VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1661/2019

CATCHWORDS

Water Act 1989 **(Vic) and** ***Owners Corporations Act 2006*** **(Vic);** applications for costs, reimbursement of fees and interest may by applicants; applicants rely on three offers made; consideration of *Calderbank* offer; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority [No 2]* [2005] VSCA 298 applied and order for costs on an indemnity basis made for part of the proceeding; in connection with reimbursement of fees, the presumption created by virtue of s 115C(1)(c) when read with s 115C(2), that in a proceeding under the *OC Act* a party who has been substantially successful against another party is entitled to an order under s 115B, applied; in connection with interest, consideration given to *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [No 3]* [2003] VSC 244 and to *Khan v Kimitsis trading as Quest Building* [2009] VCAT 912.

FIRST APPLICANT	Andrew Ralph Hill
SECOND APPLICANT	Merynne Elizabeth Hill
RESPONDENT	Owners Corporation PS524229U
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Costs, fees and interest determination 'on the papers'
DATE OF APPLICANTS' APPLICATION AND SUBMISSIONS	4 November 2022
DATE OF RESPONDENT'S APPLICATION AND SUBMISSIONS	16 December 2022
DATE OF APPLICANTS' REPLY SUBMISSIONS	13 February 2023
DATE OF ORDER	30 August 2023
CITATION	Hill v Owners Corporation PS524229U (Building and Property) [2023] VCAT 1015

ORDER

1. The respondent must pay the applicants' costs of the proceeding from the date of its commencement up to and including 20 January 2020 assessed on a standard basis on the *Supreme Court costs scale*. In default of agreement, the costs are to be assessed by the Costs Court.

2. From 21 January 2020, the respondent must pay the applicants' costs of the proceeding on an indemnity basis.
3. The respondent must reimburse to the applicants the fees paid by the applicants totalling $9,183.80.
4. The Tribunal declares that the applicants are entitled to an award of damages in the nature of interest calculated at 10% per annum on the following sums:
   (a) alternative accommodation assessed at $136,400 for the period 10 February 2019 to 29 June 2022;
   (b) alternative accommodation assessed at $34,100 for the period 29 June 2022 to 5 May 2023;
   (c) $1,137.88 in respect of electricity charges;
   (d) $2,826.22 in respect of water charges; and
   (e) $36,187.45 in respect of reimbursement of owners corporation fees.
5. The parties are directed to attempt to negotiate minutes of consent orders giving effect to the declaration set out in Order 4 above, on the basis that interest is to be calculated in respect of any sum from the date upon which it was actually paid until the date that the interest on that sum is agreed to be paid. If minutes of consent orders cannot be agreed, the applicants will have leave to apply for a further hearing at which evidence and submissions can be presented in support of the applicants' claim for interest and at which the respondent can present responsive material.
6. The respondents must pay to the applicants' damages in the nature of interest on the sum of $104,434.50 calculated at 10% per annum from 5 May 2022. The parties are directed to attempt to agree the amount. In default of agreement, the Tribunal will fix the amount to be paid.

C Edquist
Member

REASONS

1 Andrew Ralph Hill and Merynne Elizabeth Hill ('the Hills') became the registered proprietors of Unit 19 ('Unit 19') in an apartment building at 170/174 St Kilda Road, St Kilda ('the Building') in June 2007.

2 The Hills instituted this proceeding in the Tribunal in 2019 seeking damages in respect of water damage sustained in Unit 19 from the registered owners corporation for the Property, Owners Corporation PS524229U ('the OC'). They bought the action under s 16 of the *Water Act 1989* (Vic) (the '*Water Act*') and s 46 of the *Owners Corporations Act 2006* (Vic) (the '*OC Act*').

3 The hearing began before me on 8 February 2021. It continued through the whole of that week, and through the following week 12–19 February 2021. The proceeding, being part heard, was then adjourned for a further hearing on 26 February 2021. The hearing concluded on that day. The duration of the hearing was accordingly 11 days.

4 On 5 May 2022, I published Orders with Reasons ('the Reasons'): *Hill v Owners Corporation PS524229U* (Building and Property) [2022] VCAT 494. The Orders included a number of declarations but no monetary orders were made. One of the declarations was that the Hills were entitled to an injunction that the respondent make watertight their apartment (No 19) in accordance with the scope of work summarised in the Reasons. Other declarations related to the Hills' entitlement to damages in respect of a number of items. The Hills were given leave to file and serve an affidavit setting out further evidence about four claims for consequential losses, namely:

   (a) a claim for alternate accommodation on a long-term basis;

   (b) a claim for removal and storage costs;

   (c) a claim for utility expenses incurred in respect of the apartment while the Hills have not been living there; and

   (d) a claim for owners corporation fees incurred while the Hills have not been living in the apartment.

5 The Hills were also given leave to make an application for damages in the nature of interest and an application reimbursement of fees. The parties were each given leave to make an application for costs. The parties were directed to conduct a formal negotiation with a view to formulating consent orders.

6 Minutes of proposed consent orders were filed by the parties on 27 June 2022. On 30 June 2022, I made Orders in Chambers. The first order was an injunction requiring the OC to undertake works to stop water ingress into the Hills' apartment in accordance with a particular report expert witness. A procedure for determination regarding the Hills' outstanding claims for consequential losses was set out. A program for disposition of the Hills' applications for damages in the nature of interest, reimbursement of fees and costs was also set out. Again, no monetary orders were made at this point.

7 A further hearing was conducted on 7 October 2022 before me. Mr Nicholas Philpott of Counsel appeared for the Hills, as he had in the substantive hearing. Mr Joe Forrest of Counsel again appeared for the OC.

8 The Tribunal made the following monetary orders:

> The Tribunal declares that the applicants are entitled to an award of $173,600.00 in respect of alternative accommodation, being:
>
> (a) $136,400.00 for the period of 10 February 2019 to 29 June 2022;
>
> (b) $34,100.00 for the period of 29 June 2022 to 5 May 2023;
>
> (c) $3,100.00 for the 4 week period of internal rectification works.

9 The Tribunal made the following declarations:

> 2. The Tribunal declares that the applicants are entitled to an award of $1,137.89 in respect of electricity charges.
>
> 3. The Tribunal declares that the applicants are entitled to an award of $2,826.22 in respect of water charges.
>
> 4. The Tribunal declares that the applicants are entitled to an award of $36,187.45 in respect of reimbursement of owners corporation fees.

10 Order 5 provided that by reason of the Orders made on 5 May 2022, 30 June 2022 and the above orders, the OC must pay to the Hills the sum of $334,331.06. Finally, the programming orders made in respect of the Hills' applications for damages in the nature of interest, reimbursement of fees and costs were adjusted.

11 After some further minor slippage in the program, the Hills submitted an application for costs, reimbursement of fees and interest on 4 November 2022. The application was supported by written submissions of 15 pages and by an affidavit sworn by Jordana Mary Dymond. The OC filed response submissions dated 16 December 2022. They were substantial, running to 19 pages, but were not supported by any affidavit material. The Hills filed reply submissions on 13 February 2023. This determination is made having regard to those three sets of submissions.

Costs

12 Before I turn to the parties' respective positions, it is appropriate to set out the relevant provisions of s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*'). They read:

> **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.

OVERVIEW OF THE HILLS' SUBMISSIONS ON COSTS

13 The Hills' starting position is that they are entitled to an order for costs on the standard basis. They also make two other submissions. The first is that costs ought to be awarded on an indemnity basis. If that submission is rejected, then they may seek an order for costs on a standard basis but assessed on the *Supreme Court costs scale* rather than on the Tribunal's default scale, which is the *County Court costs scale*.

14 The Hills acknowledge that the prima facie rule is that each party must bear its own costs but say that it is fair that an award of costs should be made because a number of the bases for the making of an order for costs in s 109(3) have been enlivened.

15 In particular, they submit that the OC conducted the proceeding in a way that unnecessarily disadvantaged the Hills (thereby enlivening s 109(3)(a)); that the OC was responsible for prolonging unreasonably the time taken to complete the proceeding (engaging s 109(3)(b)); that the relative strengths of the claims made by to the parties were such that s 109(3)(c) comes into play; that the nature and complexity of the proceeding is such that s 109(3)(d) is activated; and that offers made by the Hills to the OC are "other matters" to be taken into account under s 109(3)(e)).

16 The OC's position in response is that the Hills' submissions do not justify an order for costs of any basis. Their fallback position is that if the Tribunal is inclined to award costs of the proceeding from its commencement, they

should be awarded on a standard basis pursuant to the *County Court costs scale*.

17 In my view, the Hills are clearly entitled to an award of costs from the start of the proceeding of a standard basis. The only issue concerning costs is whether the Hills are entitled to costs on an indemnity basis, either from the start of the proceeding, or from a later date.

18 In determining that the Hills are entitled to an award of costs on a standard basis I refer, in particular, to the nature and complexity of the proceeding. I shall come to this matter shortly,[1] but first I wish to make some short comments about the other matters relied on by the Hills.

Section 109(3)(a)

19 The Hills contend that the OC conducted the proceeding in a way that unnecessarily disadvantaged them. The OC's response is that the examples given by the Hills related to delays in performing interlocutory steps. The OC says that the material filed by the Hills does not make out the "unnecessary disadvantage" which must be established to enliven s 109(3)(a). They also say that the Hills' own conduct of interlocutory steps was not beyond reproach. I will not spend time discussing the pros and cons of these arguments, because I accept the thrust of the OC's final argument, which is that any necessary disadvantage to the Hills caused by breaches by the OC of interlocutory orders would result in only a limited amount of costs. This is because any award of costs arising from the OC's conduct of the proceeding should be confined to those matters directly arising out of the unnecessary disadvantage established.

Section 109(3)(b)

20 The Hills contend that the OC was responsible for prolonging unreasonably the time taken to complete the proceeding. The particulars relied on by the Hills are that the OC:

(a) failed to comply with Orders of the Tribunal;

(b) ended the first compulsory conference as it required expert evidence; and

(c) sought amendments to its pleadings on a number of occasions.

21 The first particular does not assist the Hills, for the reason that they have not substantiated how any failure by the OC to comply with any Order unnecessarily disadvantaged them. The second particular may be relevant, but at most it would justify an award of costs of the compulsory conference thrown away. No details were given of those costs. The third particular does not assist the Hills, because no details were given of any costs thrown away by reason of any change of pleading by the OC. There were arguments about

[1] See [25] below.

changes to the OC's defence at the hearing, but they did not cause any adjournment.

Section 109(3)(c)

22 The Hills' starting point is that they had to commence the proceeding because the OC failed to stop water ingress into the apartment, although the OC had informed them in May 2018 that they would undertake the required work. They develop the submission by arguing that the OC did not properly consider their claims in the terms required by the *OC Act* or the *Water Act* and that ultimately there was no tenable basis for the defence of the proceeding. The OC meets this submission head on, noting that its defence was based on the interpretation of the Plan of Subdivision and whether the external walls of the Hills' apartment were common property or private property. There was also a dispute about the cause of water ingress into the apartment. Hence, it cannot be "sensibly argued" that the OC did not properly consider the case made against it.

23 In circumstances where there was a wealth of evidence about the nature of the external walls and whether they were load-bearing, and also much evidence about the cause of water entry, I am satisfied that it cannot fairly be said that the OC's case was so weak that it could be characterised as untenable. The fact that the case was ultimately resolved against the OC is not a basis, in all the circumstances, for an award of costs to be made under s 109(3)(c).

Section 109(3)(d)

24 To its credit, the OC accepts that the proceeding was complex in nature. However, it goes on to submit that complexity does not, of itself, justify a costs order, let alone a special costs order.

25 I reject the OC's submission that the complexity of the proceeding does not justify even an order for costs on a standard basis. In support of this, I refer to the Reasons published on 5 May 2022. I highlight that the case involved claims made under both the *OC Act* and the *Water Act*; there were a number of issues concerning the identity of the common property; there was expert evidence given in relation to the external walls of the apartment and other expert evidence concerning the entry of water into the apartment. Once liability had been dealt with, there were a number of issues to be dealt when considering the different heads of damage. There were issues of causation and remoteness of damage and also mitigation of damage. The case involved a very significant amount of money and $334,331.06 was ultimately awarded as well as an order made for significant work to be undertaken by the OC. As noted, the hearing ran for 11 days. In my view, this is a very clear case where an award of costs from the outset of the proceeding on a standard basis can be justified.

Are the Hills entitled to an award of costs on an indemnity basis?

26 The Hills rely on three offers they made during the course of the proceeding, to which I shall return. They also rely on a case determined in the Tribunal owners Corporation list, *Edwards v Owners Corporation PS628502Y*[2] in which the Member was prepared to award costs of an indemnity basis in the particular circumstances of the case, even though no offer of compromise had been made. Special features in that case included the strength of the applicant's application for the appointment of administrator, the untenable position by the second respondent, the nature and complexity of the proceeding, and the central role of the second respondent in the dysfunction of the Owners Corporation. The Member found that not only did these factors justify an order for costs, but that "it is overwhelmingly clear that the only fair order is an award of costs on an indemnity basis".[3] In my view, the factors at play in the present case are not so exceptional that an award of costs on an indemnity basis can be justified in the absence of any relevant offer to settle. It is accordingly necessary to have regard to the offers made by the Hills.

The offer

27 The first offer was constituted by a letter dated 18 December 2019 marked "Without Prejudice Save as to Costs". It contained an offer that the Hills would compromise the proceeding provided the OC paid them the sum of $337,415.99 broken down in a particular manner on the basis that the OC undertook to carry out and pay for works to the common property as required to stop water ingress into the Hills' apartment. The offer was premised on a number of statements regarding the entry of water into the Hills' apartment through the common property, which were ultimately found to have been established by the Tribunal. It was expressed as remaining open for acceptance until 20 January 2020, a period of 32 days which had perhaps been extended from 28 days to allow for Christmas.

28 The offer made in December 2019 differed from the later offers in two respects. One distinction relates to quantum. The first offer included a term that, in addition to rectifying the common property, the Hills would accept the sum of $337,415.99, which was just over the amount ultimately awarded to them. The second offer, which was dated 24 September 2020, required the OC to undertake certain works to the common property and to pay the Hills the sum of only $187,000 in settlement of all their claims including rectification of the apartment, alternative accommodation, loss of amenity and other loss and damage including legal fees. The third offer, which was dated 18 January 2021, required the OC to pay for the work to the common property and also to pay the Hills $297,000. It can readily be seen that the order ultimately made – which was that the OC should pay the Hills

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2 [2019] VCAT 853.
3 Ibid [92].

$334,331.06 – was much more beneficial to the Hills than either the second or third offer.

29 This observation segues into the second distinction, which is that offers were expressed to be made under s 112 of the *VCAT Act*. Section 112 applies if a party to a proceeding gives another party an offer in writing to settle a proceeding and the other party does not accept the offer within the time that it remained open (provided it was open for at least 14 days) but the orders ultimately made by the Tribunal are, in the opinion of the Tribunal, not more favourable to the other party than the offer. Where s 112 applies, a presumption arises that the party who made the offer is entitled to an order that its costs be paid by the party who did not accept the offer.

30 The Hills contend that if the Tribunal is not disposed to make an order for indemnity costs on the basis of the first offer, then it should do so on the basis of the second offer. Likewise, if an order for indemnity costs is not made on the basis of the second offer, that it should be made on the basis of the third.

31 Obviously, if I am persuaded that it is fair that an order for indemnity costs should be made on the basis of the first offer, then it will not be necessary to consider the second or third offers.

Consideration of the first offer

32 The offer was not made under s 112 of the *VCAT Act*, but was expressed to be made in accordance with the principles of the English Court of Appeal decision in *Calderbank v Calderbank* ('*Calderbank*')[4] which were considered in the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority [No.2]* ('*Hazeldene*')[5]. In its concluding paragraph, the letter clearly foreshadowed that the Hills would seek an order for the payment of costs on an indemnity basis from the date of the letter in accordance with the principles set out in *Calderbank* and other cases including *Hazeldene*.

33 In *Hazeldene*, the Court of Appeal noted that *Calderbank* letters and the consequences that flow from them had been considered by the trial division of the Supreme Court in several cases. It was noted, at [18], that one of the seminal contributions to the law relating to indemnity costs was the judgment of Shepherd J in *Colgate-Palmolive Co v Cussons Pty Ltd*[6] in which his Honour stated that amongst the circumstances listed as being having been thought to warrant the exercise of the discretion to award indemnity costs was "an imprudent refusal of an offer of compromise".

34 The Court of Appeal went on to observe that so widely had this principle been accepted that the proposition had been advanced that a *Calderbank* offer gives rise to a presumption that the party rejecting the offer should pay

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4 [1975] 3 All ER 33.
5 [2005] VSCA 298.
6 [1993] FCA 536; (1993) 46 FCR 225.

the offeror's costs on an indemnity basis if the offeree receives a less favourable result.[7] The Court of Appeal rejected the notion of any such presumption and adopted the following formulation of Redlich J in *Aljade and MKIC v OCBC* ('*Aljade*'),[8] who held that the weight of authority:

> strongly points to an approach that involves no preconceptions about when the rejection of a Calderbank offer should lead to the making of a special costs order. It will do so where it is concluded that the rejection of the offer was unreasonable.

35 The Court of Appeal went on to endorse the view expressed by Gyles JA in *SMEC Testing Services Pty Ltd v Campbelltown City Council*:

> In the end the question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rules as to costs ...[9]

36 The Court of Appeal held, at [21], that when a court was exercising its costs discretion where a *Calderbank* offer had been made, it was relevant to have regard to the policy rationale underlying the availability of special orders for costs where offers of compromise had been rejected which were identified by the New South Wales Court Appeal in *Maitland Hospital v Fisher [No 2]*.[10] These were said to include the encouraging of saving private costs and the avoidance of the inherent risks, delays and uncertainties of litigation; to save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary; and to indemnify the plaintiff who has made an offer of compromise which is later found to have been reasonable, against the costs thereafter incurred.

37 The Court of Appeal also acknowledged a competing objective of equal importance, as identified by Redlich J in *Aljade*[11] as follows:

> Potential litigants should not be discouraged from bringing their disputes to the Courts. It is such considerations which underlie the general rule that an order for special costs should only be made in special circumstances.

38 The Court of Appeal considered that "these competing considerations can be sufficiently collated by applying a test of (un)reasonableness".[12] The Court went on to say:

> 24 Of course, deciding whether conduct is "reasonable" or "unreasonable" will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions. As Gleeson, C.J. said recently, "unreasonableness is a protean concept". But a test of reasonableness is, we think, entirely appropriate to the exercise of a discretion such as this.

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7 [2005] VSCA 298, [18].
8 [2004] VSC 351.
9 [2000] NSWCA 323, [37].
10 (1992) 27 NSWLR 721, 724
11 [2004] VSC 351.
12 [2005] VSCA 298, [23].

Factors relevant to assessing reasonableness

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.[33] 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 a 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 as 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

Disposition

39 Following *Hazeldene*, the question is whether the OC acted unreasonably in rejecting the offer. The OC makes a number of submissions relevant to the issue which I now address in turn. First, it submits that the first offer, and indeed each of the others made, is defective because it does not contain a single offer but combines an offer to accept a sum of money together with an offer that specified work be performed. I reject this submission. The making of a complex offer which involves an offer to accept a sum of money together with one or more other benefits is not a factor which renders the offer invalid or ineffective. Indeed, in *Calderbank*, the very purpose of the offer made was to endeavour to resolve a complex matrimonial dispute in circumstances where a simple monetary offer would not be sufficient.

40 The OC's second submission is that the letter contained not a single monetary offer but a series of offers. In my view, this submission is misconceived, because the letter clearly contains an offer to accept a specific sum of money on the basis that the OC undertakes and pays for the work to the common property required to stop water ingress into the Hills's property. The paragraph of the letter setting out the offer to accept a specific sum is [30(c)], which reads:

> The Owners Corporation pays our client the sum of $337,415.99, broken down as follows:
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> - $182,713.60 for the rectification of the property, being $176,804.10 for the works of Longbow, $1,900 for the replacement of air-conditioners; and $4,009.50 for mould remediation;
> - $10,000 for loss of amenity;

- $80,600 for alternative accommodation;
- $7,457.39 for utilities;
- $16,145 for removal of items, storage and further removalist's fees to move back;
- $40,500 towards cost to date including legal fees and experts fees.

41 It is to be noted that the offer is *to accept the sum of $337,415.99*. The figures which follow the offer are given, in my view, to illustrate how the sum is made up, and do not constitute a series of separate offers which are each capable of acceptance. Understood in this way, the first offer is an offer to accept $337,415.99 on the basis that the common property is rectified so that the apartment is made water tight.

42 The OC also submits that the offer should be disregarded because a large part of the $334,331.06 ultimately awarded to the Hills contained a figure of $173,600 for alternative accommodation costs. The OC contends that the alternative accommodation costs were directly affected by the 53-week delay in the publication of the determination, following the filing of closing submissions.[13] During this period, accommodation costs of $40,500 were incurred. This is a fair observation to make in mathematical terms, but it does not take the OC very far, because the OC itself appears to agree that it would have been reasonable for the Tribunal to take 14 weeks to publish its determination following final submissions. This is to be inferred from the fact that the OC contends that the sum ordered for alternative accommodation should be reduced by the value of 39 weeks alternative accommodation, which it calculates as $30,225.[14] The Hills robustly dispute this submission and, on the basis of a number of statistics relating to the size and complexity of the matter, contend that "it seems highly unlikely that a detailed decision as the one that was issued on 5 May 2022 would have been drafted within 13 weeks of final submissions being filed".

43 I acknowledged in the Reasons, at [20], that the completion of the decision was affected because I became involved in a long-running case in June 2021. However, I consider that any delay in completing the decision is not relevant to the ultimate determination of the claim for alternative accommodation because the Hills had not been able to move back into their apartment by the time that my substantive determination was published in May 2022. The claim for alternative accommodation is governed by where the Hills have been able to live rather than by the time it took to publish the Reasons.

44 Against these considerations, the issues of costs and reimbursement of fees must be brought into the equation. The amount claimed for costs claimed in the first offer, including expert reports, was $40,500. After that point, very significant costs were incurred by the Hills including the preparation of the Tribunal Book, preparation for the hearing, briefing Counsel for the hearing,

[13] OC's final submissions, [47].
[14] Ibid [48].

paying daily hearing fees (which ultimately totalled over $8,000) and paying for presumably half of the transcript for each of the 11 days of the hearing. Details of costs have not been provided, but I expect from decades of experience as a solicitor prior to coming to the Tribunal, that the Hills' costs of the whole proceeding together with hearing fees will be more than double the $40,500 claimed in the letter of 18 December 2019.

45 The OC may have had a view that the figure claimed for restoration of the Hills' apartment was unreasonably high but, at the same time, knew that the Hills could not live in the apartment because of mould. Accordingly, they were going to make a substantial and continuing claim for alternative accommodation. The OC must also have been aware that, in a claim of this nature and complexity, a figure of $40,500 for legal costs was modest. In my view, in not accepting the offer to perform work necessary to make the apartment waterproof and to pay the Hills $337,415.99 inclusive of costs in January 2020, the OC was acting unreasonably and imprudently.

46 I note that the tests of reasonableness set out in *Hazeldene* which are quoted at [38] above are satisfied. The offer was made in the early stage of the proceeding and adequate time (32 days) was given for it to be considered. The Hills had strong prospects of success, for the reasons articulated in the letter of offer. The offer was expressed clearly and it concluded with a statement that indemnity costs would be sought in the event that the offer was rejected. I find that it is fair to award indemnity costs to the Hills from 21 January 2020.

The Hills' costs up to and including 20 January 2020

47 Up to 20 January 2020, I find that the Hills are entitled to an award of costs on the standard basis. The only issue remaining to be determined in connection with this finding is whether costs should be assessed on the *County Court costs scale* or the *Supreme Court costs scale*.

48 Rule 1.07 provides that if the Tribunal makes an order as to costs, the applicable scale is the *County Court costs scale* unless the Tribunal otherwise orders. There is accordingly no fixed rule that the *County Court costs scale* is to be applied. This is merely the default position, which may be displaced in an appropriate case.

49 In determining what scale of costs to apply, I must do that which is fair and in accordance with the substantial merits of the case, under s 97 of the *VCAT Act*. Potentially relevant factors in the present case, in my view, include the nature and complexity of the legal issues, the complexity of the factual issues, the length of the hearing and the quantum of the award.

50 If the only feature of the case was that it concerned legal issues arising under the *OC Act* and the *Water Act,* that would not have persuaded me that it was appropriate to apply the *Supreme Court costs scale* as distinct from the *County Court scale*. The reason for this is that Parliament has invested the Tribunal with jurisdiction in respect of these enactments and it must be

presumed that, in an ordinary case arising under either or both of them, Parliament intended that the default scale should apply.

51 A similar comment can be made in relation to the factual complexity of the case, because cases involving an unreasonable flow of water are often factually complex.

52 However, in the present case, there is a convergence of complex legal issues, complex factual issues regarding the ingress of water into the apartment, and complex issues regarding the quantification of damage. This combination of factors, which resulted in the hearing running for 11 days, is a matter which I think elevates the case out of the ordinary and suggests that an award on the *Supreme Court costs scale* might be justified.

53 The matter is, in my view, put beyond doubt by the size of the award. Not only have the Hills received an award of $334,331.06 but they have received the benefit of a mandatory injunction which enjoins the OC to make their apartment waterproof. The total value of the determination is accordingly well over $400,000. This is a figure which, in my view, attracts an award on the *Supreme Court costs scale*.

REIMBURSEMENT OF FEES

54 The Hills seek reimbursement of fees incurred during the proceeding. They total $9,183.80, as set out in the following table:

Date	**Description of fees**	**Total**
26 June 2019	Filing fee for claim	$778.90
2 February 2021	Filing fee for summons	$23.70
8 February 2021	Day 1 of hearing	$362.90
9 February 2021	Day 2 of hearing	$362.90
10 February 2021	Day 3 of hearing	$362.90
11 February 2021	Day 4 of hearing	$362.90
12 February 2021	Day 5 of hearing	$725.70
15 February 2021	Day 6 of hearing	$725.70
16 February 2021	Day 7 of hearing	$725.70
17 February 2021	Day 8 of hearing	$725.70
18 February 2021	Day 9 of hearing	$725.70
19 February 2021	Day 10 of hearing	$1,088.60
26 February 2021	Day 11 of hearing	$1,088.60
6 October 2022	Hearing fees for hearing on 7 October 2022	$1,123.90
TOTAL		$9,183.80

55 The Tribunal has jurisdiction under s 115B of the *VCAT Act* to make an order at any time that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding. A presumption is created, by virtue of s 115C(1)(c) when read with s 115C(2), that in a proceeding under the *OC Act* a party who has been substantially successful against another party is entitled to an order under s 115B.

56 There is no doubt that the Hills have been substantially successful in the proceeding and accordingly they are entitled to an order for reimbursement of fees.

INTEREST

57 The Hills seek interest pursuant to s 53(2)(b)(ii) of the *Domestic Building Contracts Act 1995* (Vic), which empowers the Tribunal to make an order for damages in the nature of interest. I find this both curious and inappropriate, as the case has been brought under the *OC Act* and under the *Water Act*. However, under s 165(1)(c)(ii) of the *OC Act* the Tribunal does have jurisdiction to award damages in the nature of interest. Under s 165(2), the Tribunal may base the amount awarded on the interest rate fixed from time to time under s 2 of the *Penalty Interest Rate Act 1983* (Vic), which is currently 10% per annum. Moreover, s 19(3)(ab) of the *Water Act* empowers the Tribunal, when it is exercising jurisdiction in relation to the claim made under s 16, to make an order for damages in the nature of interest. Section 19(4) of that Act empowers the Tribunal to base the amount awarded on the interest rate fixed under the *Penalty Interest Rates Act*.

58 The OC does not dispute the Hills are entitled to interest, nor does it quibble with the interest rate claimed of 10%.

59 The Hills seek interest calculated at 10 % per annum on the sum of $334,331.06 from 10 February 2019, being the date that they were unable to live in their apartment.

60 However, they draw the attention of the Tribunal to the decision of *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [No 3]*[15] where Gillard J, at [61], made the following observations about the main objectives of interest:

> There are three main objectives of the award of interest. First, as compensation to the judgement creditor for being out of the funds from the date of commencement of the proceeding until judgement; secondly, to deter judgement debtors from delaying proceedings and thereby having the use of the money for a longer period; and finally, to encourage defendants to make realistic assessments of their liability in a case and to take bone fide steps to compromise the claim.

61 The OC then referred to *Khan v Kimitsis trading as Quest Building*[16] in which Senior Member Walker held, at [42]:

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[15] [2003] VSC 244, [61].
[16] [2009] VCAT 912.

> It must be borne in mind that it is not a liquidated claim to enforce a contract to pay interest but a head of damages and, apart from punitive or exemplary damages, damages are compensatory. Here what the Builder ought to have done is finish the house within a reasonable time but I have already assessed damages for that. The cost of fixing the defects and completing the house has not been expended yet by the Owner so he is not out of pocket for those sums. However he is out of pocket for the rent and rates that he has paid so I will allow interest on that.

62 On the basis of this passage, the OC submits that if the Tribunal was inclined to award interest the award should be limited to the moneys actually expended by the Hills. Of the amounts awarded to the Hills by the Tribunal, interest should not run on the amounts yet to be spent in respect of rectification, ie, the costs of rectification of the apartment in the sum of $58,750; the costs of rectification of the kitchen in the sum of $31,075; and the removal and storage costs in the sum of 50% of $16,145.

63 I accept that an award of damages in the nature of interest should be made in respect of items where the Hills have actually expended money. I will direct the parties to endeavour to formulate consent orders giving effect to this principle. Interest is to be calculated in respect of any sum from the date upon which it was actually paid until the date that the interest on that sum is agreed to be paid. In an endeavour to minimise calculations, where interest is to be calculated in respect of a number of payments made progressively over a period (as, for example, alternative accommodation assessed at $136,400 for the period 10 February 2019 to 29 June 2022), the parties might agree to tally the total of the payments made at the halfway mark and to calculate interest on that figure. If consent orders cannot be agreed the applicants will have leave to apply for a further hearing at which evidence and submissions can be presented in support of the Hills's claim for interest. The OC would, of course, have an opportunity to put in responsive material.

64 I note that on 5 May 2022, I made declarations that the Hills were entitled to orders for damages in respect of a number of items which totalled $104,434.50: see Orders 2, 3, 4, 6, 7, and 8. On 30 June 2022, I referred to these orders in Order 13 and noted that I would defer making orders for payment until the conclusion of the proceeding, but noted that this did not prevent the parties coming to a private arrangement about payment in order to avoid a later dispute about interest.

65 I will order that the OC must pay to the Hills damages in the nature of interest on the sum of $104,434.50 calculated at 10% per annum from 5 May 2022.

Member C Edquist