IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-19-01448

Owners Corporation No.1 PS644619K — Plaintiff

v

Sofy Pty Ltd (ACN 165 191 177) — Defendant

JUDGE:	His Honour Judge Woodward
WHERE HELD:	Melbourne
DATE OF HEARING:	On the papers, written submissions dated 2 November, 29 November and 15 December 2022
DATE OF RULING:	18 April 2023
CASE MAY BE CITED AS:	Owners Corporation No.1 PS644619K v Sofy Pty Ltd (No 2)
MEDIUM NEUTRAL CITATION:	[2023] VCC 577

COSTS RULING

Subject:	COSTS AND INTEREST
Catchwords:	Calderbank offer – offer included conditions for acceptance – whether failure to accept Calderbank offer was unreasonable – whether conduct of a party sufficient to warrant no order for interest.
Cases Cited:	*Calderbank v Calderbank* [1975] 1 All ER 333; *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 233; *Alpine Hardwoods v Hardys Pty Ltd (No 2)* (2002) 190 ALR 121; *Secretary, Department of Transport v Provan's Timber Pty Ltd [No 2]* [2020] VSCA 258; *Re Moran (No 2)* [2023] VSC 83; *Kuek v Devlan Pty Ltd* [2012] VSC 571.

APPEARANCES:	Counsel	Solicitors
For the plaintiff	J McKay	Budgen Allen Graham Lawyers
For the defendant	P Best	Kalus Kenny Interlex

HIS HONOUR:

Background and outcome

1 On 31 August 2022, I delivered my reasons for judgment following the trial ("August Reasons").[1] Terms used in this Ruling have the meanings used in the August Reasons, in which I held that the OC Licence did not authorise Sofy to construct the lift and I awarded damages in lieu of a mandatory injunction in the amount of $190,000. Further, I was satisfied that the OC had an implied easement pursuant to s12(2) of the *Subdivision Act*. I made orders reflecting my reasons on 13 October 2022.

2 I stated in my August Reasons that (at [5]):

> On the question of costs, it seems to me that the OC has been largely successful on its claim and defence to counterclaim. I will therefore order that Sofy pay the OC's costs of and incidental to the proceeding, including reserved costs, on the standard basis in default of agreement, unless either party has a basis for seeking a different order on costs. I will direct the parties to consult with a view to formulating agreed orders to give effect to these reasons. Any remaining issues the parties are unable to resolve (including on interest and costs) will be the subject of brief written submissions and will be determined on the papers.

3 The parties have provided competing submissions on both costs and interest. On costs, the OC submits that Sofy should pay the OC's costs on a standard basis until 14 February 2020, or alternatively July 2020 and thereafter on an indemnity basis, primarily relying on the principles as outlined in *Calderbank v Calderbank* ("*Calderbank*").[2] It also submits Sofy should be ordered to pay statutory interest under the s60 of the *Supreme Court Act* 1986 (Vic) ("SCA").[3] Sofy opposes both orders.

4 For the reasons below, I will order that Sofy pay the OC's costs of and incidental to the proceeding (including reserved costs, but excluding any existing costs order in Sofy's favour) on the standard basis, in default of agreement. There will be no order for costs in Sofy's favour. I will further order Sofy pay interest on the

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1 *Owners Corporation No. 1 PS646619K v Sofy Pty Ltd* [2022] VCC 1408 ("August Reasons").
2 [1975] 1 All ER 333.
3 Section 60(1*) Supreme Court Act* 1986 (Vic).

damages of $190,000 in the sum of $67,202.74, being interest calculated at the penalty interest rate of 10% per annum for the period from 1 April 2019 to 13 October 2022.

Summary of submissions

5 The OC relies upon several offers made before trial and submits the following:

(a) Pursuant to the principles governing the award of indemnity costs as discussed in *Calderbank* and *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)*[4] ("*Hazeldene's*"), the Court should find that Sofy's rejection of the OC's offers on 4 February 2020 ("First OC Offer") and 8 July 2020 ("Second OC Offer"), was unreasonable in all the circumstances. The First OC Offer and the Second OC Offer are hereafter together referred to as the "OC Offers".

(b) The OC is entitled to interest on damages in the awarded amount of $190,000 pursuant to my August Reasons at a rate of 10% per annum pursuant to the *Penalty Interest Rates Act* 1986 (Vic), which should be calculated from the date of commencement of the proceeding – 1 April 2019 – until the date of my orders on 13 October 2022 in the amount of $67,202.74 or alternatively until the date of my August Reasons in the amount of $64,964.38.

6 Relying on the default position for costs being on the standard basis, Sofy relevantly submits that:

(a) special circumstances must apply to depart from the default position and award indemnity costs; and

(b) if the OC is relying on a *Calderbank* offer, it bears the onus of establishing, among other things, that the rejection of the offer was in all the circumstances unreasonable.

4 [2005] VSCA 233 at [17]-[28] per Warren CJ, Maxwell J and Harper JA.

7 Sofy argues that costs of the proceeding should be awarded to the OC on the standard basis, except that it should have an order for its costs associated with the OC's failed application mid-trial for leave to further amend its statement of claim.

Factual background

8 It is not in dispute that the parties in this proceeding made a series of genuine attempts to settle their dispute. The history of the settlement attempts can be summarised as follows:

(a) the parties attended mediation on 10 December 2019 and reached an "in principle" settlement of the dispute for the amount of $70,000;

(b) the OC made the First OC Offer on 4 February 2020, which included terms that Sofy was to pay the OC $70,000 in full and final settlement of the proceeding and there would be mutual leases for the Lift and Generator;

(c) the First OC Offer was conditional on the OC members entering into the required resolutions to execute the leases;

(d) on 11 March 2020, Sofy rejected the First OC Offer and made a counter offer on essentially the same terms as the First OC Offer, except the payment of $70,000 by Sofy was reduced to $50,000;

(e) on 20 May 2020, Sofy essentially renewed its offer from March, the only differences relating to the timing of payment and certain details relating to the future arrangements for the land occupied by the Generator;

(f) on 8 July 2020, the OC sent the Second OC Offer to Sofy, including terms that Sofy pay the OC $70,000 "all in", payable 90 days after delivery by the OC to Sofy of a lease for the land occupied by the Lift, and the grant by Sofy to the OC of a 99 year lease for the land occupied by the Generator;

(g) the Second OC Offer was initially accepted by Sofy by letter dated 21 July 2020 and draft leases were provided by the OC to Sofy on 12 August 2020;

(h) on 26 August 2020 Sofy raised objections to the drafted leases for the generator and the lift (notably insisting that the Generator lease should contain a reduction on lot liability and also objecting to the OC's requirement that Sofy obtain insurance for the part of the common property the subject of the proposed Lift lease);

(i) on 7 June 2021, Sofy made a further offer of a settlement based on mutual 99 year leases for the disputed areas, without Sofy paying any monetary compensation asserting that it had expended considerable costs which were, in its view, wasted by the OC's conduct in the proceeding; and

(j) on the first day of the trial on 28 September 2021, counsel for the defendant noted that he had instructions to make an open offer for the full settlement of the proceeding, along the lines of Sofy's 7 June 2021 offer.

Legal principles

9 Costs will ordinarily follow the event.[5] Further, as general rule, the Court will order costs to be taxed on a standard basis, unless a Court exercises its discretion to depart from this position and award a special costs order.[6] One ground for the exercise of this discretion is following a *Calderbank* offer.

10 The principles governing *Calderbank* offers are well established. The court may exercise its discretion as to costs where a party makes a without prejudice offer as to the issues coupled with a condition as to costs, and at the trial, the judgment is less beneficial to the offeree than the offer.[7] However, the mere refusal of an offer and a less favourable outcome at trial does not guarantee an

5 *Aljade and MKIC v OCBC* [2004] VSC 351 at [10] ("*Aljade*").

6 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [97]. See also *Ikosidekas v MWL Finance Pty Ltd & Ors* [2022] VCC 887 at [31].

7 Cairns, B., *Australian Civil Procedure* (12th ed, Thomson Reuters, 2020) 569 at [12.180].

order for indemnity costs.[8] In considering the exercise of its discretion to award indemnity costs, a Court must consider whether the rejection of a *Calderbank* offer was, in all of the circumstances, "unreasonable".[9] In *Hazeldene's*, the Court stated (citations omitted):

> "The critical question is whether the rejection of the offer was unreasonable in the circumstances. We see no justification for a more stringent test such as "manifestly" or "plainly" unreasonable.
>
> 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.
>
> The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of 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."[10]

11 In its submissions, Sofy emphasises the importance of context and eschewing hindsight, including by reference to the decision of Weinberg J in *Alpine Hardwoods v Hardys Pty Ltd (No 2)*,[11] (cited with approval in *Orwin v Rickards* (Ruling No 3)),[12] in which his Honour held that:

> "The offeror needs to show that the conduct of the offeree was unreasonable. Moreover, the reasonableness of that conduct must be

8 *Hazeldene's* at [18-20].
9 As affirmed in the recent decision *Re Moran (No 2)* [2023] VSC 83 at [35].
10 Ibid at [25], citing *Aljade* at [75].
11 (2002) 190 ALR 121.
12 [2019] VSC 388 at [6].

> viewed in light of the circumstances which existed at the time the offer was rejected. The fact that the applicants ultimately failed to make good their case does not mean that they acted unreasonably in rejecting the initial offer. Nor does the fact that that initial offer was itself reasonable mean that it was unreasonable to reject it."[13]

12 Similarly and more recently, in *Secretary, Department of Transport v Provan's Timber Pty Ltd*,[14] the Court of Appeal held that:

> "While there is no need to show that the rejection of a Calderbank offer was 'highly' or 'grossly' unreasonable, it is not presumed that a refusal is unreasonable simply because the offered sum is higher than the ultimate award. Instead, the onus rests on the offeror to show that the offeree acted unreasonably. This is ultimately a matter of judgment and impression, and must be assessed at the time the offer is made, without the advantage of hindsight."[15]

Consideration

13 It is convenient to consider the issues and arguments by reference to the relevant matters listed in *Hazeldene's*, and set out above.

Stage of the proceedings at which the offer was received

14 The First OC Offer was made approximately 10 months after proceedings were commenced, and the Second OC Offer made three months later. At the time of both Offers, the following pleadings had been filed:

(a) the OC's writ and statement of claim dated 2 April 2019;

(b) Sofy's defence and counterclaim dated 27 May 2019;

(c) the OC's reply and defence to counterclaim dated 26 June 2019; and

(d) Sofy's amended defence and counterclaim and reply to defence to counterclaim, both dated 20 September 2019.

15 Thus, the respective claims, counterclaims and defences had been thoroughly articulated at the time of both OC Offers. The OC also refers to the fact that the parties participated in a mediation before the OC Offers were made which (I

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13 *Alpine Hardwoods v Hardy's Pty Ltd (No 2)* [2002] FCA 224 at [28].
14 [2020] VSCA 258.
15 *Secretary, Department of Transport v Provan's Timber Pty Ltd [No 2]* [2020] VSCA 258 at [25].

should infer) would have provided an opportunity for detailed discussion and negotiation concerning the claims in the proceeding.

16 However, Sofy submits in substance that there was a crucial part of the OC's claim missing at the time of the OC Offers. The OC first pleaded its reliance on an implied easement pursuant s12(2) of the *Subdivision Act* in relation to location of the Generator in its amended statement of claim filed 21 April 2021, well after the OC Offers. And it was this ground that formed the basis of my decision to reject Sofy's counterclaim.

17 In my view, this factor is by no means decisive in determining whether Sofy's failure to accept the OC Offers was unreasonable. Clearly the OC enjoyed a substantial measure of success in the proceeding, regardless of the Generator claim. In particular, it was wholly successful in relation to its primary claim concerning the Lift, including in relation to the construction of the Licence. On the other hand, the prospects of success of Sofy's counterclaim must be considered in assessing Sofy's decision making at the time of the OC Offers. The fact that the successful ground for resisting the counterclaim had not been articulated at that point, is clearly a relevant consideration.

Prospects of success at the date of the offer

18 I am satisfied that Sofy was in a good position to assess its prospect of success on the Licence issue at the time of the OC Offers and, for the reasons stated in my August Reasons, should reasonably have assessed those prospects as poor, but not hopeless. I also note that in the First OC Offer, the OC outlined in considerable detail the OC's interpretation of the Licence and why it considered the offer to be reasonable. And the fact that at the conclusion of the mediation, Sofy was prepared to agree in principle to pay $70,000 to settle the OC's claim reinforces that it had real concerns about its ability to successfully defend that claim.

19 In addition to its reliance on the OC not having pleaded the *Subdivision Act* defence to Sofy's counterclaim at the time of the OC Offers, Sofy argues that the absence of any expert reports at that time added to the uncertainty surrounding its prospects of success in the proceeding. To my mind, this is no more than marginally relevant. The expert evidence may have informed issues of quantum but was not relevant to the construction of the Licence. In relation to quantum, Sofy's involvement in the management of the construction of the SKY2 building (and property development and construction more generally), it was well placed to make its own assessment of the extent of its financial exposure in the proceeding.

Time allowed for the offeree to consider the offer

20 While it does not appear to be submitted by Sofy that it had insufficient time to consider the offer, for completeness I agree with the OC that the 10 days for Sofy to consider the First OC offer and 14 days to consider the Second OC Offer, were both sufficient. Further, the First OC Offer may not have included drafts of the proposed leases, it was open to Sofy (as it did with the Second OC Offer) to accept the offer subject to finalising the terms of the leases.

Extent of the compromise offered

21 Both the First and Second OC offers were made for the amount of $70,000 as 'all in' offers. The OC submits that this represented a significant compromise and fell well below the amount in damages awarded at trial, being $190,000 in favour of the OC. The remaining terms of the OC Offers were, as discussed below, provided mechanisms by which the parties could give negotiate and agree on the proposed lease agreements.

22 The primary relief sought by Sofy was an injunction requiring the removal of the Lift, or alternatively damages. The amount of damages sought was not particularised at the time of the OC Offers, and as Sofy points out, was not at that time the subject of any expert evidence. However, Sofy agreed in principle at

the mediation to settlement in the amount of $70,000 and again following the Second OC Offer, even though neither agreement was ultimately finalised. Indeed, Sofy later itself offered $50,000. Further, as noted above, Sofy was well placed to make its own assessment of its potential exposure. I also note that had I awarded the OC its primary relief, the cost to the OC would have been many times the $190,000 in damages awarded.

23 In those circumstances, I am satisfied that the extent of the compromise offered by the OC Offers was substantial and the OC has comfortably satisfied this consideration, as articulated in *Hazeldene's*.

Clarity of terms in which the offer was expressed

24 I also consider that the terms of both the OC Offers were sufficiently clear. As pointed out by the OC, Sofy was represented at all times by experienced legal practitioners and was well placed to understand and assess the terms of both OC Offers. However, there are two aspects of both of the OC Offers that raise difficult questions in determining whether the OC can establish that Sofy's failure to accept the offers was unreasonable. These are, first, the special resolution conditions and, second, the lease conditions.

Special Resolution conditions

25 Both OC Offers were made conditional upon the OC passing special resolutions pursuant to ss14 and 15 of the *Owners Corporations Act* 2006 (Vic) to enter into the proposed leases relating to the Lift and Generator. While these conditions made the OC Offers more complex, I am not persuaded by Sofy's submission that it rendered the offer in its entirety uncertain in the sense contemplated in *Hazeldene's*.

26 Sofy submits that whether the OC could have secured the necessary votes to pass both of the resolutions was at all times speculative and the OC offered no evidence that votes would have succeeded. However, in my view, the likelihood

of the OC securing the necessary resolutions of members is not a matter to consider in assessing the clarity of the terms.

27 Further (as the OC submits) it is commonly the case that offers of settlement must be conditional on approval from a third party or group of stakeholders (such as an insurer or a board of directors). Indeed, that is often the reason that parties are forced to make a settlement offer in the form of a *Calderbank* offer, rather than as an offer of compromise under the Court rules.

28 In my view, if this type of condition was sufficient to undermine the effectiveness of a *Calderbank* offer, this would have an unnecessarily detrimental and unwelcome effect on the capacity of parties to encourage settlement of proceedings. This is particularly the case where (as here) the need for stakeholder approval is mandated by statute. Having said that, the uncertainty and delay associated with the need to secure the resolutions should not be entirely disregarded in assessing whether Sofy's rejection of the OC Offers was in all the circumstances unreasonable.

Agreement to agree the terms of the lease conditions

29 The position in relation to the condition requiring the entry into reciprocal leases for the Lift and Generator is more difficult. Sofy submits that, by virtue of this clause, each OC Offer was at best, an agreement to negotiate, and neither party could be assured that if they entered the agreement there would be a resolution of the proceedings.

30 Sofy also sets out in its submissions the circumstances of the negotiations between the parties of the lease terms after Sofy had accepted the Second OC Offer and argues that these show that Sofy was negotiating over the Second OC Offer in good faith and reasonably. It submits that its letter of 26 August 2020 "invited the OC to provide calculation and 'clarity about the issues raised'", and that:

> "Between August 2020 and October 2020 Sofy's solicitor on various occasions requested a response to the letter. As late as 1 October 2020 Sofy's solicitors wrote:
>
> > 'we refer to our without prejudice letter of 26 August 2020, with respect to which we understood you were to seek your clients' instructions. Could you please confirm when we can expect to receive your clients' response to the matters raised in our letter?'
>
> The OC did not at any time respond to the letter or make any further attempt to negotiate the draft leases".

31 The OC submits in response as follows:

> "Offers conditioned upon agreement of lease terms and approval of the OC's members were reasonable in the circumstances. This observation applies with added force to the second offer of 8 July 2020, as it contained a detailed statement of the proposed lease terms which largely accorded with the earlier offer submitted by SOFY on 20 May 2020. SOFY accepted the offer on 21 July 2020. SOFY's letters of 12 and 26 August 2020 raised two essential objections which prevented the compromise from advancing. These objections are addressed in the OC's Previous Submissions. To repeat the position, SOFY's objection regarding insurance was specious as it had already agreed to paragraph 11(c)(vii) of the OC's 8 July offer (wherein SOFY agreed to insure the relevant common property for such risks as the OC might reasonably determine). As to the objection based on fees, the fees and levies imposed on a particular lot owner are set in accordance with legislation1, and could not be varied in the manner requested by SOFY. The parties (and the Court) were consequently required to advance the proceeding through to its conclusion because SOFY refused to pay some trifling fees associated with the generator land, in circumstances where the fees could not be altered in the manner that was sought due to clear statutory provisions"

32 There is force in the submissions of both parties on this issue. Thus, the question of whether those advanced by the OC are sufficient to discharge its onus of establishing Sofy's unreasonableness, is finely balanced. Neither party took me to any authority on conditional *Calderbank* offers, however, I note that it was the subject of discussion in a recent decision of McMillan J in *Re Moran (No 2)*[16] in which her Honour, in turn, cited "helpful guidance on the issue" from Dal Pont,[17] as follows:

> "To trigger costs consequences, a settlement offer should not envisage further negotiation between the parties prior to the compromise being effected; it must be capable of being accepted, thereby bringing into

16 [2023] VCC 83.

17 Ibid at [50], citing GE Dal Pont, *Law of Costs* (LexisNexis Australia, 4th ed, 2018) at 430–1 [13.78] (citations omitted).

> existence a binding contract. If the 'offer' is properly construed, from the perspective of a reasonable offeree, as an invitation to negotiate a settlement, it may hold little sway so far as costs are concerned (but could generate adverse costs consequences for the offeree who issues a blanket refusal to take up the invitation).
>
> In the same vein, 'offers' that envisage the negotiation or approval of other (or third) parties do not, as a rule, carry weight on costs. So where, in *Pearson v Williams*, an offer was stated to be conditional on agreement being reached between the defendants on certain matters, and in *Mid-City Skin Cancer and Laser Centre Pty Ltd v Zahedi-Anarak*, the defendants offered to settle the proceedings for a set sum and for the parties to 'resolve outstanding issues associated with the business names the subject of the Proceedings', neither offer was held to amount to a Calderbank offer but rather an invitation to negotiate. And in *Apostolidis v Kalenik (No 2)* the Victorian Court of Appeal, faced with an offer expressed as being subject to approval by a third party (the Australian Taxation Office), accepted the submission that it ought not attract Calderbank principles."

33 The Court has a wide and unfettered discretion in considering the costs consequences of genuine attempts at settlement. I am reluctant to endorse an approach where conditional offers, including the need to negotiate ancillary arrangements, will invariably preclude a special costs order. On the contrary, parties should be encouraged to explore every opportunity to force opposing parties to seriously consider all reasonable settlement offers. Each case must be considered on the basis of its unique facts, including an examination of why the conditions have been proposed, the reasonableness of the conditions and the extent to which the conditions are articulated and explained as part of the offer.

Whether the offer foreshadowed an application for indemnity costs

34 The OC accepts that the First OC Offer did not expressly mention a potential application for indemnity costs, but submits that the offer does state that it was put in accordance with the principles of *Calderbank* and/or *Cutts v Head*[18] and/or *Hazeldene's* and would be relied upon in support of an application for costs. I agree with the OC that it would have been sufficiently clear to Sofy (which was at all relevant times represented by sophisticated legal advisers), that a special costs order application would be made if the OC was successful in the proceeding.

[18] [1984] 1 All ER 597.

Conclusion on a special costs order

35 In the particular circumstances of this case, I have determined that no special costs order should be made. In my judgment, the uncertainty introduced by the need to negotiate the lease terms, when coupled with the other factors discussed above, brings the issue close to balance. In those circumstances and having regard to the persuasive authority of the discussion in *Re Moran (No 2)*,[19] I cannot be satisfied that the OC has discharged its onus of establishing that Sofy's failure ultimately to accept the OC Offers was unreasonable.

Other matters relevant to cost

36 Sofy submits that the Court should make an order in its favour for costs incurred in relation to the OC's application to further amend its statement of claim mid-trial. Sofy asserts that it incurred additional costs from its experts and lawyers in dealing with the proposed additional ground in the OC's proposed amended pleading during the running of the trial.

37 I accept that at the conclusion of the trial, the OC acknowledged that the application for leave to amend should not have been made and did lead to some inconvenience to the parties. However, the trial was not unduly delayed or adjourned.

38 In my view, the conduct of the OC in proposing a further amendment to its statement of claim mid-trial does not justify an adverse costs order. I agree with the OC that the fact that a party loses particular arguments made during the course of the trial should not (save in special circumstances) deprive the successful party of its entitlement to costs. It was the type of application that is commonly made as part of the cut and thrust of contested proceedings at trial, and the authorities make clear that courts should be slow to engage in a process of attempting to apportion costs for small wins and losses encountered on the path to judgment.

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19 [2023] VSC 83.

39 In this case, the OC was overwhelmingly successful in the proceeding, and should have costs (including reserved costs) awarded in its favour, but on the standard basis in default of agreement.

Interest

40 The OC submits that it is entitled to the standard order for interest pursuant to statute (SCA, s60) and claims interest at the penalty interest rate of 10% per annum on the judgment amount of $190,000 from the date of commencement of the proceeding – 1 April 2019 – until the date of final orders on 13 October 2022. Sofy resists the OC's claim for interest, essentially on the basis that the OC's conduct of the proceeding disentitles it to the benefit of the standard order.

41 More particularly, Sofy submits that:

(a) the OC was responsible for the last minute vacation of two trials; those listed on 17 February 2020 and on 26 April 2021 and by virtue of this, the litigation was extended unnecessarily for two years;

(b) "The OC's continuing failure to comply with the Court's orders and directions (which extended the proceeding for two years) constitutes a breach of the overarching obligation to minimise delay (section 25 *Civil Procedure Act* (Vic) 2010" ("CPA")"; and

(c) pursuant to s60 of the SCA, Sofy has shown "good cause to the contrary" against the awarding of damages in the nature of interest: "If interest was awarded or awarded to judgment and/or at the rate of 10% there would be a substantial injustice to Sofy in that the long delay in the trying of the proceeding was the fault of the OC".

42 In my view, these submissions must be rejected. As the OC submits there were in fact five trials listed before the sixth one proceeded. The first trial date of 30 September 2019 was adjourned by consent as neither parties had engaged experts. The trial dates of 1 June 2020 and 9 November 2020 were adjourned to

facilitate the conduct of a Judicial Resolution Conference. As to the February 2020 trial, Sofy alleges that the OC did not comply with the Court's standard pre-trial directions, including the filing of trial aides, despite multiple attempts by Sofy to resolve the issues. A proposed minute of consent, executed by both parties, was provided to the Court to adjourn the trial on 14 February 2020, and I made orders on the papers accordingly.

43 As to the April 2021 trial date, Sofy alleges that the OC again failed to comply with the pre-trial directions. However, once again, the parties provided a proposed minute of consent to vacate the trial and requested to be excused from attending a pre-trial directions hearing before Judicial Registrar Burchell (as her Honour then was). Importantly, the defendant also sought and obtained an order for costs thrown away as a result of the OC no longer relying on an expert report and obtaining leave to amend its statement of claim.

44 In relation to Sofy's allegation of breach of the CPA, it relied on the decision of Kyrou J in *Kuek v Devlan Pty Ltd*[20] *("Kuek")* in which his Honour made observations regarding the seriousness of the "specific statutory obligations" imposed by the *CPA* on the Court, parties to civil litigation and their lawyers.[21] His Honour stated that:

> "The Act must be taken seriously by litigants and their lawyers. In an appropriate case, the Court is entitled to – and will – say to a party seeking to enforce its rights in a manner that is antithetical to the overarching purpose and to that party's overarching obligations that 'enough is enough' and will act to curtail those rights in the interest of the administration of justice."[22]

45 The application in *Kuek* was brought pursuant to r63.75 of the *Supreme Court Rules* for the review of an order of the Costs Court. The process, as outlined by the *Supreme Court Rules*, relies on strict timeframes by which parties must take particular action, for the review to occur.[23] Any delay in this process jeopardises

20 [2012] VSC 571 at [68], [73] and [77]-[79].
21 Ibid at [78].
22 Ibid at [79].
23 Rule 63.57(5) *Supreme Court Rules (General Civil Procedure) Rules* 2015 (Vic).

the entirety of the review process. In my view, the circumstances of this case are less clear cut. While of course adherence to the overarching obligations under the CPA is paramount for all stages of a proceeding, the assessment of the cause and consequence of delays that routinely occur in bringing a proceeding to trial, can be problematic.

46 This case is a paradigm example of the difficulties in attributing responsibility for particular delays, as highlighted by the OC's response to Sofy's submissions that the blame lies with the OC. The OC submits as follows:

> "As to the circumstances leading to the vacation of the trial on 17 February 2020, the reason for the adjournment was outside the OC's control, and is recounted above. [The OC submits that the trial was vacated due to the unexpected unavailability of the OC's expert witness due to a family emergency.] SOFY consented to the adjournment. The trial listed for 29 May 2020 was vacated by consent due to the Covid-19 pandemic, and the subsequent listing for 9 November 2020 was also vacated by consent to facilitate a judicial resolution conference. The trial listed for 26 April 2020 was vacated when the OC's expert was not available (as stated above). Again, SOFY was notified of this on 26 March 2021. Opening submissions were filed by the OC on 13 April 2021, and a draft summary of key issues was provided to SOFY on 12 April 2020. The trial then proceeded on the next listing date of 27 September 2021."

47 I accept these submissions. The OC did cause some delay in the vacation of at least one trial date, but it has a reasonable explanation for that delay. To my mind, there was no misconduct or other act on the part of the OC that even comes close to the level of egregiousness justifying a finding that it should be denied an award of interest altogether. And where several later trial dates were also vacated, it is neither practicable nor appropriate to attempt to attribute responsibility for each delay and then try to work out the days by which the OC's entitlement to interest should thereby be curtailed. Finally, to the extent that responsibility could be attributed for costs thrown away by reason of a lost trial date, this has already been addressed by an adverse costs order.

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Certificate

I certify that these 16 pages are a true copy of the ruling of his Honour Judge Woodward delivered on 18 April 2023.

Dated: 18 April 2023

Darcy White
Associate to his Honour Judge Woodward