VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D1352/2013

CATCHWORDS

Dismissal of first respondent's claim against third respondent – application for costs –*Victorian Civil and Administrative Tribunal Act 1998* – sections 109 and 112 – relevant considerations

APPLICANT:	Mr Stephen Lindsay
FIRST RESPONDENT:	Shepp Creative Concrete Pty Ltd (120 909 186)
SECOND RESPONDENT:	WB Hunter Pty Ltd (ACN: 008 410 900)
THIRD RESPONDENT:	Parchem Construction Supplies Pty Ltd (ACN: 010 910 308)
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	20 November 2014
DATE OF ORDER:	5 December 2014
CITATION	Lindsay v Shepp Creative Concrete Pty Ltd (Building and Property) [2014] VCAT 1501

ORDER

1. The first respondent must pay the third respondent's costs of this proceeding from and including 10 October 2014. In default of agreement such costs are to be assessed by the Victorian Costs Court on a party/party basis on the County Court Scale.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For First Respondent	Ms M Rozner of Counsel
For Third Respondent	Mr M Hooper of Counsel

REASONS

1 The applicant owners commenced these proceedings in December 2013 claiming damages of $70,068 from the first respondent concreter ('Shepp') for the removal and replacement of the concrete, pool shell, pool equipment, lighting and heating and the reinstatement of fences and garden. Shepp subsequently obtained an expert report where the expert estimated the cost of the works at $102,300. The owners allege that inappropriate steel strips, known as 'crack-a-joints' have been used as control joints in the concreting surrounds; that these have rusted causing the concrete to crack, spall and chip. The owners rely on an expert report in which the author opines that if the concrete is removed and replaced, the fibreglass pool may be damaged necessitating its replacement.

2 On 24 June 2014, upon application by Shepp, orders were made joining the second and third respondents as parties to the proceeding. The second respondent ('Hunter') operates the hardware store from which Shepp purchased the control joints, and the third respondent ('Parchem') was believed, at that time, to have been the supplier of the crack-a-joints. Hunter and Parchem were joined as alleged concurrent wrongdoers so that Shepp could take advantage of the apportionment of responsibility provisions set out in Part IVAA of the *Wrongs Act 1958.* Shepp also sought contribution from them.

3 On 30 October 2014 Shepp filed an Application for Directions Hearing or Orders seeking orders joining Danley Construction Products (later amended to Danley Constructions Pty Ltd) ('Danley), the manufacturer of the crack-a-joints, and Concrete Technologies Pty Ltd ('Concrete Technologies') which it acknowledged supplied the crack-a-joints to Hunter.

4 On 19 November 2014 Shepp filed an affidavit by its solicitor, Sarah Elizabeth McPherson in support of an application that the proceeding against Parchem be discontinued with no orders at to costs. A directions hearing was listed for 20 November 2014 to hear the application. On 19 November 2014 Shepp's solicitors wrote to the Tribunal advising that in addition to the orders sought in its 30 October application, it would also be seeking orders that the proceeding be discontinued against Parchem with no orders as to costs.

5 At the directions hearing on 20 November 2014, Shepp was represented by Ms Rozner of Counsel, and Parchem was represented by Mr Hooper of Counsel. At the directions hearing I made orders dismissing the proceeding against Parchem in accordance with the Minutes of Proposed Orders handed up by Ms Rozner. Mr Hooper handed up written submissions on behalf of Parchem which had been served the previous day, and Ms Rozner handed up reply submissions on behalf of Shepp. These Reasons only concern Parchem's application for costs.

6 Parchem applies for its costs of the proceeding of $37,322.78 on a solicitor client basis. Alternatively, $28,903.95 on a party/party basis, and says that its costs should be fixed by the Tribunal.

7 In its Submissions on Costs filed at the directions hearing, Shepp says that it accepts liability for payment of Parchem's party/party costs from 9 October 2014 when it says it was clear for the first time that Parchem had not supplied the crack-a-joints, and that in any event the costs should not be fixed by the tribunal.

JOINDER OF PARCHEM

8 Shepp's application to join Hunter and Parchem as parties to this proceeding was supported by an affidavit by its solicitor, Sarah Elizabeth McPherson dated 12 June 2014, and proposed Points of Defence. In her affidavit, Ms McPherson deposes that Shepp purchased the crack-a-joints from Hunter and that she was advised by Paul Amadio of Shepp that the crack-a-joints were supplied to Hunter by Parchem. Further, that in the Technical Data Sheet for crack-a-joints Parchem *does not advise against the use of crack-a-joints in concrete around salt chlorinated swimming pools, or salt water environments.*

9 Further, that in 2009 Mr Amadio made Hunter and Parchem aware of crack-a-joint corrosion and that he carried out inspections with representatives of Hunter and Parchem of corroded crack-a-joints at other properties, although not on the owners' property.

10 Having considered the affidavit material and the proposed Points of Defence, and being satisfied they demonstrated an open and arguable case, I made orders joining Hunter and Parchem as parties to the proceeding, and ordered Shepp to file and serve the Amended Points of Defence.

11 In its Points of Defence, Shepp alleges that:

- Parchem supplied the crack-a-joints to Hunter
- Parchem knew the crack-a-joints would be onsold to third parties
- Parchem owed a duty of care to the owner and/or Shepp to exercise due care and skill in the supply of the crack-a-joints which it had breached (particulars of the alleged breach are set out).

PARCHEM'S APPLICATION FOR COSTS

12 Parchem submits that an order for costs should be made under s109 or alternatively under s112 of the VCAT Act. I will consider the claim for costs under s109 first.

Section 109

13 In considering any application for costs I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') which provides that each party must bear its own costs of a proceeding

unless the Tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109 provides:

> The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant

14 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs under s109:

> i. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

15 Parchem relies on s109(3)(c), (d) and (e).

Section 109(3)(c)

16 Parchem contends that having regard to s109(3)(c) I should order Shepp to pay its costs of this proceeding because it wrongly joined Parchem in circumstances where there was a lack of evidence that Parchem supplied the crack-a-joints to Hunter. It contends that Shepp should have either sought further evidentiary material before applying to join Parchem, or joined Hunter and then decided whether it or Hunter would join the relevant supplier.

17 Mr Hooper submitted that Shepp's application to join Parchem should not have been made until it had obtained further factual evidence to support its claim that Parchem had supplied the crack-a-joints to Hunter. I reject this.

18 I agree with and adopt Senior Member Lothian's recent comments in *Watson v Richwall Pty Ltd*[1] where she said:

> 30 As I said at paragraph 20 of *O'Donnell v Absolute Builders* [2014] VCAT 952:
>
> > If everything [that proposed joined party] says in his affidavit is proven he has a good defence to the Builder's action against him. However, a good defence is not a sufficient reason to refuse to join a proposed party. The facts of a case are proven at the hearing, not at the point where a party is seeking to join another. Until those facts are proven, a properly pleaded case can still be "open and arguable".
>
> 31 To show that there is an open and arguable case against a proposed joined party it is necessary to plead facts and law that support a successful case without proving the facts – to demonstrate a prima facie case. Nevertheless, it is not sufficient to merely assert the facts without demonstrating how those facts are supported.
>
> [underlining added]

19 In rejecting Parchem's submission, I have carefully considered the history of the proceeding insofar as it relates to Parchem. The application for joinder was supported by an affidavit by Shepp's solicitor in which she deposed to her instructions from Mr Amadio, a director of Shepp that he believed the crack-a-joints had been supplied to Hunter by Parchem. The proposed Points of Defence exhibited to that affidavit clearly set out a claim that, if proven at the hearing, would have established that Parchem was a concurrent wrongdoer. At the time the application for joinder was made, Mr Amadio had attended other sites with representatives from Hunter and Parchem where crack-a-joints had corroded. Further, I note that this misapprehension was clearly shared by Hunter which admitted in its Points of Defence dated 20 August 2014 that the crack-a-joints had been supplied to it by Parchem.

20 Any suggestion that the crack-a-joints had not been supplied to it by Parchem was not raised by Hunter until 16 September 2014 when its solicitor emailed the Tribunal seeking the issuing of a Summons requiring Concrete Technologies to Appear and produce the following documents to the Tribunal:

> Any documents regarding the supply of product referred to as 'crack-a-joint' to WB Hunter Pty Ltd in the period between 1 January 2007 and 1 January 2009, including but not limited to all invoices, purchase products, delivery slips, correspondence, agreements and other

[1] [2014] VCAT 1127

documents passing between Concrete Technologies Pty Ltd, or an entity on its behalf, and WB Hunter Pty Ltd'.

21 Although the other parties to the proceeding were not copied in on this email, a copy of the correspondence was sent to them by the Tribunal on 18 September 2014 with Notice of a Directions Hearing listed for 23 September 2014. Subsequently, Minutes of Consent Orders signed by the parties were filed on 22 September 2014 in relation to the proposed Summons to Concrete Technologies.

22 On 26 September 2014 Shepp's solicitors wrote to the Tribunal setting out the parties' respective position as to the supplier of the crack-a-joints and advising:

> On 18 September 2014, we received notice from VCAT that a Directions Hearing had been listed to consider correspondence from Hunter, a copy of which was enclosed. This correspondence stated that as a result of correspondence between Hunter and Parchem and enquiries made by Parchem, *It has come to light that Concrete Technologies Pty Ltd may be a proper respondent to this claim."* Orders were sought by Hunter and subsequently made by the Tribunal in relation to the production of documents concerning the supply of product referred to as 'crack-a-joint' by Concrete Technologies Pty Ltd or any entity on its behalf to Hunter, in the period 1 January 2007 and 1 January 2009.
>
> Until it can be determined which company and therefore which "steel strip" or "crack-a-joint" product was in fact supplied to Hunter and used by our client at the Lindsay property, we are not in a position to properly brief an expert to carry out a forensic analysis in relation to the produce the subject of this claim.

23 Having inspected the summonsed document and engaged in further correspondence with the solicitor for Parchem, Hunter's solicitor emailed Shepp's solicitor on 6 October 2014 advising:

> I attach email correspondence sent last week to the solicitor for Parchem.
>
> It seems that Concrete Technologies Pty Ltd, and not Parchem, supplied the product to our client.
>
> Once we have had the opportunity to review the documents produced by Concrete Technologies on 10 October 2014 I am likely to seek my client's instructions to file an Amended Defence naming Concrete Technologies instead of Parchem…

24 Ms McPherson deposes in her 19 November 2014 affidavit (which supplements and expands on her affidavit of 30 October 2014) that:

> 14 It was not until I receive the Notice of Directions Hearing from VCAT and Mr Ray's email of 6 October 2014, that Shepp became aware that Hunter believed that Concrete Technologies rather than Parchem may have supplied the product to it at the relevant time.

15 Until that time, Hunt & Hunt had not received correspondence open or otherwise, identifying Concrete Technologies as the relevant supplier of the product.

16 The Ultimate Holding Company of both Concrete Technologies and Parchem is Duluxgroup Limited. Both Concrete Technologies and Parchem have the same registered address.

17 Both companies are represented in this proceeding by Lander & Rogers solicitors.

25 Ms McPherson deposes in her 30 October 2014 affidavit that:

12. On 10 October 2014, Concrete Technologies Pty Ltd produced in this Proceeding, a spread sheet pursuant to a summons served on the Second Respondent to appear and produce documents dated 22 September 2014. The spread sheet indicates that it sold crack-a-joints to "WB Hunter Shepparton" between June 2007 and October 2008.

26 In my view, it is only when Shepp should reasonably have concluded that Parchem did not supply the crack-a-joints that it could have been at risk of paying Parchem's costs, subject always to the Tribunal being minded to exercise its discretion under s109(2).

Section 109(3)(d)

27 The nature and complexity of a proceeding is a relevant consideration under s109(3)(c). Although no doubt significant for the owners, the quantum of the owner's claim only just comes within the level of claims where cases in this list are more intensively case managed. The overriding qualification as set out in s109(2) is that the Tribunal can only order costs *if it is satisfied it is fair to do so*. Joinder of other parties by a respondent to a proceeding in the Building and Property List so that it can take advantage of the proportionate liability provisions set out in Part IVAA of the *Wrongs Act 1958* is common. In my view, there is nothing so unusual or complex about this proceeding such that the Tribunal's discretion under s109(2) should be exercised having regard to s109(3)(d).

Section 109(3)(e)

28 Parchem sets out in its submissions a number of factors which it contends I should take into account under s109(3)(e). I will consider each of these in turn:

(a) Shepp joined Parchem without an adequate factual foundation but the claims against Parchem are now to be dismissed

29 Mr Hooper submitted that I should have regard to the principle that costs ordinarily follow the event when a party discontinues against another party, under s109(3)(e). As indicated during the directions hearing, I reject any suggestion that the usual practice in or principles adopted by courts should inform the Tribunal in exercising its discretion under s109(2). If that were

the case s109(1) would not have a role. Section 109 is what sets the Tribunal apart from the courts: each party must bear their own costs of a proceeding unless the Tribunal is minded to exercise its discretion having regard to the matters set out in s109(3). There can never be any presumption in matters before the Tribunal that costs will follow the event.

(b) The adversarial nature of the proceeding with all parties legally represented

30 Proceedings in the Building and Property List, and the Domestic Building List before it are by their very nature adversarial as they invoke the Tribunal's original jurisdiction. The authorities referred to in Parchem's submissions all arise in proceedings where the Tribunal was exercising its review jurisdiction.

31 The fact that the respondents are all legally represented does not give rise to a presumption that an order for costs should be made.

(c) Costs have already been reserved at interlocutory stages of the proceeding

32 I fail to understand how this can be a relevant consideration.

(d) The practice in building disputes in VCAT is relevant, as there is a reasonable expectation of costs being awarded, a matter of which Shepp's legal practitioners should have been aware

33 Whilst this might once have been the case, following the decisions in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*[2] and *Sabroni Pty Ltd v Catalano*[3] there can never be an expectation of costs being awarded in proceedings in this Tribunal concerning domestic building disputes.

34 In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* Ormiston J said:

> '…there should be no presumption, as seems to have been assumed in both the Tribunal and the Trial Division, that costs ought to be paid in favour of claimants in domestic building disputes brought in VCAT…' [34]

35 In *Sabroni Pty Ltd v Catalano*, although Judge Bowman was satisfied that an order for costs should be made because of the nature and complexity of the issues before him, and the adversarial manner in which the proceeding was conducted, he said:

> 'Despite the observations of Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (delivered 5 May 1999), I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs award will be made in its favour. There is

[2] [2005] VSCA 165
[3] [2005] VCAT 374

> nothing in the wording of s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 that warrants such almost automatic expectation. In this regard I prefer the approach adopted by Deputy President Macnamara in Pure *Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31 October 2002). Deputy President Macnamara concluded that there is nothing in the nature of a proceeding in the Domestic Building List that would justify departure from the presumption contained in s.109 and the exceptions thereto, and I am of the same opinion. Each case, whether it be in the Domestic Building List or elsewhere, must be viewed on its merits. It may well be that cases in the Domestic Building List, because of their nature, have a propensity to fall within the exceptions contained in s.109(3), but that does not mean that each case should not be considered on its merits, or that cases in the Domestic Building List automatically fall into a different category when issues of costs arise.' [5]

(e) Parchem gave early notice of its intention to seek costs in *Calderbank* offers

31 July offer

36 On 31 July 2014, before it filed a Defence, Parchem made a *Calderbank* offer to Shepp to bear its own costs of the proceeding if Parchem agreed to discontinue against Shepp. A copy of the letter is attached to Parchem's submission although the copy order history referred to in the letter has not been included.

37 In the 31 July letter, Parchem's solicitors contend that Parchem did not supply crack-a-joints to Shepp at the relevant time. The offer contained in the letter was open for acceptance until 12noon on 1 August 2014 – the following day. Given the very short time the offer was open for, and that the letter appears to do more than set out Parchem's defence to Shepp's claim, I am not persuaded that it would be fair to exercise the Tribunal's discretion under s109(2) on the basis of this offer.

5 September offer

38 On 5 September 2014 Parchem's solicitors again wrote to Shepp's solicitors setting out further reasons why Parchem's joinder was misconceived. Parchem offered to accept $10,000 towards its legal costs which were estimated to be $15,000 on a party/party basis if Shepp agreed to discontinue its claim against Parchem. This offer was stated to be a *Calderbank* offer open for acceptance until 4pm on 19 September.

39 Relevantly, I note that the letter attaches copies of several documents received from Hunter entitled 'Receiving Worksheet – Invoice' which Hunter apparently relied upon at that time as establishing that Parchem supplied crack-a-joints to it at the relevant time. Parchem then sets out the reasons why it believes Hunter's claim to be erroneous. However, in my view, all this does is confirm that there was some uncertainty as to who the

supplier was at the relevant time. Mere assertions in correspondence are not conclusive evidence.

40 Again, I am not persuaded that it would be fair to exercise the Tribunal's discretion on the basis of this offer.

10 November offer

41 On 10 November 2014 Parchem's solicitors wrote to Shepp's solicitors again referring to Ms McPherson's affidavit of 30 October 2014 and the Tribunal's Notice of Directions Hearing for 20 November 2014 dated 5 November 2014.

42 Parchem's solicitors note that despite all claims against Parchem being struck through in the proposed Amended Points of Defence exhibited to Ms McPherson's affidavit the Application for Directions Hearing or Orders does not seek any order that the proceeding against Parchem be dismissed.

43 After referring to their previous correspondence with the parties, and the correspondence from Hunter's solicitors dated 6 October 2014 in which they identified that Concrete Technologies and not Parchem supplied the crack-a-joints, Parchem requested Shepp to consent to orders that Parchem cease to be a party to the proceeding, and that Shepp pay it $25,000 in respect of costs incurred in defending the proceeding to date.

44 This offer was stated to be a *Calderbank* offer open for acceptance until 12pm on 12 November 2014.

45 I note that no details of the calculation of Parchem's costs were provided. Parchem simply demanded that $25,000 for costs it said had been incurred by it in defending proceedings to which it had been a party for less than 5 months and where it had been represented at one directions hearing, and the only formal document filed with the Tribunal was its Points of Defence dated 20 August 2014.

46 I am not persuaded that it would be fair to exercise the Tribunal's discretion on the basis of this offer.

Any other matter the Tribunal considers relevant

47 Section 109(3)(e) gives the Tribunal a very broad discretion to take into account any other matter it considers relevant when deciding whether to exercise its discretion under s109(2).

48 In this instance, I consider it relevant that Shepp submits that the appropriate order be made that it pay Parchem's costs from 9 October 2014,[4] being the date on which DuluxGroup produced to the Tribunal the spreadsheet providing details of the supply of crack-a-joints by Concrete Technologies to Hunter pursuant to the Summons to Appear and Produce Documents referred to above. However, as noted above Ms McPherson has

[4] Outline of Submissions of the First Respondent as to Costs dated 20 November 2014

deposed in her 30 October affidavit as to the spreadsheet having been produced to the Tribunal on 10 October 2014.

49 I note that this followed the advice from Hunter's solicitors to Shepp's solicitors by email on 6 October 2014 that *It seems that Concrete Technologies Pty Ltd and not Parchem, supplied the product to our client.*

50 I also consider it relevant that despite receiving this information Shepp did not take any steps to apply to the Tribunal for an order that the proceeding against Parchem be dismissed. Instead it filed an Application for Directions Hearing or Orders on 31 October 2014 seeking orders for joinder of further parties. No orders were sought in that Application in respect of the proceeding against Parchem even though all references to Parchem were struck out from the Proposed Amended Points of Defence. It was not until the covering letter filed with Ms McPherson's affidavit of 19 November 2014 that it became clear that Shepp would be applying at the directions hearing listed for 20 November 2014 for the proceeding against Parchem to be discontinued.

51 In those circumstances, I am satisfied that it is fair to exercise the Tribunal's discretion and order Shepp to pay Parchem's costs of this proceeding from 10 October 2014.

Parchem's application for costs under s112 of the VCAT Act

52 Parchem claims in the alternative that Shepp be ordered to pay its costs under s112 of the VCAT Act. Although I have allowed Parchem's costs in part under s109, for the sake of completeness I will also consider its claim under s112. In respect of its claim under s112 Parchem relies on its offer dated 5 September 2014 which it says complies with the regime set out in s113 to 115 of the VCAT Act.

53 Section 112 of the VCAT Act provides:

> (1) This section applies if-
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
> (b) the other party does not accept the offer within the time the offer is open; and
> (c) the offer complies with sections 113 and 114; and
> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
>
> (2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by them offering party after the offer was made.
>
> (3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal-
> (a) must take into account any costs it would have ordered on the date the offer was made; and

(b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received

54 For present purposes it is not necessary to consider whether the offer complies with the regime set out in s113 to 115 of the VCAT Act because for the reasons set out above, and noting that the supplier of the crack-a-joints was still uncertain as at 5 September 2014, I am not satisfied that I would have made an order for costs had the proceeding against Parchem been determined on 5 September 2014.

Should Parchem's costs be fixed and on what basis should they be fixed or assessed?

55 Parchem seeks orders that its costs be awarded on a solicitor/client basis and that they be fixed by the Tribunal to avoid the costs and inconvenience of them being taxed. Alternatively, they be fixed on a party/party basis.

56 Parchem relies on two certificates from RJD Legal Services in which they certify that Parchem's costs on a solicitor/client basis are $29,062.31 exclusive of disbursements, and another certifying Parchem's costs on a party/party basis at $21,408.83 exclusive of disbursements. The disbursements set out in a Schedule of Disbursements amount to $5,354.24 including $1,362.49 plus GST to RJD Legal Services. Parchem relies on its *Calderbank* offers in support of its application that its costs be paid on a solicitor/client basis.

57 Shepp contends that the costs should be awarded on a party/party basis, they they should be assessed and that they should not include any costs that would otherwise have been incurred by Concrete Technologies as not only are they represented by the same firm of solicitors as Parchem, both companies are subsidiaries of DuluxGroup (Australia) Pty Ltd. Parchem says this is incorrect and that the ultimate holding company for both Parchem and Concrete Technologies is Alesco Corporation Limited. However, nothing turns on this.

58 As I have found that none of the *Calderbank* offers support an exercise of the Tribunal's discretion under s109(2), having regard to the comments by Nettle JA in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* I am not persuaded that there are any exceptional circumstances such that an order for solicitor/client costs should be made. His Honour said, when considering the meaning of 'reasonable legal costs':

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

59 In my view it is irrelevant that both companies are owned by the same holding company and are represented by the same firm of solicitors. It is immaterial that Concrete Technologies have apparently not traded since

2008 and no longer has any employees. Parchem and Concrete Technologies are separate, distinct legal entities. Whether there have been any savings to Concrete Technologies because of the legal work carried out on behalf of Parchem might well have been a consideration in assessing its costs but are irrelevant in assessing Parchem's costs.

60 In circumstances where I have not allowed Parchem's claim for costs in its entirety, the costs cannot be fixed by reference to the Certificates. I observe in passing, that even if I had ordered that Shepp pay Parchem's costs of the proceeding, I would have declined to fix those costs in the absence of a fully itemised Bill of Costs in taxable form.

DEPUTY PRESIDENT C AIRD