VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NOS. D144/2004 & D145/2005

CATCHWORDS

Costs, apportionment of excess in settlement sum, Part IVAA of *Wrongs Act*, offers to settle, insurance contract entitlement to costs

FILE NO. D144/2004	
APPLICANT	Ceri Lyn Lawley
FILE NO. D145/2004	
APPLICANT	Suzanna Baines
RESPONDENTS IN BOTH PROCEEDINGS	
1ST RESPONDENT	Terrace Designs Pty Ltd (ACN 004 984 225) (Builder)
2ND RESPONDENT	Geoffrey Joseph Graham
3RD RESPONDENT	John Gunston t/as A.J. Gunston
4TH RESPONDENT	Vero Insurance Limited (ACN 005 297 807)
5TH RESPONDENT	Civil and Soil Pty Ltd (ACN 076 191 056)
6TH RESPONDENT	Martine Deana Casagrande (as executrix of the estate of Alvisio Casagrande, deceased)
WHERE HELD	Melbourne
BEFORE	Senior Member R.J. Young
HEARING TYPE	Costs Hearing
DATE OF HEARING	31 August 2006, 13 & 14 September 2006
DATE OF ORDER	6 March 2007
CITATION	Lawley v Terrace Designs Pty Ltd (Domestic Building) [2007] VCAT 335

ORDER

FILE D144/2004 – APPLICANT: CERI LYN LAWLEY

1. Martine Deana Casagrande, as executrix of the estate of the late Alvisio Casagrande, be substituted as the sixth respondent and the title of the proceeding is amended accordingly.
2. The first respondent is to pay the applicant the sum of $190,320.18, such sum to be paid within 30 days of the date of these orders.
3. The first respondent is to pay the applicant's costs of the proceeding as against the first respondent, including any reserved costs, on a party and party basis assessed in accordance with the Supreme Court Scale, as agreed; and, failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act*.
4. The claim against the second respondent is dismissed.
5. The third respondent will pay the applicant the sum of $41,192.18, such sum to be paid within 30 days of the date of these orders.
6. The third respondent will pay the applicant's costs of the proceeding as against the third respondent, including any reserved costs, on a party and party basis assessed in accordance with Scale *'D'* of the County Court Scale, as agreed; and failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act*.
7. The fourth respondent is to pay the applicant's costs of the proceeding as against the fourth respondent including any reserved costs, such costs to be on a solicitor and client basis assessed in accordance with the Supreme Court Scale, as agreed; and, failing agreement to be assessed by the Tribunal in accordance with the principles set out in *Housing Guarantee Fund Limited v Ryan and Another* [2005] VCS 214.
8. The applicant's claim against the fourth respondent is otherwise dismissed.
9. It is directed that upon the assessment of costs ordered to be paid under paragraphs three, six and seven of these orders:-
   (a) the applicant bring in a single bill for assessment;
   (b) Counsel's fees be allowed at the rate of $2,000 per day for appearances and otherwise at the rate of $200 per hour, save where Counsel's fees are incurred in conjunction with the applicant in Proceeding D145/2004 where they will be allowed at one half of these rates; and,
   (c) to the extent that any item in that bill allowed on the assessment relates to the applicant's claim upon more than one party, those parties are jointly and severally liable to pay the same to the applicant.

9. The applicants, first respondent, third respondent and sixth respondent will pay all of the disbursements of the fifth respondent of the proceeding jointly and severally, such disbursements to be agreed; and, failing agreement to be assessed by the Principal Registrar in accordance with Section 11 of the Victorian Civil and *Administrative Tribunal Act*; the cost of the fifth respondent's disbursements will be borne as to 25% by the first respondent, third respondent and sixth respondent and as to 12.5% by each of the applicants.

FILE D145/2004 – APPLICANT: SUZANNA BAINES

1. Martine Deana Casagrande, as executrix of the estate of the late Alvisio Casagrande, be substituted as the sixth respondent and the title of the proceeding is amended accordingly.
2. The first respondent pay the applicant the sum of $264,154.32.
3. The first respondent pay the applicant's costs of the proceeding as against the first respondent, including any reserved costs, to be assessed on a party and party basis in accordance with the Supreme Court Scale, as agreed; and failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act*.
4. The applicant's claim against the second respondent is dismissed.
5. The third respondent is to pay the applicant the sum of $39,976.40.
6. The third respondent is to pay the applicant's costs of the proceeding as against the third respondent, including any reserved costs, such costs to be assessed on a party and party basis in accordance with Scale *'D'* of the County Court Scale, as agreed; and failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act.*
7. The fourth respondent shall pay the applicant's costs of the enforcement of her claim as against the fourth respondent, including any reserved costs, such costs to be assessed on a solicitor client basis on the Supreme Court Scale, as agreed; and, failing agreement to be assessed by the Tribunal in accordance with the principles set out in *Housing Guarantee Fund Limited v Ryan and Another* [2005] VCS 214.
8. The applicant's claim against the fourth respondent is otherwise dismissed.
9. The applicant's claim against the fifth respondent is dismissed.
10. The sixth respondent pay the applicant the sum of $22,431.52, such sum being paid within 30 days of the date of these orders.
11. The sixth respondent pay the applicant's costs of the proceeding as against the sixth respondent until 23 June 2005, including any reserved costs, such costs are to be assessed on a party and party basis in accordance with Scale *'D'* of the County Court scale, as agreed; and, failing agreement to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act.*
12. It is directed that upon the assessment of the costs ordered to be paid under paragraphs three, six, seven and eleven of these orders:
    (a) the applicant bring a single bill for assessment;
    (b) Counsel's fees be allowed at the rate of $2,000 per day for appearances and otherwise at the rate of $200 per hour, save where Counsel's fees are incurred in conjunction with the applicant in

Proceeding D144/2004 where they will be allowed at one half of these rates;

(c) to the extent that any item in that bill allowed on the assessment relates to the applicant's claim upon more than one party, those parties are jointly and severally liable to pay the same to the applicant.

13. The applicants, first respondent, third respondent and sixth respondent will pay all of the disbursements of the fifth respondent of this proceeding jointly and severally, such disbursements to be agreed; and, failing agreement to be assessed by the Principal Registrar in accordance with Section 11 of the Victorian Civil and Administrative Tribunal Act; the cost of the fifth respondent's disbursements will be borne as to 25% by the first respondent, third respondent and sixth respondent and as to 12.5% by each of the applicants.

R.J. Young
Senior Member

APPEARANCES:

For Applicant	Mr K. Oliver of Counsel
For 1st and 2nd Respondents	No appearance
For 3rd Respondent	Mr E. Riegler of Counsel
For 4th Respondent	Mr K. Howden of Counsel
For 5th Respondent	Mr B. Bolwell, Director
For 6th Respondent	Mr D.A. Klempfner of Counsel

REASONS

A. INTRODUCTION

1 This costs hearing follows the release of my determination in the substantive matters of the proceeding of 11 July 2006. The purpose of this hearing was to finalise the orders I should make in this proceeding, both as to my findings and as to any other applications, including costs, that the parties made at this hearing. The costs hearing proceeding over three days

2 The matters that were raised as needing to be addressed between the parties were:-

(a) Martine Deane Casagrande should be substituted as the sixth respondent for Alvisio Casagrande, building surveyor, deceased;

(b) the third respondent, the architectural draftsman, submitted that as the building surveyor had settled with the applicant owner in D144/2004 for a sum of $65,000, when the Tribunal's findings as to the liability of the building surveyor to the applicant was in the sum of $16,024.52; the applicant, thereby, would receive an amount of money greater than the total damage assessed by the Tribunal unless the other respondents found liable to the applicant had their quantums to be paid to the applicant proportionally reduced;

(c) the basis on which the owner's costs, if any, from the various respondents should be assessed;

(d) whether the soil engineer was entitled to his costs and if so who should be liable and on what basis; and,

(e) whether orders should be made stating the proportion of the costs to which the first respondent builder would be entitled to claim from the other respondents found liable for costs if the builder pays all of the costs of the applicant

B. SUBSTITUTION OF SIXTH RESPONDENT

3 The building surveyor, Alvisio Casagrande, died shortly before the final date of the substantive hearing and all the parties agreed that his executrix should be substituted as the sixth respondent; therefore, I will substitute Martine Deana Casagrande, as executrix of the estate of the late Alvisio Casagrande, as the sixth respondent and the titles of the proceedings will be amended accordingly.

C. THE QUANTUMS OF THE RESPONDENT BE AMENDED TO REFLECT THE OFFER ACCEPTED BY MS LAWLEY FROM THE BUILDING SURVEYOR IN THE SUM OF $65,000

4 On about 22 June 2005 the solicitors for the fourth respondent insurer sent offers to settle made in accordance with Part 4 of the *VCAT Act* (*'the Act'*) offering to pay the owners each the sum of $65,000 and the payment of their costs on a party and party basis assessed on Scale D of the County Court Scale (the offer was open of 14 days of the date of service). Ms Lawley accepted the offer made to her. The offer to Ms Baines was not accepted.

5 The Tribunal in its substantive findings found that the building surveyor was liable to Ms Lawley in the sum of $16,024.52. The architectural draftsman submits that the amount by which the offer exceeds the proportionate liability determined by the Tribunal against the building surveyor, $48,975.48, must be taken into account in assessing the proportionate liability of the architectural draftsman because to ignore the amount recoverable under that settlement agreement would lead to a situation where the applicant would be in a better position than if the contract had been performed. The architectural draftsman submits that the amount by which the offer exceeds the Tribunal's finding of liability in the building surveyor should be deducted from the total damages awarded to the building surveyor and the proportions for each of the respondents should be reassessed, including the builder. This would result in a lesser quantum for presumably all of the respondents although in its submission the architectural draftsman calculates only its own reductions in quantum.

6 The insurer accepted the architectural draftsman's submission and this was reflected in the insurer's proposed final orders in which the liability of all of the remaining respondents was diminished in proportion to the findings of liability to reflect the difference of $48,975.48 by which Lawley's recovery from the sixth respondent exceeded the quantum of liability that the Tribunal had apportioned to the sixth respondent.

7 Ms Lawley accepted that under the principle in *Boncristiano v Lohman* [1998] 4 VR 82 where two respondents have been found liable for damage under the existing scheme of joint and several liability for damages amongst multiple respondents there is a rule against double compensation. This was expressed in the following terms by Winneke P. at paragraph [89] of the decision:-

> *'The law, which now embraces equity, will not permit a plaintiff, whatever procedural device is used, to receive more than the damages which had been suffered, no matter what the cause of action upon which he proceeds against the various defenders.'*

Ms Lawley submits that therefore the excess by which her settlement with the building surveyor exceeds the quantum of liability for which the building surveyor was found liable by the Tribunal should be deducted from

the liability of the builder, whose liability for Ms Lawley's contractual claim is joint and several. However, she submits that such excess should not be deducted from the apportioned liability for which the other respondents were found liable under Part IVAA. She, therefore, resisted the architectural draftsman's submission that the excess of $48,975.52 should be distributed across all respondents. She submitted that under Part IVAA a respondent's *'liability'* was fixed and as an applicant that was what she was limited to recovering against that respondent. She accepted that she could not recover more than her total damage against all the respondents and that is why she allowed the excess to be deducted from the quantum she could seek against the builder, who is jointly and severally liable to pay damages.

8 Thus, the issue between the applicants and the respondents is whether the difference between the amount fixed by the Tribunal on the building surveyor's specific apportioned damage of $16,024.52 and the sum the applicants accepted from the building surveyor of $65,000.00, should be distributed across all respondents as the respondents submit. Or, whether the settlement sum should be deducted from those respondents whose damages were assessed as joint and several under the damages liability principles in existence before Part IVAA, in this case the builder only; and, the liability of the respondents whose damages were fixed under Part IVAA should remain the same.

9 In starting the analysis I consider that the differences in the systems between joint and several and a fixed specific liability under Part IVAA need to be examined:-

(a) for an apportionable claim under Part IVAA there is a specific limit placed on the quantum that can be recovered by an applicant from each respondent; therefore, there must be a significantly increased risk in multi-party cases, when compared to joint and several liability, that the applicant will not recover all of the damages to which it has been found entitled by the Tribunal; under Part IVAA the applicant must carry that loss, as opposed to the system of joint and several liability, where if the applicant fails to recover from one party it can recover that party's damages from another respondent who has been found liable to the applicant;

(b) it is recognised that under the system of liability as enacted by Part IVAA, settlements in multi-party proceedings is going to become far more difficult: see Byrne J – *'Proportional Liability in Construction Claims';* a paper delivered to the Building Disputes Practitioners Society;

(c) accepting the respondents' submission that any excess should be distributed between the respondents to reduce their liability, does this operate in reverse where the applicant settles with a respondent for a sum less than liability apportioned to that respondent by the Tribunal;

this requirement becomes more important under Part IVAA where an applicant is limited to recovering from a respondent the specific liability found by the Tribunal; therefore, should the shortfall in the settlement sum be distributed across the respondents; and, if so should it be distributed across only those respondents under Part IVAA or all respondents including any respondents who are jointly and severally liable for the damage;

(d) does the requirements of Part IVAA, specifically Section 24AI require that any excess in a settlement sum over the liability found must be distributed in reduction of the other respondents' liability.

10 I consider there are other aspects that need to be taken into account when considering this question:-

(a) the settlement between the parties is a private consensual contract of compromise whereby the parties settle their action, and under the laws of contract it should be given force by the Tribunal;

(b) the Tribunal should encourage settlement between the parties; and, as a corollary, the Tribunal should discourage aspects of procedure or principles of law, where it can, that discourage settlement.

11 In considering these differences I think that the observations of Byrne J in *Aquatech-Maxcon Pty Ltd v Barwon Region Water Authority* (2006) VSCA 270 at paragraph [24] are apposite:-

> *'It cannot be doubted that this proceeding was very much complicated and the trial greatly extended by the large number of defendants. It may be, however, that these complications and the extra costs which litigants are now expected to bear should be seen as the price for the advantages of the proportional liability regime which the legislature has provided for them.'*

Compared to a system of joint and several liability the liability, scheme under Part IVAA advantages the respondents at the expense of successful applicants.

12 I consider that the following conclusions can be drawn from the points raised above:-

(a) the system of apportioned liability under Part IVAA has resulted in a substantial reduction in the likelihood that an applicant will recover all of the damages to which it is entitled and would have, more than likely, recovered under a system of joint and several liability amongst respondents;

(b) settlement between the parties is always to be encouraged in litigation and the interpretation of the legislation of Part IVAA that encourages settlement, is to be preferred over an interpretation that discourages settlement;

(c) I do not consider that the liability of a defendant as set out in Section 24AI of Part IVAA refers to the overall liability of all respondents or to the liability that an applicant should be entitled to recover from that respondent; the words *liability* referred to in Sub-section 24A(I) refers to the liability found by the Tribunal and does not support a submission that an excess or depletion in a settlement sum should be apportioned across the other respondents, that requirement if it exists stems from the principle in *Boncristiano (supra).*

13 In reaching a conclusion as to what is the fair and just decision between the competing interests of the applicants and respondents I need to be mindful of the requirements of Sub-section 24AI(2) that requires that the liability for an apportioned share is to be determined in accordance with Part IVAA and the liability for an unapportionable claim is to be determined in accordance with the legal rules, if any, that are relevant. This leads me to the conclusion that *Boncristiano (supra)* can be considered to be limited to the situation under the scheme for liability for damages that existed prior to the enactment of Part IVAA where liability amongst respondents was joint and several. The principle in *Boncristiano (supra)* should only be extended to liability under Part IVAA if it is appropriate to do so.

14 In the case of *CSR Limited and Another v Maree Anne D'arcy* [1999] NSWCA 216 Mason P distinguished *Boncristiano* on the basis that the defendant with which the respondent had settled had not complied with the contract of compromise and paid the settlement sum. Therefore, the Court held that the plaintiff had not recovered more than the damage found and the principle of *Boncristiano (supra)* did not apply. The Court acknowledged that if subsequently the settling defendant paid the sum agreed in the contract of compromise then such amounts would have to be accounted for with the other defendant.

15 Where an applicant's chances of recovering all of its damage under Part IVAA is substantially reduced when compared with a system of damage and recovery that is joint and several amongst the respondents, I consider that the approach in *CSR Limited (supra)* is equitable between the parties. Therefore, I accept the submission of Ms Lawley that the excess of the settlement sum with the building surveyor over that of the liability fixed on the building surveyor by the Tribunal should only be deducted from the sums due from the builder which is joint and severally liable for all of the damage.

E. COSTS TO BE APPORTIONED

16 The architectural draftsman and the building surveyor submitted that any costs that were ordered against them should be apportioned under Part IVAA in the same proportions as the liability apportioned against them in the substantive hearing bears to the total sum of damages ordered in the substantive hearing. Their submission is based on the following premises:-

(a) 'loss and damage' referred to in Part IVAA includes costs: see *Aquatech-Maxcon Pty Ltd v Barwon Regional Water Authority and Others (No. 3)* [2006] VSC 270 at para [21] (architectural draftsman);

(b) the proportion of liability compared to the total liability found represents the upper limit of costs to be borne by the respondents as concurrent wrongdoers under Part IVAA (architectural draftsman);

(c) to do otherwise would be to subvert the legislative intent of Part IVAA (building surveyor); and

(d) there are examples of costs being apportioned to specific respondents: *Nokia Corporation v Cellular Line Pty Ltd (No. 2)* [2006] FCA 980 (building surveyor).

17 The applicant responded that such orders apportioning costs to the respondents should not be made for the following reasons:-

(a) they would not be the usual form of costs orders against unsuccessful respondents;

(b) the builder and the director of builder took no part in the hearing which was largely taken up by the architectural draftsman, the soil engineer and the building surveyor trying to deflect liability from themselves;

(c) it is solely due to the enactment of Part IVAA that the liability of the respondents, that would previously have been joint and several, was reduced to a set proportioned amounts; and

(d) the extra costs that the respondents may have to bear is the price of obtaining the advantages of the proportionate liability regime: see *Aquatech (supra)* at para [24].

18 I do not consider that the respondents' submission is correct. Taking an overview of Part IVAA I consider this deals with the legislature's intention to introduce some form of limitation on a party's liability in a multi-party claim involving a want of reasonable care on the part of each party; such that each party is only liable for its proportionate share of the total damage; thereby, doing away with the previous common law rule of joint and several liability, which is some centuries old. The enactment did not refer to costs or attempt to change the accepted manner in which they were ordered. Legislation should only be taken as changing the principles of the common law if such an intention is clear from the legislation. This is not the case with respect to Part IVAA in relation to costs.

19 I do not accept the respondents' submission that costs are part of the *'loss and damage'* suffered by the applicants. Loss and damage is the money equivalent of the actual physical loss to the claimant, it does not include the costs necessarily incurred by the claimant in establishing its claim. I consider that the example used by the third respondent that costs are a loss as they are expressly claimed in the prayer for relief actually indicates the

opposite. The normal form of the prayer for relief in a tortious claim includes, inter alia, a claim for damage (or loss and damage) and a separate claim for costs. If costs were regarded as encompassed within the definition of loss and damage the specific claim for costs in the prayer for relief would be unnecessary and would be superfluous. It is acknowledged in the rules of pleading that a party must separately plead its application for costs notwithstanding there is a plea for damages.

20 In relation to the submission that the proportion of a respondent's liability to the total liability found represents the upper limit of the proportion of costs that can be found against that respondent is not correct. Within Part IV Division 8 of the *VCAT Act* costs are at the complete discretion of the Tribunal. Other than the provisions of Division 8, there are the cost principles as developed via the common law; however, these are not hard and fast rigid rules; but, providing the adjudicator can explain the reasons for not following them, costs and how they are awarded are discretionary. Therefore, prima facie, I do not see how the proportion of liability can fix an upper bound to the proportion of costs that a respondent may have to bear.

21 This case is a good example. At the hearing neither the first respondent builder nor the director of builder director of the builder attended. Therefore, other than the applicants formally proving their cases against them, there was very little time spent during the hearing in addressing the allegations against those two parties. The costs that the applicants would have incurred in enforcing their claims against the builder were the preparation of the pleadings and the making of its formal case; this would not incur a significant sum in costs overall of the applicants. In relation to the soil engineer the only specific allegations made against him were made by the engineering expert for the building surveyor, Mr R. Brown. At the completion of the evidence in chief of the soil engineer and the conclaves no party, including the building surveyor, had any questions in cross-examination for the soil engineer. Therefore, I accept the applicants' submission that in the main the hearing was largely taken up with the architectural draftsman and the building surveyor attempting to deflect liability. I do not include the soil engineer in that as I consider that the only specific times taken up in attempting to establish any case against the soil engineer was during his discussions with Mr Brown in the engineer's conclave and the specific conclave that was held between the soil engineer and Mr Brown. Other than that time, I consider that virtually the whole of the hearing time could be ascribed to the applicant pressing and the architectural draftsman and building surveyor attempting to turn aside any allegations of a failure to take reasonable care on their part.

22 Therefore, if in the exercise of my discretion I take a practical view it would be that the time taken to argue the cases of the architectural draftsman and building surveyor when compared to the whole of the period of the hearing; such time would far outweigh the percentage of their proportioned liability

would bear to the total damage. Therefore, I do not see that the proportion of liability should form an upper bound as to the limit of their costs as it would fetter my discretion and fetter it in a way that I consider practically could result in significant injustice given my discussion above as to the progress of the proceeding and the hearing in particular.

23 Finally, in relation to the example of costs being apportioned by the Court in *Nokia (supra)* this is an example of the discretion an adjudicator has when it comes to costs. However, I consider that in this case Kenny .J. gave reasons for why she apportioned the damages and it was due to her perception of the hearing and the parties participation. In the final paragraph of her substantive decision in *Nokia Corporation v Cellular Line Australia Pty Ltd* [2006] FCA 726 she said:

> *'At the hearing, I suggested to the parties that they might turn their heads to whether or not costs should be equally proportioned between the respondents. It seemed to me that the third and fourth respondents had not seriously contested the summary judgment motion; and this should be reflected in the costs order. I also noted, and Counsel for Nokia agreed, that the third and fourth respondents were alleged to have engaged in a lower volume of infringing conduct than the first and second respondents. I propose to hear the parties on the matter of costs after delivering these reasons.'*

Therefore, in the circumstances of the *Nokia* case it appears appropriate that the damages were apportioned. Therefore, I do not consider that at law or in the exercise of my discretion the costs to the respondents should be apportioned in the same proportions as to my findings of their apportioned liability.

F. BASIS OF ASSESSMENT OF COSTS

24 The architectural draftsman and building surveyor submitted that as the amounts of liability proportioned to them were less than the Magistrates' Court that was the appropriate scale for the assessment of costs.

25 In assessing the submission I note that this was a complex and difficult case both factually and, in particular legally, as it was one of the first proceedings to consider the application of Part IVAA of the *Wrongs Act* in detail. This meant that in relation to that part the parties had to argue their positions from first principles and to undertake an interpretation of the Act. In this regard I consider that this proceeding and its hearing had the hallmarks of a test case. The case was also difficult in relation to the many factual issues, not so much as to whether or not damage has occurred, but as to which parties were liable. Having regard to the *indicia* set out at sub-section 109(3) of the Act I consider that this case was very complex and in its nature that of a multi-party factually complex building dispute. In relation to the overall quantum that was addressed and the issues in the case I consider it was equivalent to a Supreme Court case.

26 Therefore, I do not consider that the Magistrates' Court is an appropriate scale for a case of this nature and complexity. However, I acknowledge that the proportioned quantum liability of the third respondent and sixth respondent are substantially below the jurisdictional limit of the Magistrates' Court. The factually complex nature of the issues and the interpretation of the application of Part IVAA needs to be balanced between the parties, as I do not consider either party should receive an advantage over the other from those issues somewhat outside their control. Therefore, in the balancing exercise I have decided that the appropriate scale on which costs should be assessed in relation to the architectural draftsman and building surveyor is Scale *'D'* of the County Court Scale, a scale commonly used in this List for cases of some complexity.

27 The second issue in relation to the basis of the assessment of costs was a submission by the architectural draftsman and the building surveyor that the applicants' costs should be reduced by a fixed percentage to reflect the fact that they failed against the director of builder and the soil engineer. The architectural draftsman submitted that the reduction should be 33% and the building surveyor submitted that the reduction should be 10%. I do not consider that such a percentage is too rough a device. Further, I consider that in relation to the hearing, the applicants' costs of pursuing its case against the builder and the director of the builder would be small, as would be the costs of the case it put against the soil engineer. I decline to follow this submission. Where costs against a respondent are ordered it will be on the basis that the respondent will pay the applicant's costs of the proceeding as against that respondent. I consider this also deals with the sixth respondent's submission that on the authority of *Dimos v Willetts and Another* [2000] VSCA 154 which held that where a plaintiff is successful against one defendant and not against another defendant, that in the absence of an express order, the plaintiff is only entitled to recover the costs from the unsuccessful defendant that are necessary and properly incurred in proceeding its claim against the unsuccessful defendant.

G. APPLICANTS' APPLICATION FOR COSTS AGAINST THE INSURER

28 The owners claimed their costs of enforcing their claim against the insurer on a solicitor and client basis assessed on the Supreme Court Scale. The applicants right to costs against the insurer does not arise from the *VCAT Act* but as an express term of the insurance contract between them. A recent decision of the Supreme Court, *Housing Guarantee Fund v Ryan & Anor* (2005) VSC 214 held that the Tribunal must assess and find any costs arising out of a domestic building contract.

29 The owners maintain that as a result of agreements made in April and May 2005 the insurer agreed to pay their costs of enforcing their claims against the insurer on a solicitor and client basis assessed in accordance with the Supreme Court Scale.

30 The insurer maintains that under their agreement of April 2005 as set out in the insurer's letter of 7 April 2005 it was implicit in the terms of the offer in that letter that the insurer would pay the applicants' costs on Scale *'D'* of the County Court Scale on a party and party basis. And, that subsequent to 7 April 2005, it would pay the applicants' costs in relation to obtaining the insurer's agreement to pay interest on a solicitor and client basis assessed on the Supreme Court Scale. This I consider sets out the compass of the issues between the parties as to the appropriate orders for costs between the owners and the insurer.

31 The insurer maintains that the four documents comprising the offers and acceptance between the parties are the repository of the agreements and with this I agree. It also posits that any subjective intention is irrelevant and with this I agree. Lastly it posits that the subsequent conduct of the parties is inadmissible as evidence as to the party's objective intention in the making of the agreements. I do not accept this stricture, particularly when the insurer's position as to the terms of the agreement are considered. The insurer's position is that at the time of making the agreement based on its solicitor's letter of 7 April 2005 the meaning of *'reasonable costs and expenses'* was understood to mean costs on a party and party basis assessed on Scale *'D'* of the County Court Scale. I take this to mean that it is an implied term in the parties agreement. If I am correct then I consider I can take the subsequent conduct of the parties into account when considering whether such a term is in fact implied; *Codelfa Constructions Pty Ltd v State Rail Authority* (1982) 149 CLR 337 at 352-353.

32 Therefore, the starting position is what are the terms set out in the offers and acceptance and the correspondence that refers directly to the offers? I will not deal with the prior correspondence of negotiations leading up to the formal offers as they were not referred to by the parties as bearing on the meaning to be ascribed to the terms of the agreements and I consider that the prior negotiations were subsequently overtaken by the formal offers, their acceptance and the correspondence relating to the agreements made.

33 The first formal offer made in accordance with the Act was made by the insurer to each of the applicants on 7 April 2005, those offers were in largely the same terms as follows:

> *'1. The fourth respondent offers to settle the proceeding as follows:*
>
> 1.1 The fourth respondent will pay the applicant the sum of $100,000 in relation to the applicant's insurance claims, within 30 days of the date of acceptance of this offer.
>
> 1.2 The fourth respondent offers to pay the applicant's reasonable legal costs and expenses associated with the successful enforcement of the applicant's claims against it. Failing agreement between the parties, these costs are to be assessed by the Tribunal.

1.3 The fourth respondent will pay within 30 days of the date of acceptance of this offer interest on the sum of $100,000.00 to be agreed, if not agreed to be determined by the Tribunal.

1.4 This settlement offer is made with prejudice.

1.5 This settlement offer is made in accordance with sections 113 and 114 of the Victorian Civil and Administrative Tribunal Act 1998 and is open to be accepted for a period of 14 days after the date of service.

1.6 If this settlement offer is not accepted by the applicant and in the event that the applicant receives a determination at the hearing which is not more favourable, as against the fourth respondent, than this offer, the fourth respondent will rely upon section 112 of the Victorian Civil and Administrative Tribunal Act 1998.'

34 Both applicants accepted this offer in letters dated 20 April 2005. On behalf of Ms Lawley the acceptance was in the following terms:-

> *'We refer to the above proceeding and your client's Settlement Offer dated 7 April 2005 ("the Settlement Offer"). Our client accepts the Settlement Offer on the terms outlined therein.*
>
> *We confirm that this notice of acceptance is made pursuant to section 114 of the Victorian Civil and Administrative Tribunal Act 1998.'*

On behalf of Ms Baines the acceptance was in the following terms:-

> *'We refer to your correspondence of 7 April 2005 and the settlement offer by the 4th Respondent. We write to advise that our client Susie Baines, the Applicant with respect to the above proceeding hereby accepts the settlement offer by the Fourth Respondent.*
>
> *We look forward to payment of the sum of $100,000.00 within 30 days hereof.*
>
> *We will shortly forward to you our client's assessment in relation to interest and costs for agreement by your client, and failing agreement, it will be the subject of a determination by the Tribunal.'*

35 The next offer was again made by the insurer; it appears, from the correspondence I have, to have been made only to Ms Baines and it deals solely with an offer as to interest. It is not made in accordance with the Act because under the covering letter it is stated to be open only for seven days and that it is stated to be made in accordance with the principles set out in *Calderbank v Calderbank* [1975] 3 All ER 333. The offer is in the following terms:-

> *'1. The fourth respondent refers to its offer dated 7 April 2005 and offers to settle the applicant's claim for interest as follows:*
>
> *1.1 The fourth respondent will pay within 14 days of the date of acceptance of this offer the sum of $9,733.81 calculated up until 5 May 2005. This amount is calculated in*

accordance with section 57 of the Insurance Contracts Act 1984.

1.2 This settlement offer is made with prejudice.

1.3 This settlement offer is made in accordance with sections 113 and 114 of the Victorian Civil and Administrative Tribunal Act 1998 and is open to be accepted for a period of 14 days after the date of service.

1.4 If this settlement offer is not accepted by the applicant and in the event that the applicant receives a determination at the hearing which is not more favourable, as against the fourth respondent, than this offer, the fourth respondent will rely upon section 112 of the Victorian Civil and Administrative Tribunal Act 1998.'

I have not been provided with any response to this offer but from a subsequent offer and acceptance of Ms Baines I infer that none was made.

36 The next offer was made by Ms Lawley to the insurer in a letter from her Solicitors dated 13 May 2005 and headed '*Without prejudice save as to costs*' and that offer was in the following terms:-

'We refer to the above proceeding and advise that the Applicant is prepared to settle the outstanding claims against your client in the above proceeding on the following basis:

1. The Fourth Respondent shall pay to the Applicant the sum of $15,421.39 in settlement of our client's claim for interest on the sum of $100,000.

2. The Applicant shall:

(a) accept that the decision of Napier v Hunter [1993] AC 713 correctly sets out the principles regarding subrogation; and

(b) be free to negotiate a settlement of this proceeding with the remaining respondents, subject to the principles set out in Napier v Hunter.

3. If this offer is accepted by the Fourth Respondent, the Fourth Respondent will pay the costs incurred by the Applicant in enforcing her claim against the Fourth Respondent as taxed on a Supreme Court scale on a solicitor/client basis.

4. This offer is open for acceptance for a period of 7 days after receipt of the offer.

This is made without prejudice and under reservation of the Applicant's rights to rely upon the offer on the question of costs in accordance with the principles contained in Calderbank v Calderbank [1995] 3 All ER 333 and Cutts v Head [1984] 1 All ER 597.'

37 Ms Lawley's offer of 13 May 2005 was accepted by the fourth respondent in its letter to her solicitors dated 19 May 2005, the substance of which was as follows:-

> *'I refer to your client's without prejudice offer dated 13 May 2005.*
>
> *I am instructed to accept your client's offer.*
>
> *I await receipt of your client's Bill of costs in accordance with the agreed method of calculating costs.'*

38 The next offer was from the insurer to Ms Baines in a letter from its Solicitor dated 20 May 2005 which mirrored the offer made to it by Ms Lawley and it is in the following terms:-

> *'My client is prepared to settle your client's outstanding claims in the above proceeding on the following basis:*
>
> *1. My client shall pay within 7 days to the applicant the sum of $16,421.39 in settlement of your client's claim for interest on the sum of $100,000.00.*
>
> *2. My client shall:*
>
> *(a) accept the decision of Napier v Hunter [1993] AC 713 correctly sets out the principles regarding subrogation; and*
>
> *(b) accept that your client is fee to negotiate a settlement of this proceeding with the remaining respondents, subject to the principles set out in Napier v Hunter.*
>
> 3. *Upon acceptance by your client of this offer my client will pay your client's costs incurred in enforcing her claim against my client as taxed on the Supreme Court scale on a solicitor/client basis.*
>
> *4. This offer is open for acceptance for a period of 7 days after receipt of the offer.*
>
> *This is made without prejudice and under reservation of my client's rights to rely upon the offer on the question of costs in accordance with the principles contained in Calderbank v Calderbank [1995] 3 All ER 333 and Cutts v Head [1984] 1 All ER 597.'*

39 By way of letter from her solicitor of 25 May 2005 Ms Baines accepted the insurer's offer of 20 May 2005 in the following terms:-

> *'We refer to your facsimile of 12 May 2005.*
>
> *Our client hereby accepts your client's Offer on the terms and conditions as specified in your letter.*
>
> *We look forward to receipt of the cheque in the sum of $16,421.39 within 7 days. Our client will attend to an itemisation of her costs on a solicitor/client basis pursuant to the Supreme Court Scale for your client's consideration, and failing agreement, taxation.'*

40 The insurer acknowledged the acceptance on 30 May 2005 by forwarding a cheque for Ms Baines' claim for interest under a covering letter in the following terms:-

> *'I refer to your letter dated 25 May 2005.*
>
> *I enclose my client's cheque in the sum of $16,421.39 in settlement of your client's claim for interest on the sum of $100,000.00.'*

41 The insurer's submission on costs sets out that there was a disagreement between the applicants and the insurer as to the meaning of *'reasonable costs and expenses'* of the applicants. The insurer contends at paragraph [11] of its submission that it has been authoritatively settled that *'reasonable costs and expenses'* means *'party/party'* costs on the appropriate scale, citing the authority of *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd* [2005] VSCA 165. However, as I have noted above the applicant's right to costs against the insurer does not arise under Section 109 of the Act but rather is due to a term in the domestic building insurance contract between the applicant and the insurer which limited the insurer's liability to indemnify the applicants to $100,000 per dwelling together with their reasonable legal costs and expenses associated with the successful enforcement of the applicants' claims against the insurer: *Housing Guarantee Fund Ltd v Ryan* [2005] VSC 214 Therefore, I do not accept *Spencer v Dowling* [1997] 2 VR 127 as an authority on the applicants' entitlement to legal costs under the domestic building insurance contract.

42 Rather it should be remembered that at the time of the discussions, immediately post the acceptance of the 7 April 2005 offer on 20 April 2005, the leading authority in respect of legal costs arising under a domestic building insurance contract was that of Smith J in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd and Another* [2003] VSC 40 (28 February 2003) where he found that the basis on which damages should be assessed was on an indemnity basis. Subsequent to Smith J's decision the plaintiff appealed to the Court of Appeal and in the decision of *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd and Another* [2005] VSCA 165 (29 June 2005) the Court of Appeal upheld the appeal and found that the correct basis on which damages should be assessed under the term as to costs and expenses in the domestic building insurance contract was on a party and party basis. Thus, at the time of the parties' negotiations the decision of Smith J was the current authority and that was that costs should be assessed on an indemnity basis. Therefore, I can understand the basis for costs being vigorously debated between the parties.

43 However, the insurer contends that it is implicit in the wording of *'reasonable legal costs and expenses'* used in the offer of 7 April 2005 what is meant is party and party costs, consistent with the Court of Appeal's subsequent decision in *Maclaw (supra)* and that the appropriate scale given

the amount in issue was Scale D of the County Court Scale. The applicants, dispute this, contending that the basis of assessment and the applicable scale were still to be determined between the parties subsequent to the then acceptance of 7 April 2005 offer. I consider there is strong support for this view when the intent evidenced in the final sentence of Ms Baines acceptance is examined; that was that she would soon submit to the insurer her proposal for costs and interest which if not agreed by the insurer would have to be put to the determination of the Tribunal.

44 To some extent this issue can only be resolved by determining which of the parties is correct in the basis of their submissions that is whether the insurer is correct in contending that the solicitor and client costs tendered in the subsequent offers only referred to the applicants' costs incurred in relation to their claim for interest; or, whether, as the applicant contends, it refers to all of the applicants' costs in enforcing their claim against the insurer.

45 The outstanding issues that also remained to be settled after the applicants' acceptance of 7 April 2005 offer, other than costs, was the applicants' claims for interest and their rights to negotiate settlement of the proceeding with remaining respondents allowing for the insurer's right of subrogation. I consider that it was to settle these three remaining issues that led to Ms Lawley's Solicitors making the offer to the insurer of 13 May 2005. This offer was accepted by the insurer in its Solicitor's letter of 19 May 2005 without comment as to the form of the offer.

46 The insurer subsequently took the offer it received from Ms Lawley's solicitors and with minor amendments to allow for the change of party making the offer addressed in substantially the same terms to Ms Baines on 20 May 2005.

47 The insurer maintains that the offer as to costs in both of these offers relates only to the applicants' costs of enforcing their claim for interest against the insurer. However, this is not obvious from the paragraph referring to costs. That paragraph, allowing for the change of party making the offer, offers to pay the applicants' costs incurred in enforcing her claim against the insurer *'as taxed on the Supreme Court Scale on a solicitor/client basis'*. If the fourth respondent was contending that the costs being offered only applied to those costs the applicants incurred in pursuing their claims for insurance then I consider it would have been made explicit by the insurer in the acceptance of the offer from Ms Lawley and in the making of the offer to Ms Baines.

48 These offers are made *'to settle outstanding claims'* and each of the three matters addressed in the later offers are matters that could lead to further litigation of issues that would need to be put before the Tribunal and adjudicated upon as they were not specifically and precisely settled by the offers of 7 April 2005. Interest was not addressed in the 7 April 2005 letter neither was the applicants' ability to negotiate with the remaining respondents given the fourth respondents right of subrogation and finally as

I have discussed above I consider that the offer to pay the applicants' reasonable legal costs and expenses did not finalise either the basis on which such costs should be assessed or the appropriate scale by which they should be assessed. This was in fact acknowledged by the parties in the final sentence of the offer on costs in the 7th of April 2005 offer which stated:-

> *'Failing agreement between the parties, these costs are to be assessed by the Tribunal.'*

If the parties wished to avoid the potential for further litigation as to how costs should be assessed then they needed to agree precisely on the basis and scale upon which such costs would be assessed. Therefore, one is led to the conclusion that the first offer which set out precisely how the applicants' costs were to be assessed, giving both the scale by which they were to be assessed and the basis upon which they were to be assessed, would apply to all of the costs incurred by the applicants in enforcing their claim against the insurer and not merely a part, ie interest; and, this is the later offers comprising the offer of Ms Lawley to the insurer of 13 May 2005 and the insurers offer to Ms Baines of 20 May 2005.

49 If the insurer was contending that any costs mentioned subsequently to its offer of 7 April 2005 would apply only to the applicants enforcing their claim for interest then I consider that they would have made that clear in their offer to Ms Baines of 21 April 2005 to pay her interest in the sum of $9,733.81. If the offer was not accepted the covering letter informed Ms Baines that the fourth respondent would set the matter down for a half day hearing before the Tribunal in relation to interest. As can be seen from the substance of the offer set out above the offer makes no reference to Ms Baines' costs of enforcing her claim for interest. Secondly, upon receipt of the offer dealing with interest, subrogation and costs from Ms Lawley's solicitors of 13 May 2005, the fourth respondent raised no subsequent query, on the correspondence that has been put before me, to confirm that the costs offer there set out at point three of that offer relates only to the applicant's costs of enforcing her claim for interest.

50 I consider that the insurer's claim that the offer as to interest in Ms Lawley's claim of 13 May 2005 and in its offer to Ms Baines of 20 May 2005 is limited to their costs of enforcing their claim for interest against it, is incorrect. I accept the applicants' contention that the costs referred to in these offers and the reference to *'her claim'* is a reference to their whole claim against the insurer and not part only of it.

51 As such this is an agreement made between the parties at the time and I consider that as a contract of compromise its terms are enforceable. In the light of the law at the time the terms made are understandable. Therefore, I will order that the insurer pay the applicants' costs of enforcing their claims against it on a solicitor and client basis assessed on the Supreme Court scale.

H. APPLICANTS' CLAIM FOR COSTS AGAINST THE ARCHITECTURAL DRAFTSMAN

52 I find that the architectural draftsman should be liable for the party and party costs of the applicants in pursuing their claims against him.

I. APPLICANTS' CLAIM FOR COSTS AGAINST THE BUILDING SURVEYOR

53 On 19 January 2006 Ms Lawley settled with the sixth respondent in relation to quantum and costs and there is no requirement for an order as to costs against the building surveyor.

54 In relation to the proceeding by Ms Baines the same offers were made to Ms Baines by the building surveyor as were made by the building surveyor to Ms Lawley. The first offer was made on 10 June 2005 offering to pay the sum of $32,500 plus her party and party costs from 29 April 2005 to be assessed on Scale *'C'* of the County Court Scale. This offer was only open for four days and therefore not made in accordance with the Act but it was made under the principles of *Calderbank (supra)*. The second offer made by the building surveyor via its solicitor's letter of the 22 June 2005 to Ms Baines offered to pay the sum of $65,000 in full and final settlement of her claim against the building surveyor together with costs incurred in enforcing her claim against the building surveyor from 29 April 2005 such costs to be assessed on a party and party basis in accordance with Scale *'D'* of the County Court Scale. This offer was open for 14 days and was made expressly in accordance with Division 8 of Part IV of the Act. Ms Baines did not accept either of these offers.

55 The building surveyor submits that as a result of the unaccepted offers it is entitled to have an order that Ms Baines pays the building surveyor's solicitor and client costs of the proceedings from 11 June 2005 [or alternatively, 23 June 2005], such costs to be assessed on the Supreme Court Scale.

56 The applicant submits that she could only have settled with the building surveyor if the other respondents who are seeking an apportionment of liability under Part IVAA from the building surveyor agreed to the orders apportioning the building surveyor's liability to the amount offered in settlement and this did not occur. Secondly, it is difficult to settle with only one respondent in a multi-party proceeding involving apportionable claims under Part IVAA. The applicant also submitted that neither of the offers was made in accordance with the Act, and, further, when considering the limited costs component the offers were not more favourable to the applicant than the orders that would have been made by the Tribunal at that time.

57 There is force in the applicants' argument that it is difficult to settle with one respondent only in claims involving Part IVAA and that the consideration of the other respondents involved in proportionate liability is

a relevant factor in an applicant's consideration of the offer. As a practical consideration in relation to offers to settle, the need to canvas the other respondents subject to Part IVAA prior to a respondent accepting any offer, means that it would be very difficult to have all of the respondents give it full consideration and the applicant to arrive at a reasoned and considered decision on the offer within 14 days, as set out in the Act. This will be a serious hindrance in the efficient administration of justice.

58 That being the case it is difficult for me to hold Ms Baines to the time limits imposed in the Act. Nevertheless, Ms Lawley accepted the offer of 22 June 2005. Again this is a balancing exercise. In the normal course of events I would have acceded to the sixth respondent's submission that it should obtain its costs from Ms Baines after the first or second offer on a party and party basis.

59 In the light of the difficulties of an applicant settling in the circumstances of this proceeding, the applicant submits that the building surveyor should pay her party and party costs assessed on the Supreme Court Scale for the whole of the proceedings. It is important that there be an end to litigation as soon as practicable for the parties even if there is substantial difficulties in getting to such a resolution. Therefore, I consider that the appropriate order in this case is that the building surveyor pays Ms Baines' party and party costs assessed on Scale *'D'* of the County Court Scale up to and including 23 June 2005 and that thereafter there are no orders as to costs between the sixth respondent and Ms Baines. I have adopted 23 June 2005 as I consider that the first offer which was only open for four days was, notwithstanding the effect of Part IVAA, too short a period within which she could properly assess the effect of the offer when compared to the evidence that had been given in the hearing as to liability and quantum including the various categories of damage and the ones for which the building surveyor could be liable. I consequently, did not take the first offer into account under the principles of *Calderbank (supra)*.

J. THE SOIL ENGINEER'S APPLICATION FOR COSTS

60 No liability was found to be attached to the soil engineer by the Tribunal. The soil engineer sought its costs of the proceeding from the insurer which joined it to the action and kept it as a respondent for one year and when the insurer dropped out the architectural draftsman joined it by notice of contribution and it seeks its costs against those parties. The soil engineer seeks its disbursements and also costs, on the basis that Mr Bolwell was unable to work as a soil engineer and civil engineer during the period of the hearing. The soil engineer also seeks the reimbursement from these respondents of the costs it was ordered to pay the structural engineer upon the structural engineer's case against the structural engineer being dismissed for a failure to satisfactorily disclose a cause of action; the soil engineer says these costs have been taxed and paid and are in the sum of $30,740.50.

61 The soil engineer's involvement in this proceeding is not straightforward. From the information provided at the substantive hearing, the soil engineer was originally joined by the insurer. After the insurer settled with the applicants in 2005 it decided to take no active part in the hearing of this proceeding and I was informed that the insurer discontinued against the soil engineer and the building surveyor, without there being any orders as to cost. The builder then sought leave to rejoin the soil engineer and this was granted. Prior to the substantive hearing the architectural draftsman served notices seeking an apportionment of damages under Part IVAA from the soil engineer and building surveyor alleging a duty of care to the applicants. Prior to the hearing the applicants amended their points of claim to include a general claim that they were entitled to recover from *'respondents who are joined by parties (… who are concurrent wrongdoers)'*.

62 When the builder did not attend the first day of the hearing the building surveyor made an application, which was adopted and echoed by the soil engineer, that he ought be excused from the hearing on the grounds that there was no party at the hearing which was making direct allegations against him. I dismissed that application and required that both the soil engineer and building surveyor remain in the proceeding.

63 Dealing first with the soil engineer's claim seeking reimbursements for the costs it was ordered to pay the structural engineer, I cannot accede to the soil engineer's request. It was Mr Bolwell's position that the soil engineer had attempted to keep the structural engineer in the proceeding but failed and was ordered to pay the structural engineer's costs of such interlocutory proceedings. Mr Bolwell submitted that the Tribunal's substantive findings indicated that the structural engineer may be liable for professional negligence and therefore the soil engineer should be reimbursed for the costs it was required to pay the structural engineer. As I explained at the costs hearing, the soil engineer was the only party actively seeking to keep the structural engineer in the proceeding after the insurer ceased to maintain an active part in the proceeding. The soil engineer's efforts to elucidate its claim against the structural engineer were consistently found to be unsatisfactory by the Tribunal and following applications for summary dismissal by the structural engineer, the soil engineer was ordered a number of times to amend its points of claim against the structural engineer so that its cause of action against the structural engineer was clearly identified. Finally, after a number of attempts it was the decision of the Tribunal that the soil engineer had failed to demonstrate a proper cause of action against the structural engineer. The Tribunal dismissed the soil engineer's action against the structural engineer and ordered it to pay the structural engineer's costs incurred in resisting the soil engineer's efforts.

64 This order by the interlocutory Tribunal arose solely as a result of the soil engineer's failure to set out or plead a proper case against the structural engineer, as such, the costs order arose due to the failure of the soil engineer to properly carry out the legal tasks required of it. The order was

not as a result of considering the allegations against the structural engineer. It is unfortunate that the soil engineer was not legally represented but this cannot allow it to pass its costs liabilities incurred as a result of its own procedural failures onto other parties.

65 In relation to the soil engineer's application for costs I consider such costs should be paid jointly and severally by the applicants, the builder, the architectural draftsman, and the building surveyor. Such costs to be paid as to 25% by the first, third, and sixth respondent and as to 12.5% by each of the applicants. The reasons for this are that the insurer initially joined the soil engineer and then discontinued without there being any order for costs. The soil engineer was re-joined by the builder who did not attend the hearing to pursue its claims against it. The architectural draftsman issued a notice of apportionment under Part IVAA against the soil engineer and the applicants amended their pleadings to include an entitlement to recovery from any concurrent wrongdoer. Secondly, both the architectural draftsman and the applicants resisted the soil engineer's application to be excused from the proceedings on the first day of the hearing.

66 Lastly, the building surveyor was the only party to make direct allegations against the performance of the soil engineer, via its civil engineering witness who is a specialist in soils engineering, Mr R. Brown. None of Mr Brown's allegations were made out. Thus, it is apparent to me that all of the parties in this action had a hand in keeping the soil engineer in this proceeding to the end and I consider that they should all bear its costs in equal portions as to representation; this means that the two applicants share one portion.

67 The soil engineer claimed loss of earnings as part of his costs. The soil engineer is a single man corporation of which Mr Bolwell was a director and, from the evidence, the sole employee. Mr Bolwell produced no evidence as to his normal earnings or the fact that work had been forgone during the period of the hearing.

68 The Tribunal has ordered that professional advocates, such as qualified and recognised town planners receive their professional costs as a result of appearing for parties at a planning hearing, from unsuccessful parties; *Re Cardinia Shire Council v Stoiljkovic* (2002) 12 VPR 61; and, that a non-legally trained person could obtain reimbursement for lost wages or travelling expenses: *Aussie Invest Corporation Pty Ltd v Hobsons Bay City Council* [2004] VCAT 2188. Both of these decisions were made in the Planning List where, as the proceedings normally arise from a statutory review of the decision of a Responsible Authority, costs are normally only awarded where there is some contumelious behaviour on the part of a party which is ordered to pay some or all of the costs of the innocent party. In *Aussie Invest (supra)* the Tribunal found that the applicant had acted unreasonably in causing an adjournment and was ordered to pay the foregone wages of one of the objectors. In *Cardinia Shire Council (supra)* the Tribunal considered that the application had been vexatiously

commenced and pursued by the Responsible Authority and allowed the professional costs of engaging a planning advocate.

69 I do not consider these cases are directly applicable to the soil engineer's position. I accept that costs are ordered more frequently in the Domestic Building List than in the Planning List but I do not consider that, given the normal rule as to costs in the Tribunal that each party bear their own, that a party representing his one man company can expect his lost professional fees simply because he has successfully resisted the allegations against him notwithstanding that this was a very complex case and in the nature of a Supreme Court proceeding. Further, I do not consider that either of these cases cover the position of the soil engineer in that he could not easily establish his loss which in the case of a normal full time employee is evidenced by their regular pay slip. Therefore, I consider, and will order that, the soil engineer is entitled to be reimbursed for all disbursements it has incurred in this proceeding from the date it was rejoined by the builder.

J. CONCLUSIONS

70 This concludes my assessment of the final orders that ought to be made and costs. I have set out the orders for each applicant.

R.J. Young
Senior Member

RJY:RB