VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. D416/2014

CATCHWORDS

DOMESTIC BUILDING–Part IVAA *Wrongs Act 1958*–whether settlement sum paid by one respondent, a concurrent wrongdoer, is to be taken into account in assessing the amount payable to the applicant by other respondents, also concurrent wrongdoers–whether double recovery.

Section 109 *Victorian Civil and Administrative Tribunal Act* 1998–whether the second respondent should pay the costs of the applicant–consideration of matters relevant to ordering costs against a litigant in person–found that the second respondent was or should have been aware that his defence had no tenable basis in fact or law–second respondent ordered to pay costs.

APPLICANT	Yongjie Lu
FIRST RESPONDENT	Jiangent Li
SECOND RESPONDENT	Dang Hai Nguyen
THIRD RESPONDENT	Tim Yang
WHERE HELD	Melbourne
BEFORE	Member A T Kincaid
HEARING TYPE	Hearing to determine final orders following interim orders dated 30 November 2016, and to hear arguments on costs.
DATE OF HEARING	10 February 2017.
DATE OF ORDER	13 April 2017.
CITATION	Lu v Li (Building and Property) [2017] VCAT 518

Noted:

Having settled with the first respondent, the applicant seeks no payment from the first respondent consequential to the orders dated 30 November 2016, whether in respect of amounts claimed by the applicant in the proceeding, or in respect of costs.

ORDERS

1. Pursuant to section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* each of the orders 3, 4 and 5 of the Interim Orders dated 30 November 2016 is amended such that the words “is liable” are substituted

for the words "must pay", and the words "in respect of" are inserted before the figures where they appear in each of the orders.

2. The second respondent must pay $62,926.24 to the applicant (being 60% of the applicant's proved loss and damage of $104,877.07).

3. The third respondent must pay $26,219.27 to the applicant (being 25% of the applicant's proved loss and damage of $104,877.07).

4. Having regard to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, and because it is fair to do so:

   (a) the second respondent must pay to the applicant:

      (i) 60% of the applicant's costs incurred in the proceeding (including reserved costs) between 14 April 2015 (when the applicant joined the second respondent to the proceeding) and 9 May 2016 (being the date on which the applicant settled his claim against the first respondent); and

      (ii) 75% of the applicant's costs incurred in the proceeding (including reserved costs) after 9 May 2016 (being the date on which the applicant settled his claim against the first respondent), following which date the applicant was proceeding against the second and third respondents only, such costs including the costs of the hearing, and the subsequent costs application.

   (b) the third respondent must pay to the applicant 25% of the applicant's costs in the proceeding (including reserved costs) incurred from 26 October 2015 (when the applicant joined the third respondent to the proceeding) up to and including the hearing, and subsequent costs application.

5. In default of agreement between the parties on costs within 56 days, they are to be assessed by the Victorian Costs Court on the County Court Scale, and on the standard basis.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr D Pumpa of Counsel.
For the First Respondent	No appearance.
For the Second Respondent	Mr Nguyen, in person.
For the Third Respondent	No appearance.

REASONS

INTRODUCTION

1. The applicant was the registered proprietor of a property at Camp Road, Broadmeadows (the "**property**"). Prior to selling the property, he had two dwelling units constructed. He also had refurbishment works carried out to the existing house on the property (the "**works**").

2. Having heard the proceeding, I found that a registered building practitioner, the second respondent, who obtained in his own name as "builder", certificates of insurance in respect of the works purportedly to be carried out by him for the applicant, but who took no part in the works, was liable to the applicant for 60% of the completion and rectification costs subsequently incurred by the applicant.[1]

3. The first respondent was the owner of the business name "Ryan Cooper Homes", which purportedly agreed pursuant to a building contract dated 6 April 2011 to construct two new units for the applicant, and to refurbish the applicant's existing house at the property.

4. The third respondent purported to sign the building contract on behalf of "Ryan Cooper Homes". He was the person who carried out the works. He failed to complete them, and much of the works that he carried out were defective.

5. Mr Sam Coco of SFC Building Surveyors, previously the fourth respondent, was the relevant building surveyor. He issued a building permit for the works dated 5 August 2011. I found that he did so having sighted two insurance certificates provided to him by the third respondent, but obtained in the first instance by the second respondent. He was joined by the first respondent. On 15 December 2015, the Tribunal dismissed the first respondent's proceeding against Mr Coco by consent, with no order as to costs. Being no longer a party to the proceeding, Mr Coco did not appear at the hearing.

6. I found that the applicant incurred loss and damage in the amount of $104,877.07 by the conduct of the first, second and third respondents.

7. Pursuant to Part IVAA of the *Wrongs Act 1958* (Vic) I ordered that:

   a. the first respondent is liable to the applicant in respect of 15% of his loss and damage, the amount of such proportion to be assessed;

   b. the second respondent is liable to the applicant in respect of 60% of his loss and damage, the amount of such proportion to be assessed; and

   c. the third respondent is liable to the applicant in respect of 25% of his loss and damage, the amount of such proportion to be assessed.[2]

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1 See *Lu v Li* [2016] VCAT 1998.

2 As amended by the orders accompanying these Reasons.

8. It is common ground that the applicant settled with the first respondent, by agreeing to receive $50,000 from the first respondent ("**the settlement amount**"). The first respondent remained a party to the proceeding for the purpose of apportionment only.

9. I fixed the proceeding for a further hearing, in order to determine the quantum of liability of each respondent. In doing so, I invited submissions on whether the settlement amount should be brought into account for the benefit of the other respondents.

TERMS OF SETTLEMENT BETWEEN APPLICANT AND FIRST RESPONDENT

10. The applicant's solicitor Mr Zita swore an affidavit on 10 February 2017, deposing that the applicant and the first respondent entered into terms of settlement in the form exhibited to his affidavit (the "**terms of settlement**")[3].

11. The terms state, in part:

> **WHEREAS**
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> 1. The Applicant and the First Respondent entered into an agreement dated 6 April 2011 ("the contract") for the performance of works, namely the construction of three domestic dwelling units being two new units and the refurbishment of the existing dwelling at 280 Camp Road, Broadmeadows in the State of Victoria ("**the works**").
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> II. A dispute arose between the Applicant and the first Respondent in relation to the works performed and/or monies owed under the agreement.
>
> III. The Applicant terminated the agreement in or about November 2012.
>
> IV. The Applicant has lodged an Application in VCAT to determine the issues comprised in the dispute.
>
> In the interests of avoiding further costs and expense the parties have agreed to a settlement of the proceeding and the dispute in the following terms:
>
> 1. The First Respondent will pay the Applicant the sum of $50,000 (the "**settlement sum**").
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> 2. The settlement sum is to be paid to care of the Applicant's solicitors Portfolio Law, 412 Bell Street, Pascoe Vale South, 3044 in the following instalments:
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> 2.1 $30,000 on or before 6 June, 2016;
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> 2.2 $5,000 on or before 6 December, 2016;
>
> 2.3 $5,000 on or before 6 June, 2017;
>
> 2.4 $5,000 on or before 6 December, 2017.

[3] The date of the settlement is not disclosed, but clause 2.1 of the terms of settlement suggest that it was some time prior to 6 June 2016.

…

In consideration of the parties entering into these terms of settlement and subject to their performance, the parties mutually release and discharge each other from all further claims, demands, suits, and costs of whatsoever nature, however arising out of [sic] connected with the subject matter of the dispute and the proceedings.

12. Mr Pumpa for the applicant submitted that in the case of concurrent wrongdoers, such as I found to have been the case in this proceeding, the terms of settlement with the first respondent are not relevant when fixing the amounts payable by the other respondents. He submitted that the Tribunal should make an order that represents the amount that reflects the 60% proportionate liability that I have found to be attributable to the second respondent, without deduction. Mr Pumpa relies on *Gunston v Lawley*[4] for this proposition.

13. In *Gunston*, Byrne J stated:

> [56] I return to 24AI(1)(a) which speaks of "the loss or damage claimed". There is, of course, very often a distinction between the quantum of the loss or damage suffered which is the subject of a claim, the quantum of the loss or damage proved and which is, therefore, recoverable and the quantum of the loss or damage which is in fact recovered. The common law has never had any difficulty with a plaintiff obtaining a series of judgments which, if all were satisfied in full, might mean that it received more than the total amount of its proved loss or damage. What is not permitted is that the plaintiff actually recovers in the aggregate a sum greater than its proved loss or damage. This is the rule against double compensation referred to in *Boncristiano v Lohmann.* So much was not in issue before me…
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> [59] The scheme of s24AI is that any given defendant is at risk of liability and judgment for an amount limited to its proper share of the loss or damage the subject of a claim. This risk is not increased by dealings between the plaintiff and another concurrent wrongdoer. For example, a failure by that wrongdoer to pay its share does not increase the liability of another defendant. Nor is it diminished by dealings between the plaintiff and another wrongdoer as, for example, the successful outcome of a subsequent proceeding under s24AK…
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> [60] The effect of the proportionate liability regime, therefore, is to transform fundamentally the relationship which exists between the plaintiff and a concurrent wrongdoer defendant. Where under a solidary liability regime each defendant is liable for the whole of the plaintiff's loss, payment by one must affect the liability of the other. It is for this reason that the plaintiff, after settlement with one wrongdoer which involves payment by that wrongdoer in diminution of the plaintiff's loss, cannot obtain judgment of the total loss. In the proportionate liability regime, however, a payment by one concurrent wrongdoer is a benefit conferred on the plaintiff independently of its right of address against each other wrongdoer. To adopt the dictum of Dixon CJ in *National Insurance Co of New Zealand Ltd v Espagne*, the benefit of the payment made by the concurrent wrongdoer is intended for the plaintiff; it is not intended in relief of the liability of the others each to compensate the plaintiff to the limit of its proportionate liability. [**footnotes omitted**]

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4 [2008] VSC 97.

14. Mr Pumpa relied generally on the statements of principle expressed in *Gunston* in support of his submission that no account should be taken of the settlement sum received from the first respondent when making final orders as to the amounts payable by the other concurrent wrongdoers.

15. Mr Pumpa also submitted, that it cannot be concluded from the terms of settlement, that the monies were agreed to be paid only in reduction of the claimed loss and damage. Rather, he submitted, it is more appropriately construed as a payment made by the first respondent as part of a commercial settlement in order to avoid the risks and further costs of litigation where, it might have been supposed by the first respondent, he considered himself to be at risk of paying more than the settlement sum.

16. This proposition finds support in the judgment of his Honour in *Gunston* where he observed:

> If, as a consequence the settling [respondent] is fixed with a greater responsibility than would otherwise have been the case, the effect of the settlement would be to reduce the judgments which are recovered against these other wrongdoers. This is an added risk which the [applicant] assumes by settling with a [respondent]. In these circumstances, the value of [a] settlement [with a concurrent wrongdoer] to [an applicant] cannot be assessed by having regard only to the amount agreed to be paid under its terms. What must be valued is the benefit and the risk–the benefit that the settlement has brought to the [applicant] and the further risk that it has created for the [applicant].[5]

17. I accept Mr Pumpa's submission that, as a matter of construction of the terms of settlement, any amount received by the applicant from the first respondent above the $15,731.56 (for which I have found the first respondent liable to pay) cannot be said to have been paid in respect of the loss and damage itself, rather than the commercial value put on the settlement by the respective parties.[6] It follows that the excess should not be applied in diminution of the loss and damage for which I have found the other respondents to be liable.

18. Secondly, Mr Pumpa submits that even if the sum paid by the first respondent was expressed as being in diminution of the claimed loss and damage, for the reasons expressed by his Honour in *Gunston*, it should not, as a matter of principle, operate to reduce the amounts payable by the other concurrent wrongdoers. If, for example, the applicant had settled with the first respondent for say, $10,000-being an amount less than the amount that I have determined the first respondent must pay, the applicant would not have been entitled to seek the shortfall from the other concurrent wrongdoers. It follows, Mr Pumpa submits, that settlement by the first respondent at an overvalue, as has occurred here (having regard to my

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5 Ibid, at [65].

6 See also *TCM Builders Pty Ltd v Nikou & Ors* (Domestic Building) VCAT 277 (13 March 2012), where Senior Member Riegler accepted the same argument, at [141].

findings), should not operate differently. This was also the argument to which his Honour was attracted in *Gunston*,[7] which I also accept.[8]

19. It follows, in my view, that so much of the settlement sum as exceeds the amount which I have found the first respondent liable to pay to the applicant should not be brought into account when assessing the amounts payable by the other concurrent wrongdoers.

COSTS

20. The applicant seeks costs, and relies on the criteria set out in sections 109(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**"), in support of his submission that it is fair to award costs in his favour.

The law

21. Sections 109(1), (2) and (3) of the Act provide as follows:

> 109. **Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to-
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as:
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

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7 Ibid, at [63].

8 See also *Ahmed & Ors v City of Whittlesea & Ors* (Building and Property) [2015] VCAT 2042 where Senior Member Walker did not take into account monies received from the settlement of claims against the engineer and the Council, at [119].

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

22. It is apparent from the terms of section 109(1), that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding. By section 109(2), the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3). In summary, parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. Section 109(3) is by no means an exhaustive list of the things to be considered.[9]

23. It has been said that a "substantially successful party" in what was the Tribunal's Domestic Building List (now the Building and Property List) was entitled to have a reasonable expectation that an award of costs would be made in his favour.[10] However it is now established that although such awards are commonly made in such cases, there is no presumption that they should be.[11]

24. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[12] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

> In approaching the question of any application to costs pursuant to section 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows-
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

25. A domestic building proceeding can be expensive. Experts' reports are usually required. The discovery process in even a modest building dispute is usually arduous and costly, involving a large number of documents on both sides. Witness statements are usually ordered, and they are commonly drawn or settled by counsel. There are generally many factual issues involved as well as legal issues, often requiring complex legal argument.

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9 See *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54 at [28].

10 *Australian Country Homes v Vassiliou* (VCAT) 5 May 1999, unreported.

11 *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw* [2005] VSCA 165.

12 [2000] VSC 117.

The hearing will usually occupy several days. For these reasons, the "nature and complexity of the proceeding" is often submitted as the reason for making a costs order in favour of the successful party.

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

27. In the case of proceedings where final orders are made having regard to the proportionate liability regime, such as this case, there should be no expectation that owner's costs should be distributed in the same proportions as the respective liabilities of the parties. The costs discretion vested in the Tribunal is sufficiently broad that it is entitled to allocate costs in terms of the time occupied in dealing with the different claims and their outcomes.[13]

28. In respect of the strength of the second respondent's defence, I found at the hearing:

    (a) that he represented to the warranty insurer that he had entered into a contract with the applicant, when he never had,[14] and therefore his representation was misleading;

    (b) alternatively, if the nature of his representation to the insurer was that he *would* be the builder to be engaged to carry out the works (as a future matter), that he had no reasonable grounds for making it, [15] and therefore such a representation is taken to have been misleading; and

    (c) that his only defence to the effect that, once having provided the insurance certificates to the third respondent, he expected to be contacted by the applicant to carry out the works,[16] was entirely unsupported by his evidence.[17]

29. In these circumstances, I find that the second respondent made a claim in his defence that had no tenable basis in fact, within the meaning of section 109(3)(c) of the Act.

30. Had the second respondent been represented by a legal practitioner, I would have had little difficulty in finding that he ought to have been aware that the claim made in his defence had no tenable basis in fact or law. The second respondent is a litigant in person. Does this mean that the outcome should be different?

31. There is no rule of principle that prevents the ordering of the payment of costs by a litigant in person. In reaching his conclusion that a litigant in

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13 *Gunston v Lawley* (ibid) at [68]-[71].
14 See *Lu v Li* (ibid) at [59]-[64].
15 See *Lu v Li* (ibid) at [65]-[68].
16 See *Lu v Li* (ibid) at [55]-[59].
17 See *Lu v Li* (ibid) at [67].

person should pay costs following the court's dismissal of an application under the *Corporations Law* Hodgson CJ in *Bhagat v Royal & Sun Alliance Life Assurance Australia*[18] observed:

> I accept that a court does have to make allowances for the position of litigants in person, and try to ensure that a litigant does not lose out because of lack of expertise; although there is a limit to what the Court can do in that regard, while still remaining an impartial determinant of a dispute. The Court may in those circumstances refrain from making orders against litigants in person for conduct that might be considered as justifying orders for costs against represented litigants. By the same token, litigants in person can cause great hardship and expense to other parties, through making allegations and claims that lawyers would recognise as allegations and claims that could not reasonably or even properly be made, by not focussing accurately on the real issues in the case. Conduct of that nature by legally represented parties would often lead to orders for indemnity costs. Litigants in person may escape the consequence of indemnity costs, but I do not think that the circumstance that a party is a litigant in person is a ground for displacing the ordinary result that costs follows the event.

32. Similar considerations were emphasised by Heerey J in *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4)*[19]:

> A lack of knowledge of the law, unfamiliarity with court practice and a lack of objectivity are common traits of unrepresented litigants. A person's ability to [gain] redress should not depend on lawyerly skills or an ability to pay for legal representation. However, the court owes a duty to all parties to ensure that the trial is conducted in a fair and timely fashion and without significant difficulties and unnecessary expense for the parties against whom an unrepresented litigant proceeds.

33. Making due allowance, therefore, for the fact that the conduct of a litigant in person is being examined, I consider that it is fair to award costs against the second respondent because he was aware or should have become aware that his defence had no tenable basis in fact. In particular, he had no evidence to support the defence for which he was contending, other than his own uncorroborated assertions.

34. In addition, I made a finding of fact that reflected adversely on the *bona fides* of the second respondent when engaging in the conduct that led to the certificates of warranty insurance being issued to him. That was, that when the second respondent made representations to the insurer to the effect that he was or would be the builder, he was aware of the contents of the contract, and that he therefore knew that he was not a party to it. Seen in this light, his central submission to the effect that he expected to be requested by the applicant to carry out the works was made entirely without evidence and was, in my view, spurious. My rejection of his evidence reflected adversely on the second respondent, and has account of events that he attempted to establish.

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18 [2000] NSWSC 159 at [13].
19 [2007] FCA 1594 at [7].

35. I am satisfied in these circumstance that it is fair to award costs against the second respondent, although he is a litigant in person.

36. Notwithstanding my findings in respect of the proportionate liabilities of the parties in respect of the claim made in the proceeding, I have made no orders against the first respondent. This is because, having settled with the first respondent, and releases given, no order was sought by the applicant against the first respondent.

37. I make no order for costs in respect of the period from the commencement of the proceeding by the applicant on 7 May 2014 until 14 April 2015, during which period the applicant was proceeding only against the first respondent.

38. I will order that the second respondent must pay 60% of the costs of the applicant incurred after his joinder by the applicant on 14 April 2015.

39. The third respondent took no part in the proceeding. I will make an order that he must pay 25% of the applicant's costs since the time the date that the applicant proceeded against him on 26 October 2015.

40. I find that the only reason why the litigation continued after the applicant settled with the first respondent on 9 May 2016, was because of the unmeritorious position adopted by the second respondent. I therefore consider it fair that rather than order that the second respondent should pay 60% only of the costs incurred by the applicant after the date of settlement with the first respondent, the second respondent ought to pay 75% of such costs, with the 25% balance being paid by the third respondent.

41. I make the orders attached.

A T Kincaid
Member