victoria Pty Ltd v
Owners Corporation PS507524P (Owners
Corporations) (Costs) [2022] VCAT 506

ORDER

The Tribunal orders:

- 1 Owners Corporation PS507524P must pay Building Services West Victoria Pty Ltd's costs of, and incidental to, the proceeding, on a standard basis under the County Court scale, including reserved costs, and the costs of the compulsory conferences on 13 November 2018 and on 19 February 2019, from 19 June 2018 to 29 April 2019, both dates, inclusive.

- 2 Owners Corporation PS507524P must pay, under the County Court scale, all costs incurred by Building Services West Victoria Pty Ltd in, and incidental to, the proceeding from and including 30 April 2019, such costs to include reserved costs, and the costs of the Directions Hearing held on 3 July 2019.
- 3 The Owners Corporation must reimburse the filing fee of \$1,493.10 and four daily hearing fees of \$518.40 per day paid by Building Services West Victoria Pty Ltd, total fees \$3,566.70.
- 4 The Owners Corporation's application for costs is dismissed.

L Johnson
Member

REASONS

- 1 On 19 January 2022 the Tribunal's Order and Reasons were issued to the parties and published.¹ I found that the Rules of the Owners Corporation relied upon by Owners Corporation PS507524P (**Owners Corporation**) as authorising the conduct complained of by Building Services West Victoria Pty Ltd (**BSWV**), were invalid and therefore void and of no effect, because they are not and were not within the statutory rule making powers conferred on the Owners Corporation, or its predecessor. I found that the Owners Corporation had acted in breach of its statutory duty not to act beyond its powers, and I found that BSWV had suffered loss and damage as a consequence of those unauthorised actions of the Owners Corporation. I made orders that the Owners Corporation pay BSWV the sum of \$467,721.29 in damages for loss or damage suffered by BSWV by reason of the Owners Corporation's conduct in purported application of the rules that were declared invalid.
- 2 The Tribunal's orders required any application for costs and/or reimbursement of any fees paid to the Tribunal to be made in writing to the Tribunal by 11 February 2022, and for any response to an application for costs and/or reimbursement of any fees paid to the Tribunal to be made in writing to the Tribunal by 25 February 2022. The Tribunal's orders also provided that unless the parties objected, any application for costs and/or reimbursement of any fees paid to the Tribunal would be determined 'on the papers'; that is, based on the parties' written submissions alone.
- 3 Neither party has objected to the application for costs made by BSWV being determined 'on the papers'.
- 4 On 11 February 2022 BSWV filed an application for costs. That application is made pursuant to ss 109(3)(c) and (d), and ss 112, 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).
- 5 The Owners Corporation filed its submissions in response to those of BSWV on 24 February 2022. Those submissions included, at paragraphs 35 to 38, an application for the Owners Corporation's costs in the proceeding in respect of
 - (a) the costs of the re-opening application² and all subsequent costs incurred following the granting of the application;
 - (b) the costs of and incidental to the subsequent hearing following the re-opening application;
 - (c) the costs incurred by reason of the applicant giving evidence as to 2 different spreadsheets which involved additional evidence in chief, cross examination and preparation; and

¹ *Building Services West Victoria Pty Ltd v Owners Corporation PS507524P* (Owners Corporations) [2022] VCAT 64

² The Owners Corporation refers to BSWV's application on 26 November 2019 to reopen its case, which I discuss at paragraphs 11, 27, and 98 to 101 below.

(d) the costs incurred by reason of the applicant failing to comply with the Tribunal's orders for discovery.

- 6 The Owners Corporation had not sought leave to make an application for costs outside the time set out in the Tribunal's orders dated 19 January 2022, and such leave had not been granted. Nevertheless, in the interests of efficiently concluding the proceeding, I made orders for BSWV to file and serve submissions in reply to those of the Owners Corporation. BSWV filed and served its submissions in reply on 31 March 2022.
- 7 Having considered the submissions made by the parties, I now give my decision on costs in the proceeding.
- 8 The general rule in VCAT is that, subject to Division 8 of the VCAT Act, each party bears their own costs (see: s109(1) VCAT Act). The Tribunal may make an order that a party pay all or a specified part of the costs of another party in a proceeding, where the Tribunal is satisfied that it is "fair to do so" having regard to the matters set out in section 109(3). Those matters include the nature and complexity of the proceeding, the relative strengths of the claims made by the parties, and the way in which the proceeding was conducted. The purpose of costs orders is to compensate a party who has incurred costs "in circumstances where it would be unfair to require them to be liable for these costs".³
- 9 In addition to s 109 of the VCAT Act, s 112(2) of the VCAT Act provides that, unless the Tribunal orders otherwise, where a settlement offer is made that meets the criteria set out in subsection 112(1) of the VCAT Act and that offer is not accepted, the party who made the offer is entitled to an order that the party who did not accept that offer pay "all costs" incurred by the offering party after the offer was made.
- 10 BSWV seeks costs in accordance with s 109(3)(c) and 109(3)(d) of the VCAT Act for the period from the commencement of the proceeding to 30 April 2019, and claims an entitlement to all costs incurred from 30 April 2019 in consequence of an offer of compromise made on that date, that it says complied with s 112 of the VCAT Act.
- 11 The Owners Corporation seeks its costs in respect of BSWV's application for leave to reopen its case in relation to the loss and damage claimed, and all subsequent costs incurred by the Owners Corporation following the granting of the leave.

Chronology of the proceeding

- 12 Before turning to the submissions, it is appropriate to set out a short chronology of the proceeding.
- 13 BSWV issued the proceeding on 19 June 2018. The initiating Application was accompanied by Points of Claim in which BSWV alleged that BSWV had suffered loss or damage by reason of actions of the Owners Corporation

³ *Mornington Peninsula SC v Mattieson Pty Ltd* [2011] VCAT 1169 at [6].

in purported reliance on Owners Corporation Rules that BSWV said were ultra vires, void, of no effect, and unenforceable against BSWV, and were in breach of the Owners Corporation's duties under the *Owners Corporations Act 2006 (OC Act)*. The Points of Claim quantified BSWV's loss and damage at \$731,370.00.

- 14 The Points of Claim identified the following categories of loss and damage:
- | | | |
|------|--|---------------|
| i. | Increased holding costs | \$306,130.00 |
| ii. | Building variations due to revised plans | \$27,576.00 |
| iii. | Loss of rental income for lots 27A, 27B, 57A and 57B | \$73,426.00 |
| iv. | Loss of rental income for lots 35, 53, 58, and 59 | \$104,238.00 |
| v. | Diminution in value of lots 27A, 27B, 57A and 57B | \$220,000.00. |
- 15 At a directions hearing on 22 August 2018 the Tribunal made orders requiring the Owners Corporation to file and serve its Points of Defence, permitting BSWV to file and serve Points of Reply, and requiring both parties to file and serve, by 10 October 2018, a list of all documents in its possession or control, or in the possession or control of an agent, relevant to the proceedings and to make such documents available for inspection and copying. The proceeding was listed for a compulsory conference on 13 November 2018. Costs of the directions hearing were reserved.
- 16 The Owners Corporation filed its Points of Defence on 12 September 2019. BSWV filed an affidavit of documents 10 October 2019, and the Owners Corporation filed its List of Documents also on 10 October 2019.
- 17 The proceeding did not settle at the compulsory conference held on 13 November 2018 but was set down for a further half day compulsory conference on 19 February 2019. It is apparent that one reason for that adjournment was that the Owners Corporation had indicated an intention to join other parties to the proceeding: Orders were made requiring the Owners Corporation to file and serve any joinder application by 14 December 2018. Orders were also made relating to discovery: "If a party calls for a relevant discoverable document from the other party in writing, that party must produce a copy of that document/s within 5 working days". The proceeding was fixed for hearing on 1 April 2019 for 4 consecutive days. No order concerning costs was expressly made: that is, the Order was simply silent on the matter of costs. An order which says, "No order as to costs" means that the Tribunal has considered the question of costs and has decided not to award them to either party. I am satisfied that the Order of 13 November 2018, being silent, instead meant that the question of costs had not been determined. In effect the Order reserved the question of costs. This is why I have mentioned the costs of the compulsory conference on 13 November 2018 in my Order.
- 18 At the compulsory conference held on 19 February 2019 no representatives of the Owners Corporation attended, and the Owners Corporation was

represented only by its solicitor. The compulsory conference could not proceed, and it was necessary to convert the compulsory conference to a directions and to cancel the hearing scheduled to commence on 1 April 2019. The proceeding was listed for hearing on 8 July 2019 for 3 consecutive days.

- 19 Orders were made, requiring BSWV to file and serve, by 3 May 2019:
 - A written submission in support of its contentions that the guidelines and rules are invalid;
 - A Witness statement containing the narrative of the evidence for each witness to be called by the applicant;
 - A Tribunal Book containing the relevant documents referred to in the written submission and witness statements
 - Any expert report upon which the applicant intends to rely.
- 20 The orders made on 19 February 2019 also required the Owners Corporation to file and serve its written submission in reply, witness statements in reply, list of documents it required to be added to the Tribunal Book, and any expert report on which it intended to rely at the hearing, by 7 June 2019.
- 21 The costs of BSWV thrown away due to the failure of the Owners Corporation to attend the compulsory conference were reserved.⁴
- 22 On 30 April 2019, BSWV made the offer on which it relies in this costs proceeding.
- 23 BSWV was delayed in complying with the 3 May 2019 date imposed by Tribunal's orders dated 19 February 2019. BSWV did not seek leave of the Tribunal for an extension of time, but, rather, sought to reach agreement with the Owners Corporation on this. BSWV filed and served its documentation on 21 and 27 May 2019, and proposed to the Owners Corporation that the time for it to comply with the Tribunal's order be extended to 24 June 2019.⁵
- 24 On 28 June 2019 the Owners Corporation, itself not having complied with either the Tribunal's orders dated 19 February 2019, or the extended timeline proposed by BSWV, made an application for the proceeding to be further adjourned.
- 25 At a Directions Hearing held on 3 July 2019, orders were made, adjourning the proceeding to a hearing commencing on 16 September 2019 for 3 consecutive days, and requiring the Owners Corporation to file and serve by 31 July 2019 its written submission in reply, its witness statements and a list of documents it required to be added to the Tribunal Book together with copies of those documents. The Owners Corporation was ordered to pay

⁴ I discuss the costs implications of the failure of the Owners Corporation to participate in the second compulsory conference on 19 February 2019 at paragraph 96 below.

⁵ Affidavit of Simon Nixon, solicitor for BSWV, dated 1 July 2019.

BSWV's costs caused by the adjournment, quantified in the sum of \$1,000.00.

- 26 I conducted the hearing on 16, 17 and 18 September 2019, and adjourned the proceeding at the conclusion of giving evidence, making orders for filing and service of final written submissions.
- 27 On 26 November 2019 the Tribunal gave leave to BSWV to reopen its case to introduce further evidence in relation the quantum of its loss. That leave was sought on the grounds that the evidence given by BSWV's witness in the hearing in relation to the quantum of its loss and damage had contained material errors and omissions, owing to the witness having relied on an *aide memoire* which was inaccurate. A hearing was listed for 27 and 28 February 2020 for that purpose. Costs were reserved.
- 28 The hearing of BSWV's further evidence concluded on 27 February 2020. The second day of hearing was vacated, and orders were made extending the time allowed for the parties to file and serve their final written submissions.
- 29 The time for the parties to file and serve written submissions was further extended to allow for delays resulting from the COVID-19 restrictions affecting all parties. The parties filed and served their written submissions in accordance with the Tribunal's orders, but, as I noted in the reasons given for my determination of the substantive proceeding, there was a regrettable delay in those submissions being provided to me by the Tribunal's registry, due to the impact of COVID-19 restrictions and disruptions.

Application under section 112 of the VCAT Act

- 30 BSWV relies on an offer to settle the proceeding dated 30 April 2019, which its solicitors sent to the solicitors for the Owners Corporation on the same date.
- 31 As I have noted above, section 112 of the VCAT Act operates as an exception to the general rule, set out in s 109(1) of the VCAT Act, that in proceedings before the Tribunal, each party will bear its own costs. Section 112 of the VCAT Act provides that, where a party makes an offer to settle a proceeding, that complies with the conditions set out in the section, and is not accepted, the party who made the offer is entitled to an order that the other party pay all costs incurred by the offering party after the offer was made.
- 32 For convenience, I set out the text of s 112 of the VCAT Act here:

112 Presumption of order for costs if settlement offer is rejected

(1) This section applies if—

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

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

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

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

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

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

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

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

33 As can readily be seen, section 112 of the VCAT Act applies only where all four conditions in subsection 112(1) have been satisfied, namely:

(a) the offer is an offer in writing to settle a proceeding;

(b) the other party does not accept the offer within the time the offer is open, which under ss114(1) and (2) is a minimum of 14 days;

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

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

34 The text of the offer made by BSWV to the Owners Corporation on 30 April 2019, was as follows:

To the Respondent:

The Applicant offers to compromise this proceeding.

The amount of the offer in respect of the claim is \$292,576.00.

This offer is in addition to costs.

This offer of compromise is open to be accepted 14 days after service of this offer of compromise.

The amount of the offer will be paid within 28 days after acceptance of this offer.

This offer is made without prejudice.

This offer is made in accordance with Section 113 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*.

- 35 The parties agree that the offer to settle was received by the solicitors for the Owners Corporation on 30 April 2019. The parties also agree that the offer was not accepted by the Owners Corporation. The offer was in writing, and was not accepted. Sub-sections 112(1)(a) and (b) of the VCAT Act are satisfied.
- 36 It is necessary to comment on the “amount of the offer”, namely \$292,576.00, and the effect of the use of the words “The offer is in addition to costs”.
- 37 Subsections 112(1)(d) and 113(4) of the VCAT Act recognise that offers will generally be in the form of an offer to pay, or be paid, money. Sections 112 and 113 are modelled on rules of civil procedure in Court proceedings which allow a party to serve an “offer of compromise”, and those rules are themselves are modelled on obsolete procedures in which parties would literally pay money into Court in order to make such offers.
- 38 The purpose of an offer made in accordance with s 112 of the VCAT Act is to encourage settlement, by giving parties and incentive to make, and their opponents to accept, offers. The assessment required by s 112 of the VCAT Act of whether the orders ultimately made by the Tribunal are “not more favourable than” the offer requires that the offer be certain on its face.
- 39 The offer made by BSWV is expressed to be “in addition to costs”. That language reflects the usual position in relation to offers made in accordance with the Rules of Civil Procedure which apply in the courts.
- 40 In proceedings before the courts, Rule 26.02(4) of the Rules of Civil Procedure require that an offer of compromise made under those Rules must state either that the offer is made inclusive of costs, or that costs are to be paid or received, as the case may be, in addition to the offer. Although costs are always in the discretion of the Court, in Court proceedings the general approach to costs is that “costs follow the event”.

- 41 Rule 26.03(7) of the Civil Procedure Rules provides that if an offer that states that costs are to be paid or received in addition to the offer, is accepted, then unless the offer otherwise provides or the Court otherwise orders, such costs are to be paid or received in respect of the claim up to and including the day the offer was served; liability for costs in relation to any subsequent period are in the discretion of the court; and any party can apply to have the costs assessed. The effect of those Rules is that an applicant's offer to be paid an amount "plus costs" is supported by a procedural mechanism for the assessment of those costs.
- 42 Neither the VCAT Act nor VCAT Rules contain provisions mirroring rule 26.03(7) and, as I have previously stated, section 109(1) of the VCAT Act provides that there is no presumption that costs follow the event.
- 43 It is entirely appropriate that, given the effect of s 109(1) of the VCAT Act that there should be no VCAT Rules dealing with offers that are made on the basis that costs are to be paid or received in addition to the offer. I have no difficulty in understanding BSWV's offer as having been made on that basis, and accordingly concluding that, by stating that "the amount of the offer" is \$292,576.00 and that it is distinct from BSWV's costs, the offer was requiring \$292,576.00 to be paid within 28 days after acceptance of the offer but that the costs would be payable in due course.
- 44 Accordingly, I am satisfied that the offer complied with section 113 of the VCAT Act. The offer was expressed to be made "without prejudice"; it stipulated "the amount of the offer in respect of the claim" to be \$292,576.00, exclusive of costs, and it specified that that amount was to be paid within 28 days after acceptance of the offer.⁶
- 45 Section 114 of the VCAT Act requires that an offer be open for acceptance either until immediately before the Tribunal makes its orders on the matters in dispute, or for a specified period after the offer is made, which must be a minimum of 14 days. I am satisfied that the offer complied with s 114 of the VCAT Act. Again, the question of whether the offer complied with s 114 of the VCAT Act is a matter of interpretation. I think it is likely that BSWV intended that the offer be open for acceptance for the minimum period of 14 days referred to in s 114(2) of the VCAT Act. In fact, the offer was expressed as being "open to be accepted 14 days after service of this offer..." rather than open for acceptance until the expiry of a specified period, as is contemplated by s 114(2) of the VCAT Act. I do not think it was intended that the offer could not be accepted prior to the 14th day. It is possible that the true effect of the offer is that it was, in fact, open for acceptance from the 14th day until immediately before the Tribunal made its orders. However, in this case, nothing turns on that possible interpretation. The offer was not accepted, either on the 14th day, or at all. Section 112 of

⁶ I note that subsections 113(1) – (3) are not really provisions that can be "complied with" as they are permissive rather than prescriptive. The offer was made "without prejudice", which is consistent with ss 113(1) and (2). It was the first and only offer, and so s 113(3) is not relevant here.

the VCAT Act gives an entitlement to costs incurred after the date of the offer, rather than after the date that the offer closed.

46 I turn now to whether the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

47 Subsection 112(3) provides that, in determining whether the Tribunal's orders are or are not more favourable to a party than an offer, the Tribunal must take into account any costs it would have ordered on the date the offer was made, and disregard any interest or costs it ordered in respect of any period after the date the offer was made. At the date the offer was made, 30 April 2019, no application for costs had been made. As I have noted above, two orders had been made reserving costs, which, if quantified at the time, would not have been substantial. The order made on 3 July 2019, requiring the Owners Corporation to pay costs caused by an adjournment quantified in the sum of \$1,000, was made after the date of the offer, and is not relevant to the determination under s 112(3). Similarly, the costs reserved by the Tribunal's order dated 26 November 2019 are not relevant here.

48 The amount in the offer of compromise was \$292,576.00. The amount the Tribunal ordered the Owners Corporation to pay to BSWV was \$467,721.69, with costs being reserved. BSWV submits that the Owners Corporation "*would have been \$175,145.29 better off if it had accepted the offer of compromise*".⁷ Even allowing for the costs reserved, it is plain that the Tribunal's order was substantially less favourable to the Owners Corporation than the offer.

49 I find that the order made by the Tribunal was not more favourable to the Owners Corporation than the offer. Accordingly, s 112(1)(d) of the VCAT Act is satisfied, and BSWV is entitled to an order that the Owners Corporation, which did not accept that offer pay "all costs" incurred by the BSWV after the offer was made, unless the Tribunal orders otherwise.

50 The requirements of s112 of the VCAT Act having been met, I must now consider whether there is any basis on which the Tribunal ought to determine that it should "order otherwise" as contemplated by subsection 112(2) of the VCAT Act. BSWV submits that there is not. The Owners Corporation submits that the Tribunal should exercise its discretion to "order otherwise".

51 Both parties have drawn my attention to the comments of Senior Member R Walker in *Paleka v Suvak*⁸, where he observed that it is the party who failed or refused to accept the offer that bears the onus of persuading the Tribunal that it should exercise the discretion to "order otherwise".

52 The following passage from *Paleka v Suvak* is also relevant. The Tribunal noted the similarity of the qualification "unless the Tribunal orders otherwise" to the words "unless the Court otherwise orders" in Order 26.08

⁷ BSWV's submissions as to costs dated 11 February 2022 (BSWV's Costs Submissions), paragraph [8].

⁸ [2002] VCAT 895.

(3) of the Rules of Civil Procedure relating to offers of compromise, and observed:

18 The party upon whom the offer of compromise was served carries a heavy burden; the presumption as to liability for costs which arises under the rule is not easily displaced. Thus for example, in the case of judgement for damages for bodily injury, the closeness of the judgement amount to the amount in the offer of compromise will not normally be regarded as justifying a departure from the rule. Nor will the complexity of the matters which the Plaintiff must weigh in deciding whether or not to accept the offer, or the fact the Plaintiff and his advisers might reasonably have expected to have recovered more than the amount of the Defendant's offer. A Plaintiff who decides to reject an offer of compromise must be assumed to have taken into account the several contingencies arising in the case and the risks to be run if the case is to proceed. In going ahead with the case the Plaintiff must be taken to have accepted that he will run those risks and he must abide the consequences whatever they might be." (references omitted)

19 The approach taken in this Tribunal as to costs is not the same as would be taken in a court. In a court, costs usually follow the event, while in this Tribunal, the starting point is that parties bear their own costs. Notwithstanding these differences, I think that sections 112 to 114 were enacted with the same object as Order 26.08 and that similar considerations should apply in considering whether the Tribunal should exercise its discretion in declining to make the order for costs contemplated by the section. The onus is on the Respondent to show that the Order should not be made in the particular circumstances of the case.⁹

53 The Owners Corporation bears the burden of persuading the Tribunal that the presumption for a costs order in favour of BSWV should be set aside. The grounds on which the Owners Corporation submits that the Tribunal should "order otherwise" are that, in effect, the Owners Corporation was acting reasonably in rejecting that offer. The Owners Corporation asserts that at the time the offer was made, 30 April 2019, BSWV had not properly particularised its damages and had made inadequate discovery in relation to damages. The Owners Corporation says that, at the time the offer was made, "the amounts claimed in the points of claim were simply numbers on a piece of paper which [it] was unable to verify or assess". As a consequence, the Owners Corporation submits, it "was unable to conduct any meaningful assessment or verification of the offer".¹⁰

54 Further, the Owners Corporation submits that its inability to assess the offer "was caused by the applicant's breach" of the Tribunal's order dated 22

⁹ Ibid at [18] and [19].

¹⁰ Respondent's Cost Submissions dated 24 February 2022, paragraphs [6] and [13].

August 2018 requiring discovery by the parties. The relevant paragraph of the Tribunal's order stated:

By **10 October 2018** the parties must each:

- (a) file and serve a list of all documents in its possession or control, or in the possession or control of an agent, relevant to the proceedings; and
- (b) make such documents available for inspection and photocopying upon 24 hours written notice.

55 The Owners Corporation submits that “in making the offer of compromise before making discovery and providing particulars [BSWV] placed itself at an advantage to the respondent and placed the respondent at a disadvantage.”

56 In response, BSWV submits that s112 of the VCAT Act does not require consideration of whether the party who does not accept the offer to settle was acting reasonably. BSWV submits that the question of whether a party was acting reasonably in not accepting an offer of compromise is relevant only to offers made in accordance with the principles enunciated in *Calderbank v Calderbank*¹¹ and *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority No 2*¹². BSWV submits that the drafting of s 112 of the VCAT Act does not encompass that qualification.

57 It is trite to say that s 112 of the VCAT Act does not include the qualification that, if the decision to reject an offer made under that provision is reasonable, the consequences set out in that section do not follow. The former Order 26.08 did not include such words, either, however it has long been established in the courts, that, where offers known as “Calderbank offer” are made, whether it was reasonable to reject that offer will be relevant to the assessment of whether an order for indemnity costs should be made.¹³

58 Ultimately, in exercising its discretion whether to “order otherwise”, the Tribunal must have regard to all the circumstances of the case before it.¹⁴ As Acting Vice President Judge Strong observed in *Commisso v Transport Accident Commission*:

... in determining the scope of the residual discretion reserved by s.112(2), the philosophy which underpins s.109 should not be abandoned. ... The onus must be on the offeree to point to some feature of the case which would make it unjust for a s.112 order to be made. Generally speaking, it would need to be a feature which distinguishes that particular case from most other cases.¹⁵

¹¹ [1975] 3 All ER 333.

¹² (2005) 13 VR 435.

¹³ See *Calderbank v Calderbank* (1975) 3 All ER 33 and *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435; [2005] VSCA 298.

¹⁴ (2001) 3 VR 589; [2001] VSCA 236 at [31].

¹⁵ [2001] VCAT 417 at [43]; see also *Kamel v Transport Accident Commission* (unreported, VCAT, Galvin DP, 7 June 2001).

- 59 BSWV makes the further submission that the position put by the Owners Corporation suggests that no offer in accordance with s 112 of the VCAT Act (or under Order 26 of the Supreme Court Rules) could be valid until after discovery has occurred. BSWV notes that rule 26.03(1) of the Supreme Court Rules specifies that an Offer of Compromise may be served at any time prior to judgment.
- 60 There is clearly no limitation in s 112 of the VCAT Act about the stage of the proceeding at which an offer may be made, save for the implied limitation in s 114(2), which is not relevant in this case. Whether the offeree had no opportunity of weighing or assessing the offer may, in some cases, be a relevant circumstance.¹⁶ There is no hard and fast rule: all of the circumstances of the particular proceeding are relevant.¹⁷ The question is whether the circumstances of this case are sufficient to displace the presumption in BSWV's favour.
- 61 BSWV submits that there are no circumstances which operate to displace the presumption created by compliance with s 112 of the VCAT Act. BSWV submits that, to the contrary, the Owners Corporation persisted in its defence of the proceeding, notwithstanding that it had legal advice which, "at the very least cast doubt on the enforceability of the s 173 agreement and the forest design guidelines", those being the grounds on which the Owners Corporation defended the conduct complained of by BSWV, and had been advised that special resolutions were required to amend rules of the owners corporation.¹⁸

What was the situation of the parties at the time the offer was made?

- 62 The Owners Corporation says that it was not in a position to assess the offer made by BSWV on 30 April 2018 and says that this was due to BSWV's breach of the Tribunal's order dated 22 August 2018 requiring discovery by the parties.
- 63 The position of a party to whom an offer under s 112 of the VCAT Act is made, and the purpose of that offer, was well described by Senior Member Riegler, as he then was, in *Sherwood v Sherwood*¹⁹:

The evident purpose of a s 112 offer; and offers of compromise generally, is to provide costs protection for the offeror and a punitive incentive for the offeree to settle the proceeding, rather than having the matter determined by the Tribunal. The possibility of having an adverse costs order made against the offeree encourages that party to focus on the issues, the risk of litigation and the costs of continuing with the litigation. That process is part of the evaluation that an

¹⁶ Ibid at [22]. I do not consider that the position of the Owners Corporation was, in fact, comparable to that in *Coyle*. See also *Bonarrigo v DSF Pty Ltd trading as LaRosa Tiling Company* (Domestic Building) [2012] VCAT 1949.

¹⁷ *Transport Accident Commission v Coyle* (2001) 3 VR 589; [2001] VSCA 236 at [31].

¹⁸ BSWV Submissions as to Costs and Reimbursement of Fees dated 11 February 2022, paragraphs 14-17.

¹⁹ *Sherwood v Sherwood* (No 3) (Costs Hearing) (Building and Property) [2014] VCAT 1037, at [37].

offeree must undertake when considering whether to accept an offer or not.

- 64 BSWV submits that it is relevant to consider that, when the offer of compromise was made, the Owners Corporation did not request further materials to assist it to properly assess the quantum of damages. BSWV submits that the inference to be drawn from that conduct is that the Owners Corporation denied any liability to BSWV at all, and that “no amount of information would have altered the stance taken” in respect of the offer.²⁰
- 65 As I have noted above, in the chronology of the proceeding, BSWV filed and served an Affidavit of Documents on 10 October 2018, as required by the Tribunal’s order dated 22 August 2018.²¹ The Owners Corporation submits that the Affidavit of Documents did not refer to any documents relating to the claim for damages. I note that there are references to approved plans, building permits and variation of building works, although documents relating to the holding costs, rental income and property valuations are not apparent.
- 66 On 30 April 2019 the parties were facing a three-day hearing, listed to commence on 8 July 2019. The parties were yet to file and serve their submissions in relation to BSWV’s contentions that the guidelines and rules were invalid. The Owners Corporation was, however, in possession of legal advice that the guidelines were not registered and therefore may not form part of the rules.²² Given the detail set out in BSWV’s Points of Claim, the Owners Corporation was aware, on the date the offer was made, that the monetary claim made by BSWV in the proceeding was \$731,370.00.
- 67 To depart from the presumption created by s 112 of the VCAT Act, there must be a feature which distinguishes this case from most other cases. In my opinion, the Owners Corporation was well placed to evaluate the offer against the costs associated with the conduct of a three day hearing, and the risk that an award of damages would be made against it. This is not a case analogous to that in, for example *Transport Accident Commission v Coyle*²³ where the offeree was not capable of making a proper assessment. An offer of compromise may be made at any stage in the proceeding. A decision not to accept such an offer must generally be taken to be informed by a consideration of all the risks if the case were to proceed, and the submission made by the Owners Corporation in this case is not supported by evidence sufficient to take it out of the ordinary course. The circumstances of this case were not so unusual as to warrant a departure from the entitlement that usually arises from compliance with s 112 of the VCAT Act.

²⁰ BSWV Reply to the Respondent’s Costs Submissions dated 31 March 2022 paragraph 17.

²¹ The affidavit of Matthew Bush is dated 9 October 2018. I note that, in its submissions, the Owners Corporation has erroneously recorded that the affidavit was dated 19 October 2018.

²² See *Building Services West Victoria Pty Ltd v Owners Corporation PS507524P* (Owners Corporations) [2022] VCAT 64 at paragraph 101.

²³ (2001) 3 VR 589; [2001] VSCA 236.

68 Therefore, I determine that the Owners Corporation must pay, under the County Court scale, all costs incurred by BSWV, in, and incidental to, the proceeding, from 30 April 2019, such costs to include reserved costs, and the costs of the Directions Hearing held on 3 July 2019.

Application of s 109 of the VCAT Act

69 BSWV also seeks its costs in the proceeding in the period prior to the offer it made under s 112. That application is to be determined in accordance with s 109 of the VCAT Act.

70 Section 109 of the VCAT Act provides as follows:

109 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.

71 As I have noted above, BSWV submits that subsections 109(3)(c) and (d) of the VCAT Act are relevant to its application for costs. Although BSWV has put primary reliance on section 109(3)(c) and (d), I am mindful that I must consider all of the matters set out in section 109(3).²⁴ It is the totality of all

²⁴ *Fitzgerald v Holiday Concepts Management Ltd* [2008] VCAT 573 at [18].

the relevant matters set out in section 109(3) that must be considered, in the context of the prima facie rule.²⁵

72 The Owners Corporation says that BSWV's application for an order for costs under s 109 of the VCAT Act should be refused. I set out the Owners Corporation's particular submissions in relation to the provisions of s 109 of the VCAT Act under the relevant headings below.

73 I will now consider each of the matters in section 109(3) in turn.²⁶

Did the Owners Corporation conduct the proceeding in a way that unnecessarily disadvantaged BSWV? (s109(3)(a))

74 BSWV has not specifically alleged that the Owners Corporation conducted the proceeding in a way that unnecessarily disadvantaged BSWV.

75 The test to be applied in relation to s 109(3)(a) is twofold. I must consider both whether there was unreasonable conduct²⁷ and whether BSWV was "unnecessarily disadvantaged".²⁸

76 Section 109(3)(a) of the VCAT Act sets out six examples of conduct that may create unnecessary disadvantage for a party. Although the list of examples in s 109(3)(a) of the VCAT Act is not exhaustive²⁹ I have considered each of those examples.

77 As I have noted above, costs were reserved in relation to the Owners Corporation's failure to have suitably authorised representatives attend the compulsory conference.

78 Costs were ordered against the Owners Corporation on 3 July 2019 because of delay caused by the Owners Corporation's failure to comply with the Tribunal's directions requiring it to file and serve its written submission in reply, its witness statements in reply and a list of documents it required to be added to the Tribunal book together with copies of those documents. I infer, from the fact that costs were awarded, that the Owners Corporation's failure was without reasonable excuse.³⁰ An adjournment was ordered because of that failure.³¹

79 It does not appear that there was any other failure to comply with the Act, the regulations or the rules.³² There is no allegation of any attempt to

²⁵ *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117 at [22].

²⁶ Of course, it is well established that it would be "most unlikely" that all of the factors set out in section 109(3) would be relevant in any particular case, and that the weight to be attributed to particular considerations (where they are relevant) will vary from case to case.²⁶

²⁷ *Tower Rise Apartments Pty Ltd v Manningham CC* [2003] VCAT 1431 at [15].

²⁸ *Falconbridge Pty Ltd v Yarra CC* [2005] VCAT 2449 at [18].

²⁹ *Sharp v The Cononical Administrators of St Monica's College Ltd* [2003] VCAT 42; *Brown v Morning Peninsula SC* [2004] VCAT 1140; *Arrow International Australia Ltd v Indevelco Pty Ltd* [2007] VCAT 811 at [18].

³⁰ Section 109(3)(a)(i) of the VCAT Act.

³¹ Sections 109(3)(a)(iii) and (iv) of the VCAT Act.

³² Section 109(3)(a)(ii) of the VCAT Act.

deceive another party or the Tribunal.³³ There is no allegation that the Owners Corporation engaged in unreasonable conduct, or conducted the proceeding in a way that unnecessarily disadvantaged BSWV.

- 80 BSWV has not contended that the Owners Corporation conducted the proceeding in a manner that was vexatious, within the meaning of s 109(3)(a)(vi) of the Act.³⁴
- 81 As I have noted above, BSWV submits, in support of its application under s 112 of the VCAT Act, that the Owners Corporation acted contrary to advice, and sought to rely on a defence which had no tenable basis in law.³⁵ The Owners Corporation submits that its conduct in this respect is not a relevant consideration in relation to s 109(3)(a) as it is conduct that precedes the commencement of the proceeding. While that may be so, it is necessary to consider the conduct in the context of s 109(3)(c) of the VCAT Act, and I return to this issue, under that heading, below.

Was the Owners Corporation responsible for prolonging unreasonably the time taken to complete the proceeding? S109(3)(b)

- 82 This provision is concerned with the time between the commencement and the completion of the proceeding, and not to matters that took place before the proceeding was commenced.³⁶ This criterion does not require that the party deliberately intended to prolong the hearing, the party must merely be responsible for the delay.³⁷ However, merely putting a party to prove its claim does not, of itself, constitute prolonging unreasonably the time taken to complete the proceeding.³⁸
- 83 BSWV has not contended, and I do not find, the Owners Corporation to have been responsible for unreasonably prolonging the proceeding.

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 in law. (s109(3)(c))

- 84 This criterion usually involves, but is not restricted to, claims which have no tenable basis in fact and law.³⁹ It has been found that “a substantial disparity [must exist] between the strength of one claim and the weakness of its competitor...before an order for costs [under this ground] will be fair”.⁴⁰
- 85 The fact that one party was successful “does not automatically mean that the strength of the claim of the other party was so weak as to attract the

³³ Section 109(3)(a)(v) of the VCAT Act.

³⁴ See *Straw v Proctor* [2004] VCAT 464 at [16]; *IIQ Pty Ltd v Delaney Associates Pty Ltd* [2011] VCAT 2056 at [24]; *Country Endeavours Pty Ltd v Baw Baw SC (No 8)* [2011] VCAT 2043 at [29].

³⁵ Submissions of BSWV dated 11 February 2022, paragraphs 14 and 15.

³⁶ *Colac-Otway SC v Tenth Cemalux Pty Ltd* [2003] VCAT 280 at [54].

³⁷ *Singh v RMIT University* [2011] VCAT 1890 at [18].

³⁸ *Sherwood v Sherwood (No 3)* [2014] VCAT 1037 at [18].

³⁹ See e.g. *Merraton Pty Ltd v Maroondah CC* [2008] VCAT 1768 at [41]; *Country Endeavours v Baw Baw SC (No 8)* [2011] VCAT 2403.

⁴⁰ *Beasley v Victoria* [2006] VCAT 2044 at [20]

operation of s109(3)(c)”.⁴¹ Further this question has to be considered prospectively, not with the benefit of hindsight after VCAT has made its decision.⁴²

- 86 BSWV has submitted that the Owners Corporation sought to rely on a defence which had no tenable basis in law, regarding which, the Owners Corporation had legal advice to that effect.⁴³ As I have noted above, the Owners Corporation’s response on this issue is limited to s 109(3)(a) of the VCAT Act.
- 87 I accept that there were no decisions of this Tribunal, or of the courts, precisely on the question of whether there is power for Rules made by an owners corporation to “incorporate by reference” other documents. However, there is a long line of authorities that clearly established that Rules which deal with issues other than the management of common property are invalid.
- 88 While I accept that a respondent is entitled to expect that an applicant will make out its case, it is clear that from late 2014 the Owners Corporation had received clear legal advice, to the effect that the Design Guidelines relied upon by the Owners Corporation to authorise the actions it took in relation to the BSWV developments, actions which I found to be ultra vires, were not enforceable under the s173 agreement.⁴⁴ BWSV submits that, at least April 2017, the Owners Corporation was in possession of legal advice that the Design Guidelines were not enforceable by the Owners Corporation under the relevant restrictive covenants.
- 89 There is some strength in BSWV’s submission that the Owners Corporation persisted in a defence in circumstances where there was a high probability that it would not succeed, however, I do not consider that this in itself warrants a cost order being made against it under s 109 of the VCAT Act.

The nature and complexity of the proceeding (s109(3)(d))

- 90 Both the nature of the proceeding and its complexity must be considered.⁴⁵
- 91 When looking at the nature of the proceeding the Tribunal may have regard to the manner in which that type of proceeding has been dealt with historically, including how costs were dealt with.⁴⁶

⁴¹ *Kafetanis v Bookmakers & Bookmakers’ Clerks Registration Committee* [2008] VCAT 577 at [23]; *Fasham Johnson Pty Ltd v Ware* [2004] VCAT 1708 at [12].

⁴² *Cooper v Boroondara CC* [2001] VCAT 2429 at [31]; *Sixty-Fifth Eternity Pty Ltd v Boroondara CC* [2010] VCAT 310 at [7].

⁴³ Submissions of BSWV dated 11 February 2022, paragraphs 14 and 15.

⁴⁴ See also, *Building Services West Victoria Pty Ltd v Owners Corporation PS507524P* (Owners Corporations) [2022] VCAT 64 at paragraphs 101-102 and 122- 129.

⁴⁵ *Frugniet v Law Institute of Victoria Ltd* [2012] VSCA 178 at [38]-[40]. In that case the Court of Appeal said that it is important to consider both matters because – although it is ultimately a matter for the exercise of discretion – “proceedings of which the nature alone is sufficient to warrant making a costs order are likely to be limited.”

- 92 BSWV submits that the proceeding was one of “some complexity” and not a mere fee recovery proceeding, and points to the fact that the proceeding required four sitting days and detailed written submissions as a further measure of its complexity.
- 93 The Owners Corporation submits that the proceeding was not unduly complex, characterising it as “essentially a claim for damages for breach of duty by the respondent”.
- 94 The orders made by the Tribunal at the start of the proceeding clearly indicate that the proceeding was not a simple dispute. The Tribunal’s directions required the parties to prepare written submissions, witness statements and a Tribunal Book. Those orders in themselves indicate that from the outset, the Tribunal considered the proceeding to be relatively complex. I am satisfied that the nature of the proceeding was such that it was appropriate for both parties to engage legal practitioners and counsel.

Any other matter the Tribunal considers relevant (s109(3)(e))

- 95 This criterion is said to be a ‘catch-all’ consideration, and there should be no restriction as to what other matters may be considered by the Tribunal.⁴⁷
- 96 I consider the Owners Corporation’s failure to be properly represented at the compulsory conference on 19 February 2019 to be a relevant consideration. I note that costs were reserved on that day. I consider it likely, had the Owners Corporation participated, in good faith, in the compulsory conference, the dispute might have been resolved, or at the very least, the issues in contention considerably narrowed. The Owners Corporation’s failure to make its representatives available for that purpose, in my view, is conduct relevant to the question of costs in the proceeding. It is appropriate to make an order under s 109 of the VCAT Act for the Owners Corporation to meet the costs of BSWV from commencement of the proceeding on 19 June 2018 until 30 April 2019, and I will so order.
- 97 Accordingly, pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* the Owners Corporation must pay BSWV’s costs of, and incidental to, the proceeding, on a standard basis under the County Court scale, including reserved costs, and the costs of the compulsory conferences on 13 November 2018 and 19 February 2019, from 19 June 2018 to 29 April 2019, both dates, inclusive.

The Owners Corporation’s application for costs

- 98 In relation to its own application for costs, the Owners Corporation asserts that the manner in which BSWV conducted the proceeding and the hearing caused the Owners Corporation to incur unnecessary costs. The Owners

⁴⁶ *Australia’s Country Homes Pty Ltd v Vasiliou* (unreported) VCAT Young M 5 May 1999. *Alphaprint Pty Ltd v Streamline Partitioning (Aust) Pty Ltd* [2000] VCAT 398; *Pure Capital Investment Pty Ltd v Fasham Johnson Pty Ltd* [2002] VCAT 1761.

⁴⁷ *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54.

Corporation refers, in particular, to BSWV's application to re-open its case in relation to the quantum of damage after the hearing had concluded. The Owners Corporation seeks an order that BSWV pay its costs of the proceeding in respect of:

- (a) the costs of the reopening application and all subsequent costs incurred following the granting of that application;
- (b) the costs of and incidental to the subsequent hearing following the reopening application;
- (c) the costs incurred by reason of the applicant giving evidence as to two different spreadsheets which involved additional evidence in chief, cross examination and preparation; and
- (d) the costs incurred by reason of BSWV failing to comply with the Tribunal's orders for discovery.⁴⁸

99 In reply, BSWV submits that although the hearing was listed for 3 days, only one additional day's hearing was required for the further evidence as to damages. Further, BSWV notes that the additional day's hearing provided an opportunity for the Owners Corporation to call its witness Paul Cummaudo to give expert evidence about aspects of the costings put forward by BSWV. Mr Cummaudo's evidence verified part of the BSWV damages claim. Mr Gabriel, of Bendigo Bank was recalled, and Mr Simpson of Hotondo Homes, the builder, also gave evidence.⁴⁹

100 The Owners Corporation submits that it was put to additional inconvenience and cost by the re-opening. The Owners Corporation notes also, that in the course of the day's additional hearing, email evidence emerged which undermined BSWV's pleaded case that the bank had cancelled its finance.

101 It is true that an additional day's hearing was listed on the application of BSWV in order for it to lead further evidence to correct errors which had been conveyed by Mr Bush's reliance on an erroneous *aide memoire* during the hearing day on 17 September 2019. It is also the case that good use was made, by both parties, of the fourth day of hearing, as it enabled the further evidence of Mr Gabriel and of Mr Simpson to be given. I note further that, in fact, only a very small portion of the hearing day on 17 September 2019 was concerned with the material in the erroneous *aide memoire*,⁵⁰ and on, balance, I do not consider that BSWV's conduct of the proceeding in this

⁴⁸ Respondent's Costs Submissions dated 24 February 2022 paragraph 36.

⁴⁹ Although the proceeding was listed for two further days' hearing, commencing on 27 February 2022, only one day's hearing was required.

⁵⁰ Mr Bush's evidence on 17 September 2019 is recorded in the transcript for that day from pages 121 to 170 and 212 to 218. Mr Bush gave evidence drawing on the *aide memoire* from page 128 to 134 (from 10.05 am to 10.54 am), much of which involved cross referencing the table in the *aide memoire* to documents in the Tribunal Book. Similarly, much of the cross examination of Mr Bush recorded in pages 212 to 216 was primarily concerned with documents in the Tribunal Books and issues relating to meetings of the Committee of the Owners Corporation and the Design Guidelines.

respect is such as to displace its entitlement to its costs in accordance with s 112 of the VCAT Act.

102 The Owners Corporation's application for costs is dismissed.

L Johnson
Member