VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP474/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building contract – claim for costs – s.109(3)(c), (d), (e) *Victorian Civil & Administrative Tribunal Act* 1998 – costs on an 'issue by issue' basis – whether a part of a party's costs should be allowed – whether two counsel was reasonably necessary

APPLICANTS	Jennifer Barbour, Timothy Barbour
RESPONDENT	Australian Elegant Homes Pty Ltd (ACN 137 707 905)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Costs Hearing
DATE OF HEARING	10 December 2018
DATE OF ORDER	17 May 2019
CITATION	Barbour v Australian Elegant Homes Pty Ltd (Building and Property) [2019] VCAT 728

ORDERS

1. Pursuant to section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, I correct order 1 of the Reasons dated 12 September 2018 as follows:

    1. The respondent must pay to the applicants the sum of $385,568.87.

2. The respondent must pay 80% of the applicants' costs of the proceeding, including reserved costs, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale. I certify for two counsel.

3. Having regard to section 115B(1) of the *Victorian Civil & Administrative Tribunal Act* 1998 and being satisfied that the applicants have substantially succeeded in their claim, the Tribunal orders the respondent to reimburse the applicants for the fees paid, in the amount of $4,563.50.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr A. Broadfoot QC with Mr H. Forrester, of counsel on 22.11.18, and Mr H. Forrester on 10.12.18
For the Respondent	Mr K. Oliver, of counsel

REASONS

1. This is an application brought by the applicant owners for their costs of this proceeding, including reserved costs and certification for two counsel. In general terms, the proceeding involved claims by the owners for loss and damage arising from the termination of the building contract and a counterclaim by the respondent builder for disputed variation claims. Final orders were made on 12 September 2018 whereby the builder was to pay the owners the sum of $371,406.25[1]. The question of costs, interest and reimbursement of fees was reserved.

COSTS

2. There were no relevant offers of compromise and so the owners rely on subsections 109(2) and (3) of the *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT Act) in submitting that it would be fair to order the builder to pay their costs of the proceeding. The provisions of this section and the way it should be exercised are well-known (the decision of Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd[2])* and I will not repeat them here.

3. In particular, the owners rely on the following subsections:

   a. 109(3)(b) - whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

   b. 109(3)(c) - the relative strengths of the parties' cases;

   c. 109(3)(d) - having regard to the nature and complexity of the proceeding.

Did the builder's conduct prolong unreasonably the time taken to complete the proceeding within the meaning of s.109(3)(b)?

4. The owners contend that the builder's conduct in seeking an adjournment prior to the trial date which, although refused, lead to the matter proceeding 2 days later than the anticipated start date. This in turn led to the builder failing to comply with the orders for the filing of witness statements. The owners did not receive the witness statement of Mr Bishara until the evening before the commencement of the trial, and did not have time for Mrs Barbour to file a statement in reply. Mr Bishara's witness statement also included new unpleaded claims for variations. The owners say they were disadvantaged by this conduct, in that:

[1] *Barbour v Australian Elegant Homes Pty Ltd* [2018] VCAT 1242 ("the Reasons")
[2] [2007] VSC 117 at [20]

a. they did not have time prior to trial to prepare cross examination of Mr Bishara or understand the case they were to meet by counterclaim, and

b. they did not have a reasonable time to consider Mr Bishara's witness statement and prepare a written reply, instead having to lead the evidence orally during the hearing.

5. Counsel for the owners submitted that the delay by the builder in filing his witness statement and raising unpleaded issues "was that they likely delayed and lengthened unreasonably the conduct of the proceeding and made the written submissions more time-consuming and complex. Had the builder conducted the proceeding in accordance with the timetables and orders set by VCAT, it may have reduced the length of the trial".

6. The builder submits in response:

a. If the owners had been disadvantaged by the late service of Mr Bishara's witness statement, they could have consented to the adjournment of the hearing. They cannot now complain that they did not have time to prepare cross examination for Mr Bishara when they opposed the adjournment.

b. The oral evidence given by Mrs Barbour in reply to Mr Bishara's witness statement took less than one hour of the hearing time.

c. There were no "new" unpleaded claims raised in Mr Bishara's witness statement. The only variation which was not in the formally pleaded counterclaim was the claim for the change to the upper wall cladding. The owners had notice of this issue from March 2017. The fact that it was not formally pleaded did not prolong the trial. The issue of election was raised prior to the commencement of the hearing. Its resolution involved the interpretation of a letter by the Tribunal. No further evidence or hearing time was required.

d. Mr Oliver provided an analysis of the time spent during the hearing on different issues, by way of a summary of the transcript. He concluded that much of the time in the Tribunal was spent dealing with issues on which the owners were unsuccessful.

e. If the proceeding was unnecessarily prolonged, this was caused by the owners conduct in maintaining unmeritorious claims and defences and the unsatisfactory evidence of Mrs Barbour. Particulars of these allegations are discussed further below.

Was one party's case relatively stronger than the other within the meaning of s.109(3)(c)?

7. In summary, the owners contend:

    a. The critical issue in the proceeding was the question of repudiation and the owners were successful in proving the builder repudiated the contract. Had the builder conceded that the frame stage had not been reached, the repudiation claim could have been dealt with relatively briefly and the hearing would have been substantially less costly and complex.

    b. The defects claim turned on the evidence of the experts, who agreed that there were significant defects at the property. While the ultimate amount ordered was less than the amount claimed, the Barbours were always going to succeed in their damages claim for defective work to some extent.

    c. The owners concede that the builder had some success in relation to the variations. They submit that the strengths of both parties case was equal on the majority of the variations. Fundamentally, the Tribunal was required to find 'exceptional circumstances' for a large number of the variations. In such circumstances, the owners had reasonable arguments. Further, one of the major variation claims (the change in wall cladding) was raised for the first time in the witness statement of Mr Bishara.

    d. Although they did not succeed for the full amount of their claim, the total balance allowed to the owners was a significant sum and justified the Barbours spending time and money in vindicating their rights.

8. On the other hand, the builder contends:

    a. In considering the relative strengths of the claims made, the Tribunal should follow the approach favoured in the courts to look at the question of costs on an 'issue by issue' basis. The legal rationale for this approach is the use of the wording in subsection (c) that the Tribunal must consider the claims made by "each of the parties".

    b. If this approach is adopted, the result would be orders that each party pay the other party's costs of the issues on which the second party was successful.

    c. Mr Oliver provided a breakdown of the issues that were determined by the Tribunal and concluded that because each party succeeded on issues which took up a substantial part of the proceeding, the order which best reflects the outcome of the issues in this case is that there should be no orders as to costs.

d. The owners succeeded overall on repudiation, entitling them to damages for the cost to complete and rectify. However, the accepted costs of rectification and completion were closer to the builder's expert opinion than the owners'.

e. The builder succeeded on issues which took up a considerable amount of the hearing time, including:

   i. protection of the site and access to the owners expert

   ii. whether the builder refused to build in accordance with the approved drawings

   iii. the owners failed in their claim for the lift storage costs

   iv. the owners failed to reverse the payments made by them for variations concerning the sleeper retaining wall and the excavation costs

   v. the builder succeeded in its claims for variations of $94,513 (out of the $105,192 claimed).

f. Further, the owners maintained defences which had no tenable basis in fact or in law and which prolonged the hearing, including:

   i. rejecting the builder's claim for additional excavation costs without identifying which of the variations failed to comply with which of the sections of the Act

   ii. disputing variations for electrical points and roof tiles where the owners had signed a variation form

   iii. disputing the variation for the footings despite agreeing to the additional works and providing no evidence that the amount sought was unreasonable

   iv. disputing the permit fees claim, despite Mrs Barbour's written communications with the builder

   v. unreasonably refusing to accept the variation for the change in the wall cladding

   vi. claiming for the complete replacement of windows, which the Tribunal noted took up much of the hearing and a significant part of the Reasons

   vii. the amount allowed for render repairs was reduced

viii. other items were either disallowed or abandoned during the hearing.

Is the nature and complexity of the proceeding significant within the meaning of s.109(3)(d)?

9. The owners submit that the proceeding was complex as it included legal argument concerning matters of repudiation, election, termination of the contract and the interpretation of contractual terms and terms of the *Domestic Building Contracts Act* 1995. It involved significant time and effort of experts and detailed analysis of factual matters. The builder did not contradict this contention.

Are there any other matters to be considered under s.109(3)(e)?

10. The builder also submits that I should take into consideration as another matter, the fact that the only offer of compromise served by the owners was unreasonable. On 22 February 2016 they offered to accept $756,000 plus $100,000 for costs. This was higher than their claims at the start of the hearing (which totalled $602,374[3]) and did not take into account the builder's counterclaim (of $102,554[4]), and according to the builder, meant that it was effectively forced to litigate.

11. I do not accept that this offer is something I should consider under s.109(3)(e). While on its face it appears to be out of proportion to the issues in dispute at the hearing, and may not have been a genuine attempt to resolve the proceeding, it was made more than two years prior to the hearing. I am not aware of what the state of the pleadings or expert evidence was at that time. Perhaps the offer was reasonable when taken in context. Nor do I agree that it meant the builder was forced to litigate. It could have made offers to the owners, but I was informed that it did not. Accordingly I can only speculate about whether the owners would have accepted a lower amount had it been offered, and it is not appropriate for me to do that.

Conclusion on the owners' claim for costs

12. It is uncontroversial that the power to order costs is discretionary. Of course, in exercising the discretion the Tribunal must act "fairly, impartially and by reference to relevant considerations and not arbitrarily, capriciously or by reference to irrelevant considerations and not in a manner that frustrates the legislative intent"[5]. The discretion is broad and s.109 involves different considerations to those often before Courts. For example, s.109(2) provides that the Tribunal "may make an order that a party pay all or a

[3] The Reasons paragraphs 8-9
[4] The Reasons paragraph 14
[5] *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54 at paragraph 27

specified part of the costs of another party". The prerequisite is that I must be satisfied that it is fair to make a costs order (s.109(3)).

13. In the present case, having weighed up the matters put by each party, and subject to the caveat discussed below, I am satisfied that this is a matter where it is fair to make an order that the builder pay the owners' costs of the proceeding.

14. I agree with Counsel for the owners that the issues in dispute made this a lengthy and complex proceeding within the meaning of ss.109(3)(d). This can also be seen from the considerable length of the trial, the size of the Tribunal Book and the voluminous submissions prepared by both parties. As I have previously found, this work was valuable, and the trial was conducted as efficiently as possible[6]. In my view the nature and complexity of the issues warranted the engagement of experienced legal counsel and the obtaining of expert opinion by each party.

15. As for ss.109(3)(c), I accept in part the builder's contention that if I were to analyse the result on an 'issues by issues' basis (where the owners' issue was the question of termination and damages that flow therefrom, and the builder's issue was its variation claims), it is fair to say that the owners 'won' on their claim, while the builder 'won' on its counterclaim. However, I do not agree with the builder's submission that I should view this result as meaning that each of the claims made by each of the parties was relatively strong (in the language of ss.109(3)(c)). Nor am I persuaded that this means the appropriate order is that each party should bear their own costs.

16. While it is true that the builder did largely succeed on its counterclaim, it is also true that it was its actions in making claims for frame and lock-up stage payments and suspending the works, when it was not entitled to do so, that forced the owners to engage in lengthy correspondence, to engage solicitors to terminate the contract, to commence the proceeding, to prepare lengthy witness statements, to address the significant numbers of documents, to obtain expert reports as to rectification and completion costs, and to participate in much of the hearing. An order that each party bear their own costs would not be fair in these circumstances.

17. One possibility would be to order the builder to pay the owners' costs limited to each issue on which they were successful. This approach is becoming more common in litigation, as demonstrated by the authorities relied on by the respondent[7]. As was held by the Full Court of the Federal

[6] Reasons paragraph 18

[7] Including *APN Funds Management Limited v Australian Property Investment Strategic Pty Ltd & Anor (Costs)* [2012] VSC 365; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2008] VSC 296; *Civil Procedure Victoria*, Williams, at 63.02.85 and the cases cited therein

Court in *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd*[8], where the court ordered the respondent to pay a percentage of the appellant's costs of the trial:

> Costs are in the Court's discretion. Fairness should dictate how that discretion is to be exercised. So, if an issue by issue approach will produce a result that is fairer than the traditional rule, it should be applied. It is not suggested that such an approach requires a precise arithmetical apportionment of the costs as between the winner and loser of discrete issues. No doubt the assessment will often be rough and ready. But it will have the virtues of both fairness and reasonableness, which are often lacking in the application of the traditional rule.

18. In the present case, it would be an extremely difficult task for the Costs Court on a taxation to isolate each of the separate issues and the costs associated with each of them. Although the owners' claim may be broadly described as "the question of termination and the damages which flow therefrom" (to quote Mr Forrester), there were very many questions that needed to be determined in deciding that issue. For example, it is not practicable (if it is even possible) to identify how much of the costs were incurred in arguments about the frame stage progress claim, as distinct from the lock-up stage progress claim, as distinct from the notice of suspension, as distinct from the builder's denial of access, as distinct from its failure to return to site.

19. Further, such an approach would fail to make any allowance for the time spent on the builder's successful counterclaim.

20. The practical solution to this problem, increasingly adopted by the courts, is to award a percentage of a party's costs be paid, in order to take account of varying successes and failures on an issues by issues basis. For example, in *McFadzean & Ors v Construction Forestry Mining & Energy Union & Ors*[9], the Court of Appeal held:

> The Rules of Court are wide enough to permit an apportionment of costs according to issues or causes of action…
>
> Under r.63.04, the judge might have awarded costs in relation to particular questions or parts of the proceeding. We think it appropriate however, with respect, to observe that the approach taken by his Honour, of fixing of a certain proportion of a party's costs which should be paid by another party, has much to commend it…
>
> [T]o avoid the complications of taxation resulting from making orders recognising the entitlements to costs of a party on each action on which they were successful, the orders may be notionally set off against each other or other adjustments made so as to produce an order for a proportion of one party's costs. This approach to costs orders

[8] [2008] FCAFC 107 per Finkelstein and Gordon JJ at paragraph 5
[9] [2007] VSCA 289 at paragraphs 153, 157, 158, 159

> where an action has had mixed success has been followed in a number of cases…
>
> In *Hughes v Western Australian Cricket Association (Inc)*, Toohey J … concluded that 'it would be unsatisfactory to attempt to apportion issues and leave the fixing of costs of those issues to the taxing officer. That would impose a very great burden on him and upon the parties' legal representatives'. In our view, the judge's approach to the apportionment of costs was particularly apposite in this case, having regard to the multiplicity of parties, actions, and issues, and the mixed success enjoyed by the plaintiffs.
>
> As his Honour recognised, a single order for costs of the plaintiff's claim 'would the more readily facilitate taxation of costs, which could otherwise become a task of extraordinary complexity'.

21. This approach is also consistent with s.109(2) which allows the Tribunal to order a specified part of the costs be paid.

22. Taking into consideration all the issues before me during the trial, the amount of time that was devoted to hearing and deciding each issue, and the outcome and effect of each issue, I am satisfied that the fair order to make in this proceeding is that the builder must pay 80% of the owners' costs, including reserved costs, to be taxed on the County Court Scale[10] in default of agreement[11]. This percentage represents the importance of the issues on which the owners were successful to the overall outcome, the time spent on each in and prior to the hearing, and the relatively confined nature of the counterclaim. Although a significant amount of time was spent on dealing with the counterclaim items, they were secondary to the termination question.

Is it reasonable to certify for two counsel?

23. The applicants were represented by senior and junior counsel throughout the trial. They submit that they had no instructing solicitor present, and so it was reasonable for two counsel to be briefed. They point to the respondent's choice to be represented by counsel and an instructing solicitor on each day of the hearing.

24. The builder submits that it was not reasonably necessary for two counsel, including senior counsel, to be retained. The case was no different to those in which junior counsel are routinely briefed at the Tribunal, involving issues of termination and defects. There were written witness statements, a Tribunal book and few witnesses, meaning two counsel were unnecessary.

[10] Being the default scale pursuant to Rule 1.07 *Victorian Civil and Administrative Tribunal Rules* 2008
[11] The applicants provided evidence of the amount of costs they have incurred and asked me to fix a sum. I declined to do so as this is more properly the function of the Costs Court of Victoria.

25. I stress here that the owners' application was for the cost of two counsel. Although the two counsel they chose to brief were senior counsel and junior counsel, they did not ask me to "certify for a silk and a junior" (as costs orders historically phrased it), notwithstanding that the Scale of Costs prescribes a higher rate for senior than junior counsel. Instead, their submission for two counsel was put on the basis that one counsel was performing the role of an instructing solicitor during the hearing, not that the case required the specific skills of a Queen's or Senior Counsel. I add that the owners were free to brief whomever they chose. I make no criticism of their choice. However the issue is whether it is reasonable for the builder to have to pay for that choice.

26. The owners did not provide me with any authority to guide the exercise of my discretion. The authority referred to by the builder, and those I located through my own research, specifically consider whether it was reasonable to brief senior, as well as junior counsel. Nevertheless, I consider that the principles enunciated apply equally to the justification for engaging two counsel of whatever level of skill. In practical terms, the effect of the distinction is what rate should be allowed for Counsel. As I indicated during the hearing, I am not prepared to fix the rates for Counsel, and I leave that to the Costs Court. The question for me is whether it is reasonable to order the builder to pay for the costs of one or two counsel.

27. In *Oldaker v Currington*[12] the Full Court of the Supreme Court of Victoria considered an appeal from an order of the County Court certifying for senior and junior counsel for the plaintiff in circumstances where the defendant had admitted liability in a personal injuries case. The Full Court held that in determining whether a respondent should pay for the applicant's choice of two counsel:

> The question to be asked is whether the retention of senior counsel was reasonably necessary for the attainment of justice or the enforcement of the plaintiff's rights... [T]he question must be looked at from the point of view of the party who has to make the decision before the trial, at the time when it is proper, in the circumstances of the case, that counsel should be briefed. It is necessary to guard against hindsight in deciding the question. The reasonable necessity of retaining senior counsel at the time it was done is not to be tested by reference to what the trial may ultimately show to have been the plaintiff's rights or the justice of the case.

And further:

> The cases show that a wide variety of circumstances may be treated as warranting the engagement of senior counsel. A common circumstance is the weight of the case which may make a division of labour between counsel desirable. Another is the need for the special skills and experience to be found within the inner bar.

[12] 1987 VR 712 at p.715, 716

28. In *Oldaker*, the Court ultimately determined that senior counsel should not be certified for because it was not just to pass that additional fee onto a defendant to enable a plaintiff to squeeze "the last penny of damages" out of the defendant[13].

29. This decision was considered by Deputy President Macnamara (as he then was) in *Barbcraft Pty Ltd v Geobel Pty Ltd*[14]. He noted first that the Full Court had determined that:

> …no different approach should be adopted in the County Court to certifying for senior counsel as was adopted in the Supreme Court. It was a matter of the justice of the case rather than the position in the court hierarchy in which the trial was taking place. I regard that incidentally as indicating that if all else shows it to be appropriate, the mere fact that this dispute is in the Tribunal does not render it inappropriate that senior counsel should be certified for if that is what justice requires.

30. I respectfully agree with that conclusion. In fact senior counsel often appear before the Tribunal and are certified for where the circumstances of the case allow[15]. The value, complexity and public importance of disputes litigated particularly in this list can be equivalent to cases in the Supreme Court.

31. *Barbcraft* was a complex proceeding involving a retail lease. DP Macnamara referred to the conclusion in *Oldaker* (that it was not just to pass the additional counsel fee onto a defendant) and held as follows:

> In my view however, the present situation is different. One can readily imagine that failure in this proceeding would have threatened the financial viability of the tenant's business. Certainly it would have a very marked effect on any value for goodwill which the respondents might have been in a position to exact upon a sale.… It was a matter, having regard to the sums of money involved, close to financial survival. Certainly this was not a case where there was a vast amount of factual material by way of viva voce evidence to be assimilated. The history of these tenancies was however quite complex and in my view the division of labour between counsel would be desirable in preparation. The weight of the case in that sense however would not justify the retention of senior counsel; however, in my view, the matters just mentioned combined with the special skills and experience to be found in the inner bar do.[16]

32. *Weber v Deakin University & Ors (No 2)*[17] was the appeal of a dispute which had its genesis before the Tribunal. Before the Supreme Court, the

[13] Ibid at p.716
[14] [2004] VCAT 747 at paragraph 35
[15] for example, most recently, *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (No.2)* [2019] VCAT 468
[16] Ibid at paragraph 37
[17] [2016] VSC 679 at paragraph 8

University was represented by two counsel while the applicant was self represented. McMillan J summarised the test as follows:

> The position must be looked at from the view point of the party who makes the decision to retain counsel before the trial, with the test to be applied being whether a reasonable and prudent but not overcautious litigant in the position of the respondents would have sought the services of two counsel, notwithstanding the expense.

33. In the present case, it is my view that the volume of material and the number of issues in dispute mean that it was reasonable for two legal practitioners to be involved in the preparation and running of the hearing. Further, the legal issues involved in a building dispute such as this, involving questions of repudiation, termination, contractual interpretation, election, statutory interpretation of the *Building Act* and the role of a building surveyor, a technical understanding of building regulation, methods and standards, the application of the *DBC Act*, and more, warrant at least one of those Counsel to have relevant skills and experience.

34. In saying that, I do not wish to be thought to be detracting from the skills and experience of experienced junior counsel, such as Mr Oliver, who appear regularly in complex building disputes. However even an experienced junior counsel would reasonably require the assistance of a competent instructing solicitor in a case such as this.

35. I am satisfied that in this matter the applicants' solicitors, acting prudently, were justified in retaining the services of a competent and experienced member of counsel, together with a more junior but capable counsel to assist. Mr Broadfoot QC and Mr Forrester could certainly be so described. However I am not satisfied that it would be fair to the builder to make it pay for the lead counsel at the rates specified for senior counsel in the Scale of Costs. The rate of a senior junior counsel would be more appropriate. I will certify for two counsel, one experienced and one more junior, and I leave for the Costs Court the question of what is the appropriate rate for each, in accordance with item 19 of the Scale of Costs.

36. Further, it is possible that there is some overlap between the work carried out by the two counsel and their instructing solicitor, particularly in the preparation stage of the hearing. That will be a matter for the Costs Court to determine.

THE AMENDMENT OF THE ORDER

37. The parties seek two corrections to the original decision, pursuant to section 119 of the VCAT Act. This section relevantly provides as follows:

> **s.119 Correcting mistakes**
>
> (1) The Tribunal may correct an order made by it if the order contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or

(d) a defect of form.

38. The first correction is by consent and involves an arithmetical issue which was foreshadowed by me in my footnote 46 of the Reasons. The parties agree that order 1 should be varied to increase the sum payable by the builder to the owners by $41,310.

39. The second correction is sought by the builder, and has the effect of reducing the amount awarded to the owners by $27,138.37. In the Reasons, I allowed the owners the cost of completing the retaining wall at the side of the house, as part of the experts' agreed assessment of completion costs. The builder submitted that the construction of this retaining wall was not included in the original contractual scope of works, and as I have included it as part of the owners' loss and damage, I should also allow the builder the cost of that item as a variation to it. The amount of $27,138.37 is the figure provided by the experts, which I have accepted. I agree with the logic of Mr Oliver's submission, that this is a material miscalculation of figures. I am satisfied that had the matter been drawn to my attention at the hearing, the correction would at once have been made[18].

40. As a result of the two corrections, I will make the following correcting order pursuant to s.119, in substitution for order 1 of the Reasons:

1. The respondent must pay to the applicants the sum of $385,568.87.

SENIOR MEMBER S. KIRTON

[18] *Riga v Peninsular Homes Improvements* [2000] VCAT 56 at [22]