VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1154/2015

CATCHWORDS

DOMESTIC BUILDING–COSTS–Section 109 *Victorian Civil and Administrative Tribunal Act 1998*– whether fair to order costs-costs awarded to the applicants

FIRST APPLICANT	3G Group Homes Pty Ltd (ACN 167 353 111)
SECOND APPLICANT	Gethsemane Garden Group Pty Ltd (ACN 152 265 293
RESPONDENT	Mr Xian Wei He
WHERE HELD	Melbourne
BEFORE	Member A T Kincaid
HEARING TYPE	Costs application
DATE OF HEARING	5 September 2016 Applicants' subsequent written submissions filed 12 September 2016, Respondent's written submission in response filed 5 October 2016
DATE OF ORDER	20 January 2017
CITATION	3G Group Homes Pty Ltd v Xian Wei He (Costs) (Building and Property) [2017] VCAT 104

ORDER

1. Having regard to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, and because it is fair to do so, the respondent must pay to the applicants the costs of the applicants incurred in the claim and the counterclaim, including reserved costs. In default of agreement within 28 days, they are to be assessed by the Victorian Costs Court on the standard basis on the County Court Scale.

A T Kincaid
Member

APPEARANCES:

For Applicants	Mr Goh, director.
For Respondent	Mr He, in person.

REASONS

Background

1. I heard this proceeding over 5 days between 15 August 2016 and 19 August 2016, and gave my decision orally, with reasons, on 19 August 2016.

2. In summary, I found that the respondent was liable:

   (a) to pay to the first applicant $114,415.81 including interest, being the balance of monies owing for works undertaken by the first applicant at units 2-3, 32 Hodgson Street, Heidelberg plus $84,000 payable pursuant to the building contract for units 2-3, upon the respondent failing to obtain construction finance; and

   (b) to pay to the second applicant $31,966.31 including interest, being the balance of monies owing for works undertaken by the second applicant at units 4-5, 32 Hodgson Street, Heidelberg plus $63,232.22 payable pursuant to the building contract for units 4-5, upon the respondent failing to obtain construction finance.

3. On 5 September 2017 the Applicants made a claim for costs pursuant to sections 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**"). I subsequently received written submissions from the parties.

4. The applicants rely upon the criteria set out in sections 109(3)(a)(vi), 109(3)(c), (d) and (e) of the Act, in support of their submission that it is fair to award costs in their favour.

The law

5. Sections 109(1), (2) and (3) of the Act provide 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 sub-section (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.

6. It is apparent from the terms of section 109(1), that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding. By section 109(2), the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3). In summary, parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. Section 109(3) is by no means an exhaustive list of the things to be considered.[1]

7. It has been said that a "substantially successful party" in what was the Tribunal's Domestic Building List (now the Building and Property List) was entitled to have a reasonable expectation that an award of costs would be made in his favour.[2] However it is now established that although such awards are commonly made in such cases, there is no presumption that they should be.[3]

8. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[4] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

> In approaching the question of any application to costs pursuant to section 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows-
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.

---

1 See *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54 at [28].
2 *Australian Country Homes v Vassiliou* (VCAT) 5 May 1999, unreported
3 *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw* [2005] VSCA 165.
4 [2000] VSC 117

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

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

9. A domestic building proceeding can be expensive. Experts' reports are usually required. The discovery process in even a modest building dispute is usually arduous and costly, involving a large number of documents on both sides. Witness statements are usually ordered, and they are commonly drawn or settled by counsel. There are generally many factual issues involved as well as legal issues, often requiring complex legal argument. The hearing will usually occupy several days. For these reasons, the "nature and complexity of the proceeding" is often submitted as the reason for making a costs order in favour of the successful party.

10. In each case, however, the question is whether it is fair in the circumstances of the particular case that a party be ordered to pay the costs of another party. Other than where an offer pursuant to section 112 of the Act falls to be considered, the onus of establishing that is on the party seeking the order for costs. Since every case is different, reference to what occurred in other cases is of limited assistance.

Claim under section 109(3)(c)

11. In regard to section 109(3)(c) of the Act, the Applicants submit that the respondent had no tenable basis in fact or law for resisting the claims that they made.

12. It is necessary for me, when considering this submission, to summarise what the central issues were in the case, how they were resolved, and to what extent the respondent had an arguable defence to the claims made by the applicants.

The parties and the contracts

13. The applicants are both building companies, of which Mr Goh is the sole shareholder and director. Mr Goh appeared on behalf of the applicants and gave evidence in regard to the matter.

14. Mr He (the "**respondent**") is an elderly retired gentleman, who speaks little or no English. I was greatly assisted by a translator Ms Ye throughout the hearing.

15. At the time of the relevant events, the respondent lived in a double storey brick house at Hodgson Street, Heidelberg (the "**property**"). He purchased the property in 2010, recognizing its potential for a multi-unit

redevelopment. As early as March 2013, the respondent obtained drainage and pavement plans for a proposed 4 unit development. The drainage plans set out the stormwater drains for the proposed 4 units.

16. The respondent approached Mr Goh in late 2014 to assist with the development. Because the proposed construction of "units 2-3", and "units 4-5" were the subjects of separate building contracts, this is how the 4 units were compositely referred to during hearing, and I adopt the same composite reference in these reasons.

17. In late 2014, the respondent requested Mr Goh to assist with the proposed development.

18. On 3 November 2014 the first applicant and the respondent entered into a building contract in regard to the construction of units 2-3 (the "**first contract**"). The first contract included 18 pages of architectural drawings prepared by an architectural drafting firm Planning and Design, 12 pages of engineering drawings prepared by BK Consultants, and a specification on the letterhead of the second applicant.

19. On 3 November 2014 the second applicant and the respondent entered into another building contract in regard to the construction of units 4-5 (the "**second contract"**).

20. Mr Goh had taken the view that the second contract had subsequently been assigned by the second applicant to the first applicant, and therefore the second applicant was not required to be a party. On the first day of the hearing, he tendered an "assignment agreement" that purported to assign all rights and obligations under the second contract to the first applicant. Having formed the view that the assignment agreement (to which, I observed to him, the respondent was not a party) was unlikely to have achieved what he intended, Mr Goh sought leave to add the second applicant to the proceeding. I granted this application on the second day of the hearing.

The terms of the contracts

21. The contracts contained the following terms, among others:

Clause 10.4A:

Each **Progress Claim** and the **Final Claim** submitted by the **Builder** and the **Owner** will show the following details:

A. the sum paid or to be paid by the owner under the Contract for the Deposit and all Stages completed to date.

Clause 11.1:

Evidence of capacity to pay the contract price

The owner will within fourteen (14) days of the **Owner** signing the **Contract**, provide written or other reasonable evidence to the **Builder** that the **Owner** has the financial capacity to pay the **Contract Price**

Clause 11.2:

Continuing obligation upon Owner to provide evidence of capacity to pay

The obligation of the owner to provide evidence of capacity to pay the **Contract Price** is a continuing obligation until the **Works** have reached **Completion**.

Clause 11.3:

Builder may request evidence of capacity to pay during the contract.

The **Builder** may at any time until the **Works** have reached completion, request the owner to provide written or other reasonable evidence of capacity to pay the balance of the **Contract Price** or any variation notwithstanding the fact that the **Owner** has previously provided such evidence to the **Builder** under the **Contract**, and the **Owner** will, within fourteen (14) days of any request, provide evidence of such capacity to pay.

Clause 11.8:

Owner to pay progress payments

The **Owner** will make **Progress Payments** to the **Builder** in accordance with the agreed and completed progress payments table as set out in Item 23 of the **Appendix.**

Clause 11.10:

Interest payable on outstanding payments

If the **Owner** shall fail to make any payment to the **Builder** by the due date [referred to in clause 11.9], the **Builder** will be entitled to interest on all outstanding amounts at the rate specified in item 15 of the **Appendix**, payable from the due date until payment is made in full.

Clause 20.1:

Owner's right to serve notice of intention to terminate contract

If the **Builder**:

…

- Is in substantial breach of this **Contract**

THEN

[provisions follow for termination preceded by written notice]

Clause 22.1:

Builder's right to serve notice of intention to terminate contract

If the **Owner**:

…

- Fails to produce to the **Builder** written or other reasonable evidence of capacity to pay the **Contract Price** as required by Clause 11.1 or, if requested under clause 11.2 or 11.3

Special Condition 4:

If Contract is terminated by client alone and intentionally without any valid and legal reasons, [the Contractor] can claim 20% of the contract price to cover builder's overheads, supervision and profit.

Special Condition 5:

This contract is subject to finance approval. This contract will be deemed invalid if the client is unable to produce the proof of finance. Builder is entitled to all expenses+20% if the contract is terminated due to failure to provide finance approval for the project.

22. I observed during my oral reasons that Special Condition 5 appearing in both contracts, is poorly worded. On the one hand, it states that if the owner does not obtain finance, the relevant contract is deemed "invalid". This suggests that if finance is not obtained, the contract becomes null and void, and that the parties both walk away without any mutual liabilities, other than the respondent for work performed by applicant while finance was being sought. On the other hand, Special Condition 5 goes on to state the consequences of a failure by the respondent to obtain finance-that is, that the applicant is entitled to "all expenses" plus 20% of the contract price. Also, the word "invalid" in Special Condition 5 also sits uneasily with clause 22.1, which states that the applicant may terminate for failure by the respondent to provide proof of capacity to pay, but which also preserves the builders other "rights and remedies". I found that the use of the term "invalid" in Special Condition 5 did not constrain the applicant's express contractual rights to the effect that in the event that finance was not obtained by the respondent, the applicants may terminate the respective contracts, and also claim 20% of the respective contract sums. That is exactly what the applicants sought to do in this case.

The claims made by the applicants

23. The applicants claimed that they lawfully terminated the contracts on 27 August 2015.

24. The first applicant claimed that it was entitled to $95,565 unpaid monies under the first contract, being the amount payable by the respondent pursuant to the first contract for the base stage ($150,000) less the amount paid by the respondent ($54,435).

25. The second applicant claimed that it was entitled to $27,099 for pit and drainage works under the second contract.

26. In addition, upon the works not proceeding because of the respondent's failure to obtain construction finance, the first applicant claimed 20% of the value of the uncompleted works under the first contract, amounting to $90,031. The first applicant relied on Special Condition 5 as the basis of their entitlement to do so.

27. The second applicant similarly claimed 20% of the value of the uncompleted works under the second contract, amounting to $68,936.

28. As appears from my orders, I found the respective applicants to be entitled to lesser sums pursuant to the "20%" claims.

Defence and Counterclaim of the Respondent

29. The respondent denied liability for the applicants' claims. In regard to the first applicant's claim, he denied that the works had reached the claimed "base" stage, and he disputed the extent of the drainage works undertaken by the applicants.

30. He also denied that the applicants were entitled, under the contracts, to be paid 20% of the value of the uncompleted works.

31. The respondent also submitted that he lawfully terminated the contracts on 21 April 2015, and that he was entitled to damages for his expected lost profit on the development.

Lack of merit in the respondent's defences to the claim

(a) That the applicant failed to reach base stage as would entitle him to base stage payment under the contracts

32. I was readily able to find on the evidence, including photographs tendered by the applicants, that the first applicant had completed units 2-3 to base stage, and was therefore entitled to payment for the works.

33. I was also readily able to find on the evidence, including photographs tendered by the applicants, that the second applicant had completed the drainage works for units 4-5 pursuant to the drainage plans, and was therefore entitled to payment for the works.

(b) That the applicants were not entitled to claim 20% of the value of the uncompleted works if finance was not obtained by the respondent.

34. The respondent's second defence to the claims was that the contracts were subject to finance. That is to say, he was entitled to terminate the contracts if he was unsuccessful in obtaining a bank loan, remaining liable only for any work performed by the applicants prior to the date of termination.

35. To this end, the respondent relied on an alleged further contract dated 3 November 2014, on which there is a 3 line endorsement, in mandarin.

36. The endorsement is dated 5 November 2014. The respondent gave evidence that he wrote it. One translation of the third line of the endorsement, tendered by the respondent, stated "if bank loans have not been approved, contract is terminated". Another translation, tendered in evidence, stated "The contract is terminated if the bank loan is not obtained". I construed this as a "subject to finance" clause, to the effect contended for by the respondent.

37. The respondent gave evidence that his lawyer told him to insert it as a precaution, in case finance was not obtained. He said that it was agreed to by the applicant at a meeting at the respondent's house on 5 November 2014, 2 days after the signing of the contracts. The respondent said that

there was a meeting on 3 November 2014, when the contracts were signed, *and* a further meeting on 5 November 2014. The respondent's wife said that she remembered the applicant agreeing to the endorsement on 5 November 2014, "sitting around the coffee table" at the respondent's home.

38. The applicants denied ever having agreed to the clause. They submitted, consistently with Special Condition 5, that the contracts were subject to finance, but that if finance was not obtained, they were entitled to 20% of the value of the uncompleted works. They submitted that the handwritten endorsement dated 5 November 2014, relied upon by the respondent, was inserted by the respondent at a later date without their knowledge.

39. Mr Goh tendered his own signed version of the additional agreement, which did not bear the handwritten endorsement.

40. The respondent submitted, without the benefit of any expert evidence in support, that Mr Goh had "chemically treated" the document, so as to remove the endorsement from his copy. I carefully inspected the document, and could find no evidence of any treatment having been applied at the bottom of the document.

41. The significant aspect of the endorsement, I found, was that it was not acknowledged in writing by either party. Both parties' signatures *above* the endorsement. It would have been an easy matter, I found, for each of them to have both initialled their acknowledgement of the endorsement. There was no evidence before me to demonstrate that the endorsement was not simply added later by the respondent.

42. I found that the respondent and his wife were both mistaken about the course of events, and that the respondent therefore failed to prove, on the balance of probabilities, that the alleged further "subject to finance" clause in the document signed on 5 November 2014 was a term of either contract.

43. Such a clause, as would relieve the parties from further obligations in the event that finance was not obtained, would also have been inconsistent with Special Condition 5 of the contracts, which expressly gave rise to certain rights in favour of the applicants if finance was not obtained by the respondent.

44. In summary, I found that the respondent could not rely on the alleged manuscript addition to the contract so as to relieve him of any liability to the applicant for payment of 20% of the value of the uncompleted works, consequent upon the building contract being unable to be performed on account of the respondent being unable to obtain finance.

45. I also concluded, in any event, that the respondent did not purportedly terminate the contracts on basis of not obtaining a bank loan, but because of an alleged breach of contract by the applicants in failing to provide sufficient documents to the respondent to *obtain* a bank loan.

46. In my view the two defences relied on by the respondent lacked merit, and the respondent, properly advised, had no arguable basis for bringing them.

In particular, the respondent's submission from the bar table to the effect that the applicant had fraudulently altered the document dated 5 November 2014 was entirely unsupported by any evidence, and I find that there was no no arguable basis for making it.

Lack of merit in the counterclaim

47. The respondent counterclaimed for damages, and sought to set off the alleged damages against the claim.

48. The respondent claimed the amount of $1,000,000 as damages for breach of contract. He submitted, in broad terms, that the applicant breached an obligation to provide particular documents to the respondent's finance broker for submission to various banks, as would have enabled the respondent to obtain construction finance for the development. As a result of the applicant's alleged failure to do so, the respondent alleged, he suffered loss and damage.

49. He calculated his alleged loss and damage of $1 million by submitting that the 5 unit development, when complete, could have been sold for $4.4 million, and that total development costs that he would have incurred would have been $3.4 million.

50. He arrived at the sale price of $4.4 million by adopting an expected sale price of $880,000 for the house and each of the 4 units of the development. The only evidence upon which he relied for an expected sale price of each unit was that he spoke recently with the owners of unit 2 who allegedly informed him that that they paid $880,000 for their unit.

51. The respondent was unclear as to how he calculated the figure of $3.4 million for his expected development costs. His evidence for this, set out in a document he tendered called "investment catalogue", was made up of all cost inputs associated with the land amounting to $2,172,426 (and which included the amount of $102,501 paid so far to the applicants) and the balance, up to $3.4 million, being the estimated further development cost of the 4 units. The applicant was unclear as to how he had calculated this figure. The total anticipated further development costs were therefore **$**1,227,574 (or about $307,000 per unit.). This is the figure, when added to $2,172,426 that resulted in the figure for total claimed development costs of $3.4 million.

52. I noted from the "investment catalogue" that the respondent was highly leveraged. He purchased the property for $1.16 million. He gave evidence that he funded this by borrowing $1.04 million from the ANZ, and borrowing the deposit for the property from the second tier lending market.

53. In the event, the respondent sold the property for $1.9 million, with units 2-5 only partially constructed, and settled the sale on 19 February 2016.

54. By a document subsequently filed by the respondent on 8 July 2016 apparently not with the benefit of legal advice, the respondent increased his

counterclaim from $1 million to $1,290,146. This was made up of the $1 million expectation loss already claimed (see above), *plus* his claimed loss on the sale of the property of $272,426. This latter figure was the shortfall between the amount he claimed to have spent on the property ($2,172,426) and his sale price ($1,900,000).

55. I explained to the respondent that he could not recover both heads of damage-one for "expectation" arising from alleged breach of contract by the applicants, and the other for "reliance" damages typically associated with a claim for misrepresentation or misleading and deceptive conduct, and that they are claims that are typically made in the alternative. Given however that paragraphs 11-13 of the Points of Defence alleged "misrepresentations", and that the respondent was unrepresented, I considered it fair to the respondent that I also consider his claim for reimbursement of his holding costs on that basis.

56. I also found that there was nothing to support the respondent's claim for $272,000 on the basis of suffering loss as a result of alleged misrepresentation by the applicant about his capacity to undertake the contract. No such representations were proved, beyond the proposition that he was a builder with an insurance for multi-unit development which, I found, he in fact possessed.

57. I was unimpressed with the way in which the respondent sought to justify the amount sought by his counterclaim, relying as he did on hearsay (the alleged conversation with the current owner of unit 2) and speculation (the further development costs).

58. In the event, I was not strictly required to consider further the amounts claimed by the respondent in his counterclaim, because I found that his claim that the applicants had breached their alleged obligation to provide certain documents to him so that he could obtain finance, had no merit.

59. I now outline the factual basis of his counterclaim, and why I dismissed it. The respondent said that he terminated the contract on 21 April 2015 in reliance on an alleged breach by the applicants in failing to supply the respondent with documents necessary for the respondent to obtain finance for the construction project.

60. There are no express terms governing what the applicants were obliged to provide to the respondent in order to assist the respondent to obtain finance.

61. I found that the only documents the applicant was obliged to obtain under the contract which, acting reasonably, he would have been obliged to provide to the respondent were the warranty insurance policy required under clause 5.3.

62. Beyond that, I found that the most that the applicant was obliged to do, as an implied term of the contract, were only those things that can reasonably be expected by the respondent as would allow the respondent to perform his obligations under the contract. This, I found, included documents as might

reasonably be anticipated by the parties to be required by the respondent to obtain finance.

63. The respondent, by his Points of Defence, submitted that these documents were as follows:

    (a) The applicants' "business development license", demonstrating their ability to build 3 or more houses on a single piece of land;

    (b) evidence from the last three years of the applicant having built 3 or more houses on land;

    (c) evidence of relevant insurance policies;

    (d) a building permit for the units; and

    (e) evidence of the builders practitioners registration.

64. The respondent gave evidence that potential financiers also wanted the first contract and the second contract to be consolidated into the one contract.

65. I found that absent an express term, I did not consider that the applicant was obliged to provide documents (a) and (b).

66. In any event, I found that the respondent's proposition that the applicants failed to provide required documents, had to be looked at in the light of the contents of emails exchanged between Mr Goh of the applicants and a Ms Me Xiang of Wealthlink, the respondent's finance broker, who communicated at all times with Mr Goh concerning the respondent's financier's alleged requirements.

67. On 9 April 2015, Ms Xiang emailed a request of Mr Goh to provide:

    (a) one fixed price building contract for all 4 units;

    (b) "detail and experience of builder'; and

    (c) "building design aspects".

68. On 10 April 2015 Mr Goh emailed Ms Xiang:

    (a) the entire company profile;

    (b) his companies' letter of eligibility (this showed that the group was eligible as a domestic builder for warranty insurance for the construction of multi-units);

    (c) 2 certificates of insurance, both dated 5 November 2014, one for $300,000 for unit 2 and one for $300,000 for unit 3; and

    (d) 4 Jpeg photos of units constructed by the applicants.

69. There was no evidence of Ms Xiang ever having responded to Mr Goh to the effect that what he emailed on 10 April 2015 was insufficient for the respondent's purposes.

70. I found that the applicants had provided all documents reasonably required by the respondent to obtain finance.

71. I also found that it was not until 21 April 2015 that the solicitor for the respondent wrote to the applicants, as follows:

> We are instructed to advise as follows:
>
> 1. Pursuant to Clause 4 of the building contract entered into between the parties on or around 3 November 2014, [the applicants] as named Builders are liable for obtaining building permits for the construction of the 4 units. If the said units are not obtained within 60 days from the date of the contract, then either party may terminate the contract.
> 2. **The building permit for Unit 4-5 has not been obtained to date**;
> 3. Pursuant to the supplementary agreement signed between the parties in Chinese, the contracts are subject to our client's loan approval.
> 4. Since the signing of the contracts and the [supplementary] agreement, or client repeatedly requested you to provide the following documents for the purpose of the loan approval, including but not limited to, the following documents:
>
> a. **Building permits for all 4 units**;
>
> b. Evidence of building practitioner's registration;
>
> c. Evidence of builder's record for the last 3 years in completing more than 3 units on one building site.
>
> We are instructed that you have not yet provided any of the above required documents to our client and as a result, our client's loan cannot be obtained. In particular, our client has not received any evidence of your builder's registration, despite the representation made by you to our client that you hold qualification or registration that is suitable and necessary to undertake the project.
>
> In light of the above, we are instructed to give notice that our client has decided to terminate the contracts pursuant to the terms of the contracts…

72. One of the principal contentions in this letter, relied on as a ground for termination of the contracts, was the alleged failure by the applicants to provide a building permit for all 4 units. I accepted Mr Goh's evidence that this was never a requirement, and certainly Ms Xiang never asked for it. Ms Xiang was not called to give evidence.

73. The applicant's evidence, in respect of the alleged need for a building permit for all 4 units, was that in early November 2014, the respondent was anxious for the works to proceed so as not to be placed in breach of his planning permit, which would otherwise expire on 14 November 2014. The evidence given by Mr Goh was that the parties expressly agreed that the building works for units 2-3 would proceed first (including the drainage only for units 4-5), with the above-ground construction of units 4-5 to proceed later. This was intended to prevent a strain on the respondent's finances, as would otherwise be the case if construction of all 4 units was to be proceeded with at the same time. Mr Goh gave evidence, and I found, that the respondent was unable to provide evidence of his capacity to pay on 3 November 2014, when the contracts were signed. I also found that Mr Goh therefore intended to avoid a full commitment to constructing the 4

units until the respondent had provided evidence of financial capacity to pay pursuant to the above terms of the contracts. I found that Special Condition 5, which effectively imposed a 20% liability on the respondent in the event that finance was not obtained, was consistent with the risk adopted by the applicants in commencing work where there had been no evidence proffered by the respondent of capacity to pay.

74. I concluded therefore, that even if the request had been made for all four building permits, as claimed by the respondent's solicitors letter dated 21 April 2015, the agreement between the parties was that the development was to be staged and that only a permit for the construction of units 2-3 was required to be issued at that time. No subsequent request of the bank could change the nature of the agreement between the parties.

75. I therefore found that the respondent's case that there were sufficient grounds at law for him to terminate the contract on 21 April 2014, based on an alleged failure by the applicant to provide documents as may have satisfied the proposed construction financier, had little merit. It followed that the respondent's counterclaim for damages, based on his submission that he was entitled to terminate the building contracts in reliance on the applicant's alleged breach of contract, failed.

Merits of the applicant's claims

76. The further issue for decision was whether, given that my finding that the respondent did not lawfully terminate the contract on 21 April 2015, the applicant lawfully terminated on 27 August 2015. If so, was the applicant entitled to any and if so what damages by reason of such termination.

77. The applicant relied on an alleged breach by the respondent in failing by that date to pay the balance of the base stage claim of $95,564.70 submitted by the applicant on 20 April 2015, and failing to provide evidence of his capacity to pay the contract price under the two contracts.

78. As I have said, the applicants' principal contention that there was an express agreement to the effect that the works would proceed on the basis of the first applicant constructing units 2-3, and the second applicant constructing the drainage only for units 4-5.

79. The first applicant claimed that at the time that he submitted the invoice for $95,000 as the balance of the base stage for units 2 and 3, he had completed the base stage for units 2-3. I found from the Certificate of Compliance dated 9 December 2014, that it had indeed completed the base stage at that date. No persuasive argument was put forward by the respondent as to why the base stage had not been completed. Photographs attached to the Berkowicz report support the proposition that the base stage had been completed. They were the subject of extensive examination during the hearing. I therefore found that the respondent was obliged to pay the first applicant $95,565.

80. I also found that it was necessary for the second applicant to carry out the underground pipe works for stormwater, with associated pits in respect of units 4-5, as a necessary part of doing the pipes for units 2-3. I therefore found that the respondent must pay the second applicant $27,099. There was some contention about whether these works had been done. I accepted the evidence of Mr Goh that he performed these works, which was supported by evidence given by a Mr Pitney, quantity surveyor, who gave evidence.

81. Interest was claimed in respect of these amounts. I found that interest is payable in respect of the $95,565 from a date that is 7 days after it was submitted on 20 April 2015.

82. In regard to the claim by the second applicant for interest, I found that interest is payable from a date that is 7 days after the progress claim was submitted on 1 June 2015.

83. I did not allow compound interest as provided in the contract. It was not sought by the applicants.

84. In addition I found that the first applicant was entitled to damages of $90,031 for breach of contract by the respondent. This is 20% of the balance of the contract sum not paid. I am satisfied from documents tendered by the applicant that 20% profit was a fair sum to award.

85. I also found that the second applicant was entitled to damages of $68,936 being 20% of the contract price for units 4 and 5.

86. I am satisfied that this outcome demonstrates that both claims brought by the applicants were strongly arguable, and that there was no reasonably arguable basis for the respondent defending the claim and bringing the counterclaim. I find that in this circumstance, it is fair to make an order that the respondent pay a specified part of the costs of the applicant.

Other bases for ordering costs

87. In respect of the claim by the applicants for costs pursuant to section 109(3)(a)(vi) of the Act, I have carefully read the applicants' submissions, and I am not persuaded that the applicants were unnecessarily disadvantaged by any conduct of the respondent amounting to vexatiously conducting the proceeding.

88. In respect of the claim by the applicant for costs pursuant to section 103(d) of the Act, I do not find that there were complex questions of fact and law in the proceeding, justifying an order for costs.

89. Having regard to the considerations set out above, I find that it is fair to order that the Applicant pay the Respondent's costs of the proceeding.

Further observations concerning the amount claimed for costs

90. The applicants make claims for costs totalling $64,233.99.

91. Some of the costs claimed are said to have been incurred in a Supreme Court proceeding No "SCI 2016 1143". I observe that I would see no cause for the applicants recovering in this Tribunal any costs associated with a proceeding elsewhere.

92. I also observe that there seems to be no reason why the applicants should recover any costs in connection with their application before this Tribunal for a freezing order, which was dismissed on 4 April 2016.[5]

93. I am also not persuaded that the costs charged to the applicants by Francis Lim, Barristers & Solicitors of $13,626.80, by Fairweather Legal Pty Ltd of $5,324.92 by Glenwell Mill Lawyers of $10,500 and by Bellarmine Lawyers of $6,468 were all reasonably necessary for the bringing of the applicants' claims and defending the counterclaim. If agreement cannot be reached between the parties, however, these claims will need to be determined by the Victorian Costs Court.

94. I make the orders attached.

A T Kincaid
Member

[5] VCAT proceeding BP286/2016