VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D700/2013

CATCHWORDS

DOMESTIC BUILDING DISPUTE–Counterclaim for damages by building owner only cause of action extant at date of hearing.

Costs–offer made by counterclaimant pursuant to section 112 *Victorian Civil and Administrative Tribunal Act 1998*; costs awarded to counterclaimant from date of such offer as no basis advanced for ordering otherwise.

Costs–section 112 *Victorian Civil and Administrative Tribunal Act 1998*; whether consideration of factors there set out makes it fair to award costs to counterclaimant.

Costs–respondent by counterclaim not joined until later in the proceeding, after costly 5-day preliminary hearing–whether it is fair that the respondent by counterclaim should also be liable for the counterclaimant's costs of defence and counterclaim prior to his joinder–consideration of principles in *Country Endeavours Pty Ltd v Casacir Pty Ltd*

FIRST APPLICANT	Advaland Pty Ltd (ACN 144 477 994) (in external administration following winding up order on 21 June 2017) (struck out by order 20 July 2017)
SECOND APPLICANT Respondent by Counterclaim	Kitchener Crespin
FIRST RESPONDENT Applicant by Counterclaim	Spencer John Bitcon
SECOND RESPONDENT	Alan Richard Gaskell
THIRD RESPONDENT	Asset Confiscation Operations
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Costs application by first respondent (applicant by counterclaim)
DATE OF HEARING	On written submissions from first respondent dated 8 October 2018
DATE OF ORDER AND REASONS	30 January 2019
CITATION	Advaland Pty Ltd and Anor v Spencer John Bitcon & Ors (Building and Property) (Costs) [2019] VCAT 150

ORDERS

1. The respondent by counterclaim Mr Crespin must pay the counterclaimant Mr Bitcon's costs of defending the claims brought by Mr Crespin from and including 6 March 2014, and the costs of Mr Bitcon's counterclaim against Mr Crespin from and including 6 March 2014, including all reserved costs.
2. If costs are no agreed, they must be taxed by the Victorian Costs Court on the standard basis, and in accordance with:
   (i) the County Court scale, including where applicable County Court Scale D, for costs incurred up to and including 21 March 2018;
   (ii) the Supreme Court scale for costs incurred after 21 March 2018; and
   (iii) Mr Bitcon's counsel fees are certified at $5,000 per day and $500 per hour (exclusive of GST).

A T Kincaid
Member

APPEARANCES:

For the second applicant	Mr Crespin in person (but not on 1 October 2018)
For the first and second respondents	Mr Kirby of Counsel

REASONS

1 Mr Spencer Bitcon, the first respondent and counterclaimant ("**Mr Bitcon**") seeks a costs order against Mr Kitchener Crespin, the second applicant ("**Mr Crespin"**), following the final orders that I made in this proceeding on 1 October 2018.

2 My orders were made following the hearing of Mr Bitcon's counterclaim against Mr Crespin on 4-6 September 2018 when both parties were represented, and on 1 October 2018 in Mr Crespin's absence.

BACKGROUND

3 Mr Bitcon is the owner of a property located at Staunton Lane, Glen Iris ("**the property**")**.**

4 Mr Bitcon entered into a contract on or about 4 August 2010 for the construction of a residential dwelling on the property.

5 Advaland Pty Ltd ("**Advaland**"), now in liquidation, was a company owned by Mr Crespin, and of which Mr Crespin was sole director.

6 The parties fell into dispute during the course of the building works, which culminated in the building contract being terminated in January 2013.

7 Mr Crespin's registration as a domestic builder was suspended by the Building Practitioners Board on 26 March 2013, because of events leading to the termination.

8 Advaland commenced the proceeding on 17 June 2013 against Mr Bitcon and a Mr Alan Gaskell, claiming the sum of $210,513 for work undertaken during the period February 2011 to 16 November 2012, plus payment for "further domestic building works" in an unspecified amount. These amounts claimed were said to be owing to Advaland pursuant to a contract between it and Mr Bitcon.

9 There was a dispute in the proceeding from the outset as to who the correct parties to the building contract were. Mr Crespin asserted by affidavits sworn 19 August 2013 and 9 September 2013 that Advaland, and not Mr Crespin personally, was the party that contracted with Mr Bitcon.[1]

10 By contrast, Mr Bitcon defended the claim on the ground that no building contract existed between him and Advaland. Mr Bitcon alleged by affidavits sworn 20 August 2013 and 6 December 2013 that the building contract was between him and Mr Crespin in Mr Crespin's personal capacity. In that respect, Mr Bitcon contended that the version of the written building contract in his possession constituted the true written contract made between the parties.

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[1] Advaland's Points of Claim dated 17 June 2013, paragraph [2].

11 Mr Bitcon unsuccessfully applied for summary dismissal of the proceeding under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**") on this basis.[2]

THE PRELIMINARY HEARING

12 On 1 October 2013, his Honour Judge Macnamara made orders in the proceeding that there be a preliminary hearing on 13 January 2014, on the questions:

a) Is [Advaland] the contracting party, as builder, of the building works the subject of this proceeding?

b) What document constitutes the written contract between the parties.[3]

13 The preliminary hearing took place before Senior Member Riegler over 5 days between 13 and 17 January 2014. Mr Bitcon filed a number of affidavits; sworn by himself, his partner Ms Molan and a mortgage broker, and he also subpoenaed witnesses to give evidence at the hearing.

14 On 4 February 2014, SM Riegler delivered his reserved decision ("**the Riegler decision"**).[4] In summary, SM Riegler found that:

(a) The building contract was between Mr Bitcon and Mr Crespin, and not Mr Bitcon and Advaland; and

(b) Mr Bitcon's version of the contractual document, as annexed to his 6 December 2013 affidavit, was the correct version of the building contract.[5]

15 The proceeding was returned before SM Riegler at a directions hearing on 6 March 2014 to enable the Tribunal to make further orders as to the future conduct of the proceeding, having regard to the findings and declarations made by him on 4 February 2014.

16 At the directions hearing on 6 March 2014, SM Riegler made orders joining Mr Crespin, against Mr Crespin's will, as a second applicant to the proceeding, and striking out Advaland 's Points of Claim.[6]

17 Further orders were made at the directions hearing requiring the parties to complete various other interlocutory steps relevant to the main proceeding.

18 At the conclusion of the directions hearing before SM Riegler on 6 March 2014, Mr Bitcon through his counsel Mr Kirby, made an application that his costs of and associated with the preliminary hearing be paid by Advaland and Mr Crespin. Written submissions were filed by Mr Kirby in support of that costs application. Given that the costs application was made without

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2 See Order of Judge Macnamara dated 1 October 2013.
3 Order of Judge Macnamara dated 1 October 2013.
4 Order and Reasons of Senior Member Riegler dated 4 February 2014.
5 Affidavit of Spencer James Bitcon sworn 6 December 2013, exhibit "SJB-1".
6 Order of Senior Member Riegler dated 1 October 2013

notice, and that the applicants were not represented by counsel at that directions hearing, SM Riegler reserved the question of costs.

19 Consequential orders were made giving the applicants leave to file and serve any written submissions on the question of costs in response to the submissions made by Mr Kirby. In accordance with those orders, the applicants filed written submissions on 21 March 2014, to which SM Riegler also had regard. I have also reviewed those submissions, given that the second applicant has not filed any submissions in respect of the current application for costs.

20 By his subsequent order dated 26 May 2014, and for the written reasons that he gave, SM Riegler reserved the question of costs of the preliminary hearing.

MR CRESPIN SEEKS LEAVE TO APPEAL

21 In May 2014, in Supreme Court Proceeding S Cl 2014 2211, Mr Crespin made an application for an extension of time for leave to appeal the Riegler decision. The application was dismissed with costs by Derham AsJ on 29 May 2015.

22 In October 2014, in Supreme Court Proceeding S Cl 2014 5763, Mr Crespin made an application for an extension of time for leave to appeal the orders made by Judge Macnamara on 1 October 2013. This further application was also dismissed with costs by Derham AsJ on 30 September 2015.

23 Both applications for leave to appeal had the effect that earlier orders of the Tribunal had to continually be vacated pending the outcome of the appeals.[7]

CRIMINAL PROCEEDING AGAINST MR CRESPIN

24 In 2013, Mr Crespin was charged by the police in relation to the damage caused to the property. On 14 March 2017, following a 28-day trial, Mr Crespin was found guilty of six counts of criminal damage to the property. His Honour Judge Meredith ordered that Mr Crespin pay Mr Bitcon compensation for the damage in the sum of $80,000 pursuant to section 86 of the *Sentencing Act 1991*.[8]

ADVALAND NOW WOUND UP

25 A winding up order was made in the Supreme Court against Advaland on 21 June 2017. On 20 July 2017, the Tribunal made an order striking out its claim against the first and second respondents.

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[7] Order of Member Farrelly dated 3 July 2014; Order of Deputy President Aird dated 28 August 2014; Order of Deputy President Aird dated 7 November 2014; Order of Deputy President Aird dated 19 February 2015; Order of Deputy President Aird dated 25 March 2015; Order of Deputy President Aird dated 12 June 2015.

[8] Affidavit of James Murray Pergl sworn 17 October 2017, exhibit "JMP-31".

THE HEARING BEFORE ME

26 I heard the proceeding on 4-6 September 2018 with both Mr Bitcon and Mr Crespin present, and on 1 October 2018 with Mr Bitcon the only party present. Mr Kirby appeared for Mr Bitcon and the second respondent, Mr Gaskell.

27 Despite being joined, and various orders that he file Points of Claim by a specified date,[9] Mr Crespin did not make any claim against Mr Bitcon in the proceeding. Indeed, previous orders made at a directions hearing on 8 May 2018 note that Mr Crespin then informed the Tribunal that he did not intend to make any claim against the respondents in the proceeding.

28 On the first day of the hearing, Mr Kirby tendered a copy of an email dated 3 September 2018 that Mr Bitcon's solicitors had received the previous day, stating:

> Dear Sir
>
> I write to advise you of an outline of the points of defence for tomorrow's hearing.
>
> 1. Your client has no maintainable claim pursuant to the [Domestic Building Contracts Act 1995].
> 2. Unjust enrichment.
> 3. All of your claims are denied.
> 4. There is no contract.
> 5. Your client has not even paid for the work done to date.
>
> Kind regards
>
> K Crespin

29 It became clear to me, during the course of the parties' openings that the claimed defences (1) and (4) in the email related to Mr Crespin's contention at the preliminary hearing that he was not liable as the builder under the relevant building contract to Mr Bitcon[10], but that the party so liable was Advaland. This was of course the issue that had been dealt with by SM Riegler at the preliminary hearing.

30 I was also informed by Mr Crespin during his opening that he intended again to seek leave to appeal against the decision of SM Riegler based on new evidence which, he alleged, had come to light in the criminal proceeding in the County Court to which I have referred. He further explained that he was under the impression that the proceeding in the Tribunal had to be heard and determined before it was appropriate for him to seek such leave. I responded to the effect that this was not correct.

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9 Order of Senior Member Riegler dated 6 March 2014; Order of Senior Member Riegler dated 2 April 2014; Order of Member Farrelly dated 17 April 2014; Order of Deputy President Aird dated 20 July 2017; Order of Member Edquist dated 5 December 2017.

10 Being exhibit "SJB 1" to the affidavit of Mr Bitcon sworn 6 December 2013.

31 The issue as to which of the two building contracts was applicable having been determined by the Riegler decision, and there being no relevant pending appeal, I ruled at the start of the second day's hearing that I would not permit Mr Crespin to lead evidence or seek to elicit facts in cross-examination which had the intention of enabling Mr Crespin to impugn the findings of SM Riegler.

32 At the end of the second day of the hearing 5 September 2018, Mr Crespin was part way through his cross-examination of Mr Johnson, expert building consultant engaged by Mr Bitcon.

33 It had earlier been contemplated that Mr Crespin would make an application for an adjournment of the matter, due to a commitment that he had earlier announced he had on Friday 7 September 2018.[11]

34 At the start of the third day of the hearing on 6 September 2018, Mr Kirby tendered an email received by his instructors early that day stating that Mr Crespin is "filing an appeal [against the orders of SM Riegler] this morning". Mr Crespin appeared at 10.17 am. He confirmed that he had electronically filed an application for leave to appeal, and that the application had been given an E File no 19048. He tendered a copy of the alleged Notice of Appeal.

35 I adjourned the further hearing of the proceeding to 1 October 2018, with an estimated duration of 5 further days, and ordered Mr Bitcon through his solicitors to inform the Tribunal in writing by 21 September 2018 on whether, having regard to the alleged filing of an application seeking leave to appeal, there was a reasonable prospect of the resumption of the hearing on 1 October 2018.

36 By an affidavit subsequently sworn on 13 September 2018 by Mr Kirby's instructor Mr Pergl, and filed with the Tribunal that day, Mr Pergl confirmed that his enquiries had revealed that there was no evidence that Mr Crespin had duly commenced an appeal as alleged, that Mr Pergl had twice requested Mr Crespin to provide evidence that he had done so, to which there had been no response from Mr Crespin.

37 Having regard to the contents of the affidavit, I fixed a directions hearing for 24 September 2018 for the purpose of hearing the parties in relation to the matters raised in the affidavit of Mr Pergl. Mr Crespin emailed the Tribunal late in the evening of 23 September 2018 to the effect that he could not attend the directions hearing the following day because he was very sick.

38 At the directions hearing on 24 September, I made orders to the effect that the hearing would resume on 1 October 2018, with 5 days allocated.

39 At the resumed hearing on 1 October 2018, I heard the balance of evidence from Mr Johnson, evidence from Mr Bitcon and evidence from his architect

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[11] The Tribunal had indicated to the parties that a further 3 days commencing 1 October 2018 would be available for any such adjourned hearing.

Mr Pandolfini. I subsequently determined that Mr Bitcon was entirely successful in his cross claim against Mr Crespin for $560,472.

40 I dismissed the defences raised by Mr Crespin which, given there was no claim made by him against Mr Bitcon, stood only as claimed set-offs against the counterclaim.

41 I also ordered that any application for costs must be filed and served by 8 October 2018, and that my costs order would be made on the papers unless the Tribunal, or either of the parties, sought a 1-hour hearing for the purpose of making further submissions on costs.

42 By email dated 2 October 2018 Mr Crespin forwarded a copy of an email dated 6 September 2018 that he had received from the Commercial Court Registry, confirming that his Notice of Appeal had been received that day, and also confirming that it had not then been accepted by the Court for filing only.

43 By email also dated 2 October 2018, Mr Crespin requested that the Tribunal's files in relation to this proceeding, and a related proceeding D494/13 be transferred to the Supreme Court as soon as possible.

44 The Tribunal has received no further communication from Mr Crespin, and none from the Court.

45 I received a written submission on costs dated 8 October 2018 on behalf of Mr Bitcon, but not from Mr Crespin. Having left a reasonable further time for Mr Crespin as a self-represented party to do so, and without having received a submission from him, I resolved to proceed with my consideration.

CLAIM FOR COSTS OF THE PROCEEDING, INCLUDING THE PRELIMINARY HEARING

46 Mr Bitcon seeks costs orders as follows:

(a) Mr Crespin pay Mr Bitcon's costs of defending the claims brought by both Advaland and Mr Bitcon, and the costs of Mr Bitcon's counterclaim, including all reserved costs and the costs of and incidental to the hearing of the preliminary hearing before SM Riegler on 13-17 January 2014, such costs to be agreed or taxed in accordance with:

(i) the County Court scale, including where applicable County Court Scale D, for costs incurred up to and including 21 March 2018; and

(ii) the Supreme Court scale for costs incurred after 21 March 2018; and

(iii) the Second Applicant's counsel fees be certified at $5,000 per day and $500 per hour (exclusive of GST).[12]

47 Mr Bitcon makes his claim for costs of the proceeding, based on:

(a) two offers of settlement made by Mr Bitcon to Mr Crespin in the course of the proceeding, in accordance with Sections 112, 113 and 114 of the Act under cover of letters to Mr Crespin dated 21 March 2018 and 16 August 2018 respectively, which were not accepted by Mr Crespin; and

(b) my final decision on the counterclaim, in his favour; and

(c) the considerations in section 109 of the Act.

Power to award costs

48 The power to award costs is contained in section 109 of the Act.

49 The approach of the Tribunal to the question of costs was summarised by Gillard J in the case of *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117 at [20]:

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

50 The preliminary requirement is that the costs order be fair, which has been said to require that the order be "just and appropriate in the circumstances".[13] Furthermore, the power under section 109 has been recognised as a very powerful one, justifying a broad scope of costs orders including orders against successful parties and against parties joined against their will.[14]

51 The authors of *Pizer* also note that costs are very commonly awarded in the Domestic Building List; however this does not create a presumption that they should be in all cases.[15]

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12 Refer T*oohey v Pump Engineering* [2015], VSC 589; rules 63.07 and 63.72(1) of the Supreme Court (General Civil Procedures Rules

13 *Filippou Management Pty Ltd v MREEF Project Company No 11 Pty Ltd* [2010] VCAT 1261 at [20].

14 See Emrys Nekvapil, Pizer 's Annotated VCAT Act, (Thomson Reuters, 2017, 6th Edition), p. 587-588

15 See Emrys Nakvapil, *Pizer's Annotated VCAT Act,* (Thompson Reuters, 2017 6th Edition), p. 618.

COSTS OF THE PROCEEDING

52 I shall deal first with Mr Bitcon's submission that he should be entitled to his costs from 21 March 2018 pursuant to section 112 of the Act. Section 112 provides:

> **112. Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if–
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
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> (b) the other party does not accept the offer within the time the offer is open; and
>
> (c) the offer complies with sections 113 and 114; and
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> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
>
> (2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.
>
> (3)…

53 Where s 112 of the Act is found to apply, it avoids the need for the party claiming costs to persuade the Tribunal, in the exercise of its discretion, of the application of one of the required factors described in section 109(3) of the Act. Rather, the offeree must persuade the Tribunal that, in all the circumstances of the case, including those applying at the time the offer was made, the Tribunal should "order otherwise".

Offers of Compromise made to Mr Crespin

Offer dated 21 March 2018

54 On 21 March 2018, Mr Bitcon's lawyers sent a letter to Mr Crespin, by post to his address for service at 125 Warren Road, Parkdale Victoria, 3185 and by email to his email address for service at kitchenercrespin@hotmail.com[16] (the "**March Offer**").

55 The March Offer contained an offer to resolve the proceeding on the following terms:

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16 See paragraph 1 of the Findings in the Order of Member Marks dated 9 May 2018

1. The Offer is open for 15 days from the date of this letter, being until **4.00pm on 5 April 2018,** after which time it automatically expires;
2. The Offer is in settlement of:
   (a) All claims that have been made, or could have been be made, against you, by either or both Respondents, arising out of the subject matter of the proceeding; and
   (b) Any claim that you have made, or you could have made, against either or both Respondents, arising out of the subject matter of the proceeding.
3. You will pay our client the sum of **$382,988.00 (the Settlement Sum)** within 28 days of the date of the Offer, that is, **by 4.00 pm on 18 April 2018.**
4. You will consent to the Tribunal making an order in this proceeding in substance as follows:
   (a) You will pay the First Respondent, Mr Bitcon, the Settlement Sum by 4.00 pm on 28 April 2018;
   (b) Upon you paying the Settlement Sum in accordance with the orders, the First Respondent 's claim in this proceeding will be dismissed; and
   (c) Any claim made by you against either or both Respondents in this proceeding will also be dismissed.

56 I find that the March Offer complied with s.112, s.113 and s.114 of the Act in that:

(a) it was made in writing and expressed to be "with prejudice";

(b) it provided for the payment of money by Crespin and specifies when the money would be paid;

(c) it was open for acceptance for at least 14 days; and

(d) it was not withdrawn whilst it was open for acceptance.

57 Mr Crespin did not accept the March Offer within the time that it was open for acceptance.

58 I find that the March Offer also:

(a) thoroughly and clearly set out the particulars of Mr Bitcon's counterclaim in the proceeding, and that the quantum of the counterclaim, net of the amount ordered by the County Court in compensation was $562,707.00;

(b) thoroughly and clearly sets out how the proposed settlement sum of $382,988 was calculated; and

(c) put Mr Crespin on notice that should the March Offer not be accepted, and Mr Crespin achieved a no more favourable result than the March Offer at the final hearing, then Mr Bitcon would seek an order that all

of the costs incurred by Mr Bitcon after the date of the March Offer be paid by Mr Crespin.

59 I find that the proposed settlement sum represented a substantial (almost one-third) discount on the quantum of the counterclaim.

60 I find that the orders made by the Tribunal were not more favourable to Mr Crespin than the offer within the meaning of s.112(d) of the Act.

61 Given that there is no contention by Mr Crespin that I should order otherwise pursuant to s.112(2) of the Act, or any grounds otherwise apparent to me that I should do so, I find that Mr Bitcon is entitled to an order that Mr Crespin pay Mr Bitcon all costs incurred by Mr Bitcon after the offer was made, that is to say from 21 March 2018 onwards.

Offer dated 16 August 2018

62 On 16 August 2018, Mr Bitcon's lawyers sent a letter to Mr Crespin, by post to his address for service at 45 Rae Street, Edithvale Victoria, 3196[17] and also by personal service on Mr Crespin at his then place of employment at Alba's Cafe in Parkdale (**the "August Offer"**).

63 On 5 December 2017, the proceeding was fixed for hearing on 8 May 2018. On 9 May 2018 the Member found that Mr Crespin had not been served with all the documents that Mr Bitcon intended to rely on at the hearing for the purposes of the counterclaim. Mr Kirby submits that the August Offer was made following an adjournment of the hearing out of an abundance of caution, in case the March offer was subsequently found wanting in form.

64 The August Offer was, in substance, made on the same terms as the March Offer save that the August Offer was open for acceptance until 16 August 2018.

65 Mr Kirby submits that should the Tribunal deem the March Offer to be ineffectual, then Mr Bitcon seeks that Mr Crespin's failure to accept the August Offer be taken into account in determining costs, and that Mr Crespin be ordered to pay Bitcon's costs from the date of the August Offer.

66 I have found that the March offer complies with the statutory requirements, and so I see no need to make further findings in respect of the August Offer.

COSTS OF THE PROCEEDING UNDER SECTION 109

Generally

67 The power to award costs is contained in section 109 of the Act, which relevantly provides as follows:

> **109. Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.

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17 See paragraph 10 of the Orders of Member Marks dated 9 May 2018

(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.

68 The various elements in section 109(3) are matters that the Tribunal is entitled to have regard to when considering the overarching question of fairness, and are not rules in themselves.[18] The matters in section 109(3)(a)-(e) are a checklist and aid to determining what is fair in particular circumstances, however, it is not a matter for a party seeking costs to satisfy the Tribunal of any one or more of them.[19]

69 Mr Kirby submits on behalf of Mr Bitcon that all of the five criteria in section 109 of the Act apply, so as to make it fair to make an order for costs in favour of Mr Bitcon.

Conduct of the proceeding to the unnecessary disadvantage of Mr Bitcon

Section 109(3)(a)(i)–whether Mr Crespin failed to comply with orders or directions of the Tribunal without reasonable excuse

70 The first of the five criteria relied on by Mr Kirby is set out in section 109(3)(a) of the Act, to the effect that Mr Crespin conducted the proceeding in a way that unnecessarily disadvantaged Mr Bitcon by certain described conduct.

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18 *Mornington Peninsula SC v Fox* [2003] VCAT 1524.

19 *S & R Property Developments Pty Ltd v Moonee Valley CC* [2001] VCAT 541 at [36].

71 The first type of conduct relied on by Mr Kirby is Mr Crespin's failing to comply with the Tribunal's Orders. I find that this included:

(a) Mr Crespin's failure to file any Points of Defence to Counterclaim despite being ordered to do so on 6 March 2014,[20] 2 April 2014,[21] 17 April 2014,[22] 16 November 2016,[23] 20 July 2017,[24] 5 December 2017[25] and 9 May 2018 (order of Member Marks made 9 May 2018);

(b) Mr Crespin's failure to file any list of documents, despite being ordered to do so on 20 July 2017[26] and 5 December 2017; [27] and

(c) Mr Crespin's failure to file any Amended Points of Claim after SM Riegler struck out Advaland's Points of Claim on 4 March 2013, despite being ordered to do so on 6 March 2014,[28] 2 April 2014[29] and 17 April 2014.[30]

72 Further, on 22 April 2016, Mr Crespin filed amended Points of Claim which, despite the Riegler decision, maintained that the Building Contract was between Advaland and Mr Bitcon. On 22 July 2016, Mr Bitcon made a request for further and better particulars of the amended Points of Claim, which Mr Crespin failed to provide despite being ordered by the Tribunal to do so on two occasions.[31] On 20 July 2017, following the winding-up of Advaland, Advaland 's amended Points of Claim were struck out, and Mr Crespin was ordered to file Points of Claim in his own right, including any particulars of loss or damage.[32]

73 On 22 August 2017, Mr Crespin emailed the Tribunal, holding himself out to be a representative of "Crespin Legal", and advised that he would be pursuing the claim previously filed by Advaland on the basis that it had been assigned to him. However, despite further orders,[33] Mr Crespin did not file any Points of Claim.

74 On 8 May 2018, at the commencement of the final hearing, Mr Crespin sought and obtained an adjournment of the hearing to 4 September 2018 on the basis of his statement that he had not received any material filed and served by Mr Bitcon for the hearing.[34] He sought the adjournment on the

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20 Order of Senior Member Riegler dated 6 March 2014.
21 Order of Senior Member Riegler dated 2 April 2014.
22 Order of Member Farrelly dated 17 April 2014.
23 Order of Judge Jenkins dated 16 November 2016.
24 Order of Deputy President Aird dated 20 July 2017.
25 Order of Member Edquist dated 5 December 2017.
26 Order of Deputy President Aird dated 20 July 2017.
27 Order of Member Edquist dated 5 December 2017
28 Order of Senior Member Riegler dated 6 March 2014.
29 Order of Senior Member Riegler dated 2 April 2014.
30 Order of Member Farrelly dated 17 April 2014.
31 Order of Judge Jenkins dated 16 November 2016; Order of Senior Member Farrelly dated 23 January 2017.
32 Order of Deputy President Aird dated 20 July 2017.
33 Order of Member Edquist dated 5 December 2017.
34 Member Marks noted in paragraphs 1, 2, 3 and 6 of the Findings set out in her Order dated 9 May 2018, that Crespin had been properly served with all relevant material.

basis that he wanted an opportunity to defend Mr Bitcon's counterclaim, and obtain expert evidence. Notwithstanding this, he did not file any expert evidence or affidavit material in response to the affidavit material filed by Mr Bitcon, and he did not provide any purported Points of Defence until 5.46pm on the day before the first day of the adjourned hearing fixed before me for 4 September 2018. The Points of Defence comprised a 5-line email, to which I have referred.

76 On 1 October 2018 Mr Crespin did not appear at all, and thus put Mr Bitcon to further expense, time and inconvenience in being required to prove his case when, after all that had gone before, it went undefended.

77 I find that there was no real reasonable excuse for these compliance failures by Mr Crespin.

Section 109(3)(a)(v)–whether Mr Crespin attempted to deceive another party or the Tribunal

78 The second type of conduct as a basis for seeking costs, relied on by Mr Kirby on behalf of Mr Bitcon, is Crespin's allegedly having attempted to deceive both the Tribunal and the respondents by:

a) filing and serving affidavit material, and allegedly giving false evidence at the preliminary hearing, about the circumstances surrounding the execution of the building contract; and

(b) tendering a version of the building contract which was found to not be the correct version, which necessitated the preliminary hearing in the first place.

79 Subsequent events, Mr Kirby submits, also strengthen the proposition that Crespin attempted to deceive the Tribunal and the Respondents, such as:

(a) Mr Crespin's failure to make any claim in the proceeding which, it is submitted, proves that the original claim by Advaland, based on an allegedly fraudulent contract, was a vexatious attempt to harass and intimidate Mr Bitcon, and to shield Mr Crespin from personal liability;

(b) Mr Bitcon's success in the proceeding;

(c) Mr Crespin's criminal conviction for criminal damage after a 28-day trial, in which he denied all charges against him and pleaded not guilty, allegedly indicating his dishonest and disreputable character; and

(d) the findings of the Victorian Building Authority regarding Mr Crespin's conduct.

80 To make good these propositions, Mr Kirby relies on *Avonwood Homes Pty Ltd (in liq) v Milodanovic* [2005] VCAT 2205, when SM Walker held:

> Parties should not be put to the expense of coming to the Tribunal to meet applications founded on false evidence that is known to be false

by the persons giving it. Where this occurs they should be indemnified for their costs.[35]

81 Mr Kirby submits that in evidence given at the preliminary hearing, Mr Crespin and Mr Bitcon's factual recollections of the circumstances surrounding the signing of the building contract were diametrically opposed.[36] Given the significant divergence, the proper explanation, Mr Kirby submits, cannot be that both parties had difficulties recollecting the events and remembered things differently. Instead, the only real explanation, Mr Kirby submits, is that the account of one was fabricated, and the other was honest. Given SM Riegler's findings, he submits, Mr Bitcon's evidence should be accepted as the honest account.

82 In the Riegler decision, although SM Riegler stopped short of declaring that the version of the Building Contract tendered by Mr Crespin was a forgery, Mr Kirby submits that it was clear that SM Riegler considered that the evidence given by Crespin regarding the signing of the Building Contract was misconceived.[37] The only proper inference to be drawn from this finding is that the evidence given by Crespin was at best misleading, and at worst dishonest. It follows from this inference, Mr Kirby submits, that the version of the Building Contract tendered by Mr Crespin must have been a forgery.

83 Therefore, in circumstances where, Mr Kirby submits, Mr Crespin gave misleading evidence before the Tribunal at the preliminary hearing, the most likely explanation for Crespin's false evidence was that the building contract he tendered was known by him to be a forgery. Mr Kirby submits that it is therefore clear that he attempted to deceive both the Tribunal and the respondents.

84 I disagree. I have concluded, from my reading of his Reasons dated 4 February 2014 that there is nothing in the evidence given on behalf of Advaland from which SM Riegler was able to find that Advaland had advanced falsehoods in evidence or, at the least, maintained a proceeding in wilful disregard of known facts.

85 This is clear from SM Riegler's Reasons, in which he stated:

> 29. It is not usual for witnesses to recall historical events differently, especially where a long period of time has elapsed. It is human nature for persons, over a period of time, to unwittingly or subconsciously reconstruct events and as a consequence, honestly hold a particular view as to what may have occurred in the past, even if that view is erroneous. However, in the present case the divergence between the two versions of events is so diametrically different, notwithstanding that each version was presented as a plausible scenario. **Ultimately, however, I am guided by the numerous documents that were tendered in**

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35 *Avonwood Homes Pty Ltd (in Liq) v Milodanovic* [2005] VCAT 2205 at [10].
36 Order and Reasons of Senior Member Reigler dated 4 February 2014 at [7]-[29].
37 Order and Reasons of Senior Member Reigler dated 4 February 2014 at [38]-[40].

evidence, which tend to give greater weight to one version over the other.

…

38. In determining the questions before me, I have carefully considered the evidence of all witnesses and in particular, any inconsistencies and concessions made. Of significance, were the concessions made by Ms Scholtes [called by Mr Crespin], that it was common practice for Advaland to use white labels which were similar to the labels seen on the Owner's version of the MBA contract. According to Ms Scholtes, this was done to give the contracts a more professional look. A further concession made by both Ms Scholtes and Mr Crespin was that their recollection of the meeting on 6 August 2010 was, to a large extent, aided by the fact that the contract bore the same date, rather than from examining diary notes or other like material. In fact, Mr Kirby, counsel for the Owner, called for the production of all diary notes held by Mr Crespin. Although Mr Crespin explained that he had electronic versions of his diary, which would corroborate the meeting, nothing was produced to verify that a meeting took place on 6 August 2010.

39. Moreover, there are inconsistencies in the evidence of Mr Crespin and Ms Scholtes that remain unexplained or at least not satisfactorily explained. First, Advaland's version of the *Contract Addenda* has a date printed on the first page being *25/01/11*. Further, the second page, which named the builder as *Advaland*, has a printed date of *3/09/13*. By contrast, the Owner's version of the *Contract Addenda* has printed at the bottom of every page the date *3/09/10*, being a date that precedes the exchange of the contract documents. According to Mr Crespin, the date of 3 September 2013 is a typographical error. I have difficulty accepting that evidence. In particular, that explanation does not explain why on one hand, the Owner's version has a consistent date of 3 August 2010 on every page, while the Advaland's version has different dates and coincidentally, on the critical page naming the builder, a date which postdates the filing and serving of the Owner's affidavit dated 20 August 2013, which first raises the allegation that the building contract was entered into with Mr Crespin personally, and further exhibits a copy of the Owner's version of the MBA contract.

40. Second, Ms Scholtes gave evidence that between January and October 2010, she was employed by Advaland to prepare contract documents on its behalf. She said that in all cases she named the builder as Advaland Pty Ltd. However, an extract from the ASIC database was produced during the course of the hearing which showed that Advaland was first registered on 7 June 2010. In those circumstances, how could it be that contracts were entered into by Advaland prior to June 2010? In

my view, this statement undermines the credibility of her evidence.

41. From the Owner's perspective, there are also inconsistencies in the evidence given. In particular, the certification process adopted by Mr Rotstein and Mr Gaskell was, as I have already commented, inappropriate. Nevertheless, what took place is explicable and I do not consider that it was done for any ulterior motive, other than to expedite matters.

42. Balancing all of the evidence and in particular, the chain of emails tendered during the course of the hearing, coupled with the corroborating evidence of Ms Molan, Mr Rotstein and Mr Gaskell [all called by Mr Bitcon], **I consider the Owner's version of events to be the more likely scenario**. Moreover, there is evidence from un-interested witnesses, such as Prue Morse, the valuer appointed by the construction finance lender, verifying that the Owner's version of the contract documents were given to her in 2010, well before the parties had fallen into dispute. Similarly, evidence was given by Long Pham, a loan officer employed by the National Australia Bank, which also confirmed that the lender was in receipt of the Owner's version of the contract documents well before any disputation arose between the parties.

43. In my view, it is reasonable to draw an inference that these documents reflect the actual documents that were exchanged between the parties, given that it is unlikely that the Owner would have fabricated or altered a document in circumstances where there is no dispute or disagreement between the parties. Indeed, it defies logic that the Owner would alter the documents so that they reflected the name of Mr Crespin, rather than Advaland, given that both the building permit and certificate of warranty insurance both named Advaland as the relevant builder.

44. I note that both Mr Kirby and Mr Lanza argued that the other was burdened with the onus of proving that the version of the contract documents held up by the opposing party was a forgery. In my view, it is unnecessary to decide the preliminary questions on the basis of one party having to carry the burden of proof. **Each party has maintained a particular position regarding the contract documents and it is for the Tribunal to decide, on the balance of probabilities, what facts transpired based on the evidence and documents presented to it**. As I have indicated, in my opinion the evidence given by the witnesses called by the Owner and the documents tendered by him, persuade me that the Owner entered into a building contract naming Kitchener Crespin as the builder and that the contract documents comprise the Owner's version of the MBA contract ((Exhibit R-12) and the Owner's version of the *Contract Addenda* bearing the date 3 July 2010 (**emphasis added**).

86 SM Riegler therefore considered the particular position regarding the contract documents adopted by each party, and decided, on the balance of probabilities, what legal arrangement was, based on the evidence and documents presented to him. This led him to conclude that it was Mr Bitcon's version of events to be the more likely scenario.

87 In a later hearing before SM Riegler, which was conducted on the papers, the Senior Member refused to make a costs order against Advaland for the preliminary hearing and reserved costs.[38] The Senior Member did not then accept Mr Kirby's submission that the only explanation for the divergence of evidence was that there had been fraud or wilful disregard of known facts.[39] He found that it was possible that there were actually two different versions of the building contract both parties had signed and not a forged version.[40]

88 Mr Riegler concluded in his Reasons dated 26 May 2014:

> 35. I do not accept that submission, even though it is difficult to reconcile the Owner's and Ms Molan's evidence with that of Mr Crespin and Ms Scholtes. However, it does not necessarily follow that Advaland continued in wilful disregard of known facts. In particular, the evidence before me indicated that neither party paid much attention to the identity of the builder at the time of contract. For example, the Owner gave evidence indicating that he had little understanding of the distinction between Advaland, the company and Mr Crespin, the person. He said that he understood them to be one and same. Therefore, if the white labels had been removed from Advaland's version of the contract, it is possible that by the time that contract was engrossed, it was done so ignorant or forgetful of the fact that the version held by the Owner still named Mr Crespin as builder. This scenario becomes more feasible when one considers that there may have been a significant passage of time before Advaland eventually engrossed its counterpart and that this occurred during a period when Mr Crespin was transitioning his building business to Advaland, from what was previously Mr Crespin as a sole trader.
>
> 36. Although one may speculate one way or the other, the fact remains true that people's memory of past events often becomes reconstructed through the passage of time. This observation was made by McClelland CJ in *Watson v Foxman*:
>
> Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes and litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well is conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which

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38 Order and Reasons of Senior Member Riegler dated 26 May 2014.
39 See *Colgate Palmolive Company v Cussens Pty Ltd* [2014] VSC 37.
40 Order and Reasons of Senior Member Riegler dated 26 May 2014 at [35].

> plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.[41]

37. Therefore, I am not persuaded that the circumstances in the present case justify the making of a costs order based on the submission that Advaland had told an untruth in wilful disregard of known facts.

89 I see no reason to depart from the findings of SM Riegler, and I have concluded that there is insufficient support for the proposition that Mr Crespin attempted to deceive Mr Bitcon or the Tribunal. The submission to the effect that Mr Crespin attempted to deceive either is therefore rejected.

90 I also find that Advaland's advancing of the proposition at the preliminary hearing that it was the contracting party was not, as contended on behalf of Mr Bitcon, in wilful disregard of known facts. I find that it was reasonably open to Advaland to contend as it did.

Section 109(3)(a)(vi)–whether Mr Crespin vexatiously conducted the proceeding

91 The third type of conduct relied on by Mr Kirby as justifying a costs order in Mr Bitcon's favour is conduct of Mr Crespin that was vexatious within the meaning of section 109(3)(a)(vi) of the Act.

92 This is a reference to the manner in which the proceeding is conducted, and not with whether the proceeding itself was vexatious.[42]

93 There are a number of ways in which a person may conduct a proceeding which may be found to be vexatious within the meaning of this provision.[43]

94 First, a proceeding is conducted in a vexatious way:

> …if it is conducted in a way productive of serious or unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging.[44]

95 Mr Kirby submits, and I find, that a significant amount of Mr Crespin's conduct in the proceeding could be characterised as vexatious in this sense, including:

(a) Since the preliminary hearing, and the orders of SM Riegler striking out the Points of Claim, Advaland attempted to make the same claim again by filing the Amended Points of Claim, in disregard of the Riegler decision, and Mr Crespin failed to make any claim or file any defence to Mr Bitcon's counterclaim;

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41 (2000) 49 NSW LR 315 at 318-319.

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

43 See also the much-quoted decision of Roden J in *Attorney-General (Vic) v Wentworth* (1988) 4 NSWLR 481 at 491.

44 *Wharington v Vero Insurance Ltd* [2007] VCAT 124 at [11] (referring to *Victoria v Bradto Pty Ltd* [2006] VCAT 1813 at [67] which decision was cited with approval by Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216

(b) the application in May 2014 by Mr Crespin for an extension of time to seek leave to appeal the Riegler decision, dismissed on 29 May 2015; and

(c) the application in October 2015 by Mr Crespin for an extension of time to seek leave to appeal the Macnamara orders, dismissed on 30 September 2015.

96 I also find that Mr Crespin's continuing to assert at the hearing before me that, notwithstanding the outcome of the preliminary hearing, the building contract was with Advaland, was vexatious conduct within this first sense of the expression.

97 There is a second sense in which a proceeding can be found to have been conducted vexatiously. In *Loughran v Hasham*[45], upon which Mr Kirby relies, SM Walker stated as follows:

> The section [109(3)(vi)] is not specifically directed to the bringing of a vexatious claim. However to persist in the conduct of a proceeding in pursuit of a vexatious claim when one knows or ought to know that it is vexatious is, in my opinion, conducting the proceeding vexatiously. Legal proceedings are intended to be used for the pursuit of legitimate claims and bona fide disputes, not vexatious claims or groundless disputes. A party should not have to incur substantial legal costs in contested proceedings in order to prosecute a claim to which there is no arguable answer or defend a claim that is simply unsustainable.

98 I read the learned Senior Member's statement here as being to the effect that to persist in the conduct of a proceeding in pursuit of a claim when one knows or ought to know that it is simply unsustainable, is conducting the proceeding vexatiously.

99 The relevant test was also carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[46] and she concluded:

> [77] By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:
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> (a) commenced an action for damages, following the finding that the Respondent was in breach of the lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;
>
> (b) **persisted in what should, on proper consideration, be seen to have been a hopeless case**;
>
> (c) **engaged in conduct which caused a loss of time to the Tribunal and the Respondent**;

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45 [2018] VCAT 586 at [16].
46 (2015) VCAT 596.

(d) commenced a proceeding in wilful disregard of known facts or clearly established law; and

(e) **made allegations as to losses which it claimed to have incurred, which ought never to have been made**.

[78] In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages (emphasis added).

100. In an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval.

101. I also find that Mr Crespin's continuing to assert at the hearing before me that notwithstanding the outcome of the preliminary hearing, the building contract was with Advaland, was vexatious within this second meaning of the expression "vexatious conduct".

102. Mr Kirby also appears to rely on a third sense in which a person may be found to have conducted a proceeding vexatiously. That is, where the litigation was commenced and maintained for an ulterior purpose. In this case, Mr Kirby submits, it was to harass and intimidate Mr Bitcon. He submits that it is appropriate, when considering whether the proceeding has been commenced for an ulterior purpose, also to consider the surrounding circumstances, including related proceedings.[47] Relevantly, Mr Kirby contends, these circumstances include:

(a) Mr Crespin lodged two caveats over the Property, both which prohibited dealings with the Property "absolutely". Under the first caveat, Mr Crespin claimed an interest pursuant to a constructive trust and under the second he claimed an interest as chargee. Both caveats were removed by order of Judge Macnamara on 17 June 2014.[48]

(b) On 5 August 2013, Crespin issued an unmeritorious proceeding against Bitcon in the County Court alleging that monies were lent by Mr Crespin to Mr Bitcon pursuant to a loan document which Mr Bitcon had never seen nor executed.[49] This proceeding was issued after Mr Crespin challenged the first of the two caveats lodged on the title of the property, and led to Mr Crespin lodging the second caveat alleging an interest as chargee. When asked to provide particulars of the alleged advances under the alleged loan, Mr Crespin provided

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47 *Country Endeavours v Casacir Pty Ltd* [2013] VSC 22 at [50].

48 Affidavit of Spencer James Bitcon sworn 13 April 2018, exhibit "SJB-34".

49 The fact that an applicant has brought other unmeritorious proceedings is also relevant under section 109(3)(e): *Country Endeavours Pty Ltd v Baw Baw SC (No 8*) [2011] VCAT 2403 at [27].

documents which indicated that the alleged advances were the same amounts as those being pursued by Advaland at the time in this proceeding. The County Court proceeding was stayed on 17 June 2014 by order of Judge Macnamara, pending the outcome of this proceeding.[50] Relevantly, his Honour held:

> the situation of having two proceedings relating to the same transaction pending in two different tribunals is intolerable. It was submitted, correctly, I think, that this phenomenon is precisely within what the technical term 'vexatious' comprehends.[51]

103 I am not satisfied that these matters satisfactorily demonstrate that Mr Crespin conducted the proceeding for the ulterior purpose of harassing and intimidating Mr Bitcon, rather than prosecuting his perceived right to relief at law, found by SM Riegler to have been flawed.

104 I therefore find that the conduct of Mr Crespin to which I have referred amounted to his "vexatiously conducting" the proceeding within the meaning of section 109(3)(a)(vi) of the Act, falling within the first and second senses of that expression.

105 I find that the conduct of Mr Crespin, described in sub-sections 109(3)(a)(i) and (vi) of the Act, unnecessarily disadvantaged Mr Bitcon within the meaning of section 109(3)(a) of the Act, because it caused extra cost to be incurred by Mr Bitcon and delay in the resolution of the proceeding.

Section 109(3)(b)–whether a party was responsible for unreasonably prolonging the time taken to complete the proceeding

106 This criterion does not require that the party deliberately intended to prolong the hearing, the party must merely be responsible for the delay.[52]

107 This proceeding was issued on 17 June 2013, yet the final hearing did not take place until more than 5 years later, on 4-6 September and 1 October 2018.

108 There were several different reasons for this delay, however, Mr Kirby submits that it was primarily due to the conduct of Mr Crespin, for instance:

(a) Mr Crespin issued the appeals, which were found to be unmeritorious, and which had the effect of delaying the determination of this proceeding with earlier orders of the Tribunal continually being vacated pending the outcome of the applications for leave to appeal;[53]

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50 Affidavit of Spencer James Bitcon sworn 13 April 2018, exhibit "SJB-34".

51 Affidavit of Spencer James Bitcon sworn 13 April 2018, exhibit "SJB-34", page 17.

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

53 Order of Member Farrelly dated 3 July 2014; Order of Deputy President Aird dated 28 August 2014; Order of Deputy President Aird dated 7 November 2014; Order of Deputy President Aird dated 19 February 2015; Order of Deputy President Aird dated 25 March 2015; Order of Deputy President Aird dated 12 June 2015.

(b) Mr Crespin continually failed to comply with the Tribunal's orders (as discussed above) or to correspond with the respondents regarding the proceeding, which had the effect that the respondents could not take certain steps in the proceeding, for instance, taking steps to properly brief an expert witness;

(c) On 28 April 2017, Mr Bitcon's solicitors wrote to the Tribunal seeking an adjournment of a compulsory conference set down for 2 May 2017 due to a compensation application made by Bitcon in the criminal proceeding and the winding up application against Advaland, amongst other things. Mr Crespin refused to consent to this adjournment, resulting in a wholly unnecessary appearance before the Tribunal on 2 May 2017 at which Senior Member Levine made orders cancelling the compulsory conference;[54]

(d) Mr Crespin delayed the final hearing, scheduled to commence on 8 May 2018, by alleging that he had not received the material filed by Mr Bitcon, despite it being properly served in accordance with previous orders made by the Tribunal.[55] Further, Mr Crespin telephoned the Tribunal on 20 April 2018 and was advised that the proceeding was listed for hearing on 8 May 2018, but did not make any enquiry of Mr Bitcon's solicitor or the Tribunal about any material that Bitcon had already filed for the final hearing;

(e) Mr Crespin delayed the conclusion of the hearing (which had been fixed on 9 May 2018 to take place during 4-7 September 2018) by twice seeking an adjournment of it:

    (i) Firstly, at the commencement of the hearing on 4 September 2018, Mr Crespin sought an adjournment of the hearing to take place on 7 September 2018 in order to attend a hearing in another jurisdiction on that same day. No prior notice of this request had been given to Mr Bitcon or the Tribunal despite it being very likely that Mr Crespin had prior notice of this other hearing; and

    (ii) Secondly, on 6 September 2018, being the third day of the hearing, Mr Crespin sought an adjournment of the hearing that day based on having filed a Notice of Appeal against the Riegler decision with the Supreme Court of Victoria. Ultimately it transpired that the Notice was rejected by the SCV and he did not otherwise proceed with the Appeal.[56] There is a compelling inference that the timing of this adjournment was to avoid Mr Crespin having to proceed with the proceeding before the Tribunal.

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54 Order of Senior Member Levine dated 2 May 2017.
55 See Footnote 40 hereof
56 See the Affidavit of James Murray Pergl sworn on 13 September 2018

109. I accept the merit of these arguments, and I find that Mr Crespin unreasonably prolonged the time taken to complete the proceeding before the Tribunal.

Section 109(3)(c)–the relative strengths of the claims made by each of the parties, including whether Mr Crespin made a claim that had no tenable basis in fact or law

110. This criterion usually involves, but is not restricted to, claims which have no tenable basis in fact and law.[57] It has been found that "a substantial disparity [must exist] between the strength of one claim and the weakness of its competitor…before an order for costs [under this ground] will be fair".[58]

111. I accept Mr Kirby's submission that in circumstances where:

(a) The only claim advanced by Mr Crespin was the original claim made by Advaland, which was found to be untenable and was struck out by SM Riegler due to the fact that Advaland was not the contracting party;

(b) Advaland was subsequently wound up, its claim was struck out and Advaland's liquidator elected not to make any claim against Mr Bitcon;[59]

(c) Mr Crespin failed to make any claim in the proceeding; and

(d) Mr Crespin failed to file any defence to Mr Bitcon's Counterclaim for rectification damages despite being ordered to do so on numerous occasions, other than to provide a cursory five-line emailed defence the night before the final hearing. I rejected those defences in my decision.[60] One of Mr Crespin's defences (being that "there is no contract) was untenable by reason of the Riegler decision. Mr Crespin attempted to persist with this argument, requiring me to make a ruling that he be restrained from doing so during the hearing.

112 I find that this is not a case where there is a substantial disparity between claims. It is, rather, a case in which Mr Crespin had no tenable defence to the counterclaim. I consider that this ground for seeking costs has therefore been made out.

Section 109(3)(d)–the nature and complexity of the proceeding

113 Generally, cases in the Building and Property List, such as this one, involve expert evidence, substantial discovery, multiple day hearings, witness statements and complex legal argument. As such, these cases are said to

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

58 *Beasley v Victoria* [2006] VCAT 2044 at [20].

59 See Order of Deputy President Aird dated 20 July 2017.

60 See paragraph 1 of the Orders made on 1 October 2018.

have a "court-like" nature and a complexity which generally justifies an award of costs for the successful party.[61]

114 I find that there are also good reasons why this proceeding was of a nature and complexity as to make it fair that a costs order be made, including:

(a) The preliminary hearing was hard fought and occurred over a five-day period with both parties pursuing "every viewpoint with vigour";[62]

(b) there have been many different steps and hearings in the matter over the course of almost five years;

(c) Mr Bitcon was forced to make an application for a freezing order over properties owned by Mr Crespin; and

(d) after learning that the Commonwealth Bank of Australia ("**CBA**") had entered into possession of Mr Crespin's property at Parkdale (as mortgagee in possession due to Mr Crespin's default under his mortgage with the CBA), which was the subject of a freezing order by the Tribunal,[63] Mr Bitcon was forced to make a complex application to vary the freezing order to allow the monies from settlement of the sale of the Parkdale property to be paid out of the Assets Confiscation Office to the Domestic Builders Fund.[64]

Section 109(3)(e)–any other matter the Tribunal considers relevant

115 This criterion has been stated to be a 'catch-all' consideration, and there should be no restriction as to what other matters may be considered by the Tribunal.[65]

116 There are various other matters which are relevant to the question of whether a costs order against Mr Crespin is fair, including the fact that:

(a) Advaland's original claim against the respondents was misconceived, in that it did not have any legal standing to make a claim under the building contract, as confirmed by the Riegler decision;[66]

(b) throughout the best part of the proceeding, including the preliminary hearing, both parties were represented;[67]

(c) although Mr Crespin failed to obtain representation for a portion of the proceeding, this failure was unreasonable in the circumstances;[68]

(d) Mr Crespin aggressively pursued the respondents and conducted the litigation in an adversarial fashion;[69]

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61 *Hyndman v Hurtob Homes Pty Ltd* [2014] VCAT 1126 at [15]; *Williamson v Melbourne Water Corporation (No 2)* [2013] VCAT 1811 at [71].
62 Order and Reasons of Senior Member Riegler dated 26 May 2014 at [29].
63 Order of Member Edquist dated 5 December 2017.
64 Order of Member Edquist dated 27 March 2018.
65 *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54.
66 *Ballarto Pastoral Pty Ltd v Department of Primary Industries* [2006] VCAT 478 at [32].
67 *Styles v Murray Meats Pty Ltd* [2005] VCAT 2142 at [17].
68 *Noonan v Melton CC* [2010] VCAT 747 at [29].

(e) Mr Crespin issued the appeals, which were found to be unmeritorious and doomed to fail;

(f) a failure to make a costs order in Mr Bitcon's favour would deprive him of a large measure of the fruits of the litigation in respect of which he has been successful, because a sizeable amount of the damages awarded to him will be consumed by the amount spent by Mr Bitcon in legal costs;[70]

(g) Mr Crespin lodged two caveats over the property;

(h) Mr Crespin unsuccessfully issued a proceeding in the County Court alleging a loan between himself and Mr Bitcon.[71]

(i) In 2013, Mr Crespin was charged by the police in relation to the damage he caused to the Property. On 14 March 2017, following a 28-day trial, Mr Crespin was found guilty of all six counts of criminal damage. Judge Meredith ordered that Mr Crespin pay Mr Bitcon compensation for the damage in the sum of $80,000 pursuant to section 86 of the *Sentencing Act*.[72]

(j) On 18 October 2017, the VBA published a Notice of Decision in which it found Mr Crespin guilty of 32 allegations made against him, including 16 allegations in relation to the damage caused to the property.[73]

(k) Mr Crespin has failed to pay Mr Bitcon's costs thrown away in the sum of $12,000, pursuant to the Order made by Member Marks on 9 May 2018.

117 Putting to one side the costs prior to the date of the preliminary hearing, I am therefore satisfied that pursuant to section 109(2) of the Act, it is fair that Mr Crespin should pay the costs of Mr Bitcon in the proceeding, having regard to:

(a) Mr Crespin's conduct of the proceeding in:

(i) failing to comply with orders and directions of the Tribunal without reasonable excuse; and

(ii) vexatiously conducting the proceeding

that unnecessarily disadvantaged Mr Bitcon within the meaning of section 109(3)(a) of the Act;

(b) Mr Crespin's prolonging unreasonably the time taken to complete the proceeding within the meaning of section 109(3)(b) of the Act;

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69 *Styles v Murray Meats Pty Ltd* [2005] VCAT 2142 at [17]-[18]; *Naylor v Oakley Thompson & Co Pty Ltd* [2008] VCAT 2074 at [40].

70 *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463 at [20]; *Beasley v Victoria* [2006] VCAT 2044 at [48].

71 *Country Endeavours Pty Ltd v Baw Baw SC (No 8*) [2011] VCAT 2403 at [27].

72 Affidavit of James Murray Pergl sworn 17 October 2017, exhibit "JMP-31".

73 Affidavit of Spencer James Bitcon sworn 13 April 2018, exhibit "SJB-37" and "SJB-38".

(c) the relative strengths of the claims made by each of the parties within the meaning of section 109(3)(c) of the Act;

(d) the nature and complexity of the proceeding within the meaning of section 109(3)(d) of the Act; and

(e) the other matters to which I have referred.

COSTS PRIOR TO DETERMINATION OF THE PRELIMINARY HEARING

Can the Tribunal make a costs order under section 109 against Mr Crespin for Advaland's conduct prior to Mr Crespin's joinder?

118 Mr Crespin was not joined to the proceeding until 6 March 2014.

119 There is a remaining question whether my order that Mr Crespin must pay the costs of the proceeding should extend to the costs prior to and of the preliminary hearing, at which time he was therefore not a party to the proceeding.

120 Mr Bitcon claims these costs against Mr Crespin. Mr Bitcon submits that he was forced to incur costs to successfully demonstrate that the relevant building contract was between him and Mr Crespin, and not between him and Mr Crespin's company, Advaland.

121 For this proposition, Mr Bitcon relies on certain authorities to the effect that joined parties can be liable for costs incurred before they were joined to the proceeding.

Is Mr Crespin a 'party'?

122 Contrary to the position under section 24 of the *Supreme Court Act 1986* (Vic), costs orders against non-parties cannot be made under section 109 of the Act. The requirement under section 109(2) is that the costs order be made against a "party", and the Tribunal has often rejected applications for costs against non-parties.[74]

123 Mr Crespin was joined as a party to the proceeding on 6 March 2014. As such, Mr Kirby submits, given that Mr Crespin is a party to the proceeding, an order that he be liable for some of the costs prior to 6 March 2014 would not be an order for costs against a non-party. Mr Kirby submits, therefore, that any costs order against him, in respect of the conduct of Advaland pre-joinder would fall within the Tribunal's discretion under section 109(2). I accept the correctness of these propositions.

124 With respect to Mr Bitcon's claim for costs against Mr Crespin prior to the date that Mr Crespin was joined as a party, Mr Kirby submits that the facts

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[74] See e.g. *Vitalis Group Pty Ltd v Yarra CC* [2000] VCAT 1691 at [51]; *Pong Property Development Pty Ltd v Paradise Constructers Pty Ltd Pty Ltd (in liq)* [2005] VCAT 2513 at [9]; *Friends of the Surry Inc v Minister for Planning* [2013] VCAT 157 at [29], [37].

of this case are analogous to those in *Country Endeavours Pty Ltd and Ors v Casacir Pty Ltd & Ors.*[75]

125 In that case, Country Endeavours Pty Ltd ("**Country Endeavours**") had an interest in land adjoining a quarry. A permit to re-open the quarry was granted by the responsible local council in March 2009, following an extensive hearing by the Tribunal of two planning applications for review.

126 In September 2009 Country Endeavours commenced an enforcement proceeding under section 114 of the *Planning and Environment Act 1987* (Vic) against the council and various quarry parties in relation to alleged non-compliance with the permit.

127 The proceeding was commenced in September 2009. However, in May 2010, the Tribunal made an order joining various other parties as applicants and, against their will, Mr and Mrs Giles who were the directors of Country Endeavours.

128 Mrs Giles was found to have been very dissatisfied with the decision of the Tribunal to grant a permit, and she was a leading objector in the earlier review applications.

129 The enforcement proceeding was heard over 4 days in late November 2010.

130 The applicants were unsuccessful in the enforcement proceeding, and the Tribunal made a costs order that all of the applicants, including those joined in May 2010, were jointly and severally liable for the costs of the council and the quarry parties, for the whole of the proceeding.

131 The Tribunal stated that the reason it was exercising its discretion to order costs against both Mr and Mrs Giles was due to the conduct of Mrs Giles in the proceeding, which was vexatious, and which suggested that the enforcement proceeding had been brought for an ulterior purpose.[76] It will be recalled from my comments above that this is one of the senses in which the conduct of a proceeding may be found to have been vexatious. In his Reasons, the learned Senior Member stated:

> 34. I am satisfied, in all the circumstances, that this enforcement application was brought for ulterior motives. It was not brought because there was some contravention of the planning permit or its conditions that was giving rise to a problem being suffered by Mrs Giles, Mr Giles or either of their companies; or by the public generally. Rather, I think it is clear, at least in retrospect, that the proceedings were brought for the ulterior purpose of frustrating Casacir and of frustrating the permit granted by the Tribunal and for the purpose of frustrating Casicir's attempts to act on that purpose and to re-establish the quarry…
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> …

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75 [2013] VSC 22

76 *Country Endeavours Pty Ltd v Baw Baw SC (No 8)* [2011] VCAT 2403 at [40], [47].

> 40. There is no doubt that Mrs Giles has attempted, by the use of these and other proceedings to prevent or dissuade Casicir from proceeding with the re-opening of the quarry. She has also harassed the Responsible Authority with the view to inducing support for her campaign in that respect. She has pursued that along with a further ulterior motive of seeking to induce Casacir to buy out her property and that of her neighbours on what I take to be favourable terms…All in all, I am satisfied that this application and its prosecution have bene vexatious in the sense that they have been for ulterior purposes.

132 The applicants appealed the costs order to the Supreme Court, arguing that the order should not have extended to an order against the joined parties.

133 In the appeal, the joined parties argued that it was unreasonable, by the award of costs, to lay the responsibility for issuing the vexatious proceeding at their feet, as they were joined late in the proceeding, and against their wishes, and could therefore not be held responsible for issuing the proceeding found to have been brought vexatiously.[77]

134 Her Honour Emerton J did not accept the appellants' argument that it was not open to the Tribunal to find that the joined parties brought the enforcement proceeding for an ulterior purpose, because none of them was named as an applicant when the proceeding was instituted at the Tribunal.[78]

135 With regard to the Tribunal's power to order that costs be paid by a party prior to that party's joinder, her Honour concluded:

> The discretion to award costs against parties under s 109 of the VCAT Act is a broad one. The Tribunal must be satisfied that it is fair to do so. Although s 109(3) requires regard to be had to certain matters, they are broad in nature and include 'any matter the Tribunal considers relevant'. The joined parties were joined in the proceeding having regard to the fact that they had a real interest in its outcome and ought to be bound by the orders of the Tribunal. Once joined, the tribunal could have regard to their role in the proceeding to determine whether it was fair to make costs orders against them under s 109 of the VCAT Act.
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> There is nothing to be made of the fact that some of the costs that the joined parties have been ordered to pay were incurred before they were joined as parties. Once they were joined as parties, they became amenable to costs orders under s 109 of the VCAT Act. That power is not circumscribed by a requirement that a party against whom or which costs are ordered was a party at the time the costs were incurred. It was open to the Tribunal to decide that it was fair in all of the circumstances for the joined parties to be liable for costs incurred before they were joined [emphasis added].[79]

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77 *Country Endeavours Pty Ltd v Casacir Pty Ltd* [2013] VSC 22 at [39].
78 *Country Endeavours Pty Ltd v Casacir Pty Ltd* [2013] VSC 22 at [54].
79 *Country Endeavours Pty Ltd v Casacir Pty Ltd* [2013] VSC 22 at [57]-[58].

136 With regard to the making of the costs order against Mrs and Mr Giles for the period prior to their joinder, her Honour found the Tribunal based its costs order on the parties conduct of the applicants more generally, having regard to the considerations in paragraphs (a), (c) and (e) of section 109(3) of the VCAT Act, including the way in which the enforcement proceeding was conducted, and whether it was unwarranted, misconceived or lacking in substance.[80]

137 Significantly, her Honour stated:

> 46. Furthermore, it is highly artificial to treat the joined parties as entirely divorced from the commencement of the enforcement proceeding. Mrs Giles wrote to the quarry parties in August 2006 and April 2007 on behalf of both herself and Mr Giles to make it clear that the quarry proposal threatened their retirement plans, that she and Mr Giles had 'rights' and that she would fight the quarry proposal by going to 'whatever means I can legally go'. Country Endeavours was subsequently used as the vehicle for the exercise of those rights.
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> …
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> 54. I do not accept the argument that it was not open to the tribunal to find that the joined parties brought the enforcement proceeding for an ulterior purpose, because none of them was named as an applicant when the proceeding was instituted. Although the joined parties were unwillingly joined as applicants some time after the enforcement proceeding was instituted by Country Endeavours, the Tribunal was entitled to proceed on the basis that Mrs Giles was the one who was principally prosecuting the proceeding as her company was not capable of commencing or prosecuting the enforcement proceeding independently of their directing mind or minds, those of Mrs and Mr Giles.

138 Mr Kirby submits that, at all relevant times, Crespin was the controlling mind of Advaland and that, like Country Endeavours, it was merely the vehicle through which Mr Crespin issued his unmeritorious claim against Mr Bitcon and Mr Gaskell.

139 The fact that Crespin was the controlling mind of Advaland is demonstrated, Mr Kirby contends, by the following:

(a) Crespin was the sole director of Advaland when the building works at Mr Bitcon's property were undertaken and remained the sole director until 8 April 2013 when Robert Franklin, who we understand is Crespin's step-father was appointed a director;

(b) The appointment of Mr Franklin as a director of Advaland is likely to have been due to the fact that Crespin's building registration was suspended by the Building Practitioners Board on 26 March 2013 and

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[80] *Country Endeavours Pty Ltd v Casacir Pty Ltd* [2013] VSC 22 at [43].

Crespin needed a registered building practitioner as a director of Advaland (Mr Franklin was registered) so that Advaland could carry on trading as a domestic builder.

(c) Mr Crespin was at all times the sole shareholder of Advaland;

(d) The registered office and principal place of business of Advaland has at all times been 125 Warren Road, Parkdale, which is a property owned by Mr Crespin personally;

(e) Advaland's claim in the VCAT Proceeding listed Mr Crespin as the contact person;[81]

(f) Mr Crespin swore all affidavits relied on in the VCAT Proceeding; and

(g) Mr Crespin appeared at all stages of the VCAT Proceeding, either with his solicitors or self-represented, and Mr Franklin took no part in the litigation.

140. I accept the proposition that, for these reasons, Mr Crespin was the controlling mind of Advaland.

141. In summary, Mr Kirby submits that Mr Crespin, as the controlling mind of Advaland, used it as a vehicle to issue an unmeritorious and vexatious claim based on fraudulent assertions and a forged contractual document. He contends that Advaland was never the correct party to issue the proceeding, and if Mr Crespin sought to make a claim in the proceeding in relation to the building contract, he should have made it in his own name. He argues that Mr Bitcon was forced to incur the substantial delay and expense of a five-day trial in order to prove that his version of the building contract was the correct one. He contends that given that Advaland is now in liquidation as a result of a winding up order made by the Supreme Court on 21 June 2017,[82] there is no prospect of recovering costs from Advaland in relation to the pre-joinder period. He submits that it is therefore fair in all the circumstances that if the Tribunal is minded to make a costs order against Mr Crespin under section 109 of the Act, it should in respect to the whole of the proceeding, including the pre-joinder period.

142. I am unable to be satisfied that the circumstances of this proceeding are similar to those in *Country Endeavours*. It is clear from the findings of the Tribunal in that case that the proceeding was brought for a collateral purpose (for Mr and Mrs Giles to be bought out) from inception. For the reasons I have discussed, I have been unable to satisfy myself that Mr Crespin as the controlling mind of Advaland, caused the proceeding to be

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81 VCAT Application to Domestic Building List dated 17 June 2013.

82 Order of Associate Justice Randall on 21 June 2017 upon application by Bitcon following service of a Statutory Demand under s 459E of the *Corporations Act 2001* (Cth) based on Advaland's failure to pay a costs orders owing to Bitcon which were made after Advaland was unsuccessful in both of its 2 Supreme Court Appeals (as defined below). See Affidavit of James Murray Pergl sworn 17 October 2017, exhibit "JMP-36".

issued for a collateral purpose such as to attract the operation of the costs principle in *Country Endeavours*.

143. Mr Bitcon's claim for costs against Mr Crespin in respect of the period prior to Mr Crespin's joinder is therefore dismissed.

144. I have found that the proceeding was issued by Advaland, whose controlling mind was Mr Crespin, based upon what was later determined by SM Riegler to have been an incorrect view of the contractual arrangements. SM Riegler made no finding that Mr Crespin's view was dishonestly held. Had I found that Mr Crespin dishonestly caused the proceeding to have been issued and maintained prior to the preliminary hearing or, that prior to the preliminary hearing, his argument concerning the contractual arrangements should have been seen by Mr Crespin as hopeless, my decision concerning pre-joinder costs may well have been different.

Applicable scale of costs

145. I have made an order for costs under the County Court scale, which is the default provision under Rule 1.07 of the Tribunal's *Rules*. For some of the costs period[83] this will be under County Court Scale D, which is the highest scale. I consider that this is appropriate given the quantum of the final decision, the difficulty of the case and Mr Crespin's conduct.

146. Mr Bitcon also seeks an order that in default of agreement costs from 21 March 2018, the date of the section 112 offer, should be taxed on the Supreme Court Scale. The higher scale of costs is sought to compensate Mr Bitcon for, and to recognise, Crespin's unreasonable conduct in not accepting the March Offer. Had Mr Crespin not acted unreasonably, then Mr Bitcon would have saved the significant costs that he incurred after the date of the March Offer.[84] I agree with this proposition, and my orders reflect this.

147. Further, given the circumstances of the case, it was reasonable for Bitcon to brief an experienced junior counsel. Mr Kirby's rate is $5,000 per day and $500 per hour (exclusive of GST). The maximum Supreme Court scale for junior counsel's fees is $5,614.00 and $561 per hour. 80% of these amounts is $4,491.20 and $448.80. In the circumstances set out above Mr Bitcon submits that it is an appropriate case for Mr Kirby's fees to be certified at $5,000 per day and $500 per hour. VCAT has the power to make such an order under section 111 of the Act.[85] I consider it fair to certify Counsel's fees accordingly.

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83 See paragraph 10 of the Orders of Member Marks dated 9 May 2018.

84 For an example of where VCAT "enhanced" the costs order to the Supreme Court scale of costs, for costs incurred after an offer was not accepted, see *Architectural Building Project Management v Monty Manufacturing Pty Ltd* (Domestic Building) [2014] VCAT 57 (30 January 2014) at [29] and [30].

85 See also *Toohey v Pump Engineering* [2015] VSC 589; rules 63.07 and 63.82(1) of the *Supreme Court (General Civil Procedure) Rules*.

148. I make the attached orders.

A. Kincaid
Member