VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D766/2001

CATCHWORDS

Domestic building dispute – party admitting liability and withdrawing counterclaim in writing – application by other party for judgment – basis upon which judgment can be given - nature and extent of admission – whether admission was withdrawn – whether and in what circumstances an admission can be withdrawn – no power of Tribunal to award interest unless conferred by enabling enactment – s.53(2)(b)(ii) of Domestic Building Contracts Act 1995 – power to award interest – application for costs – manner in which the proceeding was conducted relevant

[2006] VCAT 1049

APPLICANT	Mackie & Staff Pty Ltd
RESPONDENT	Dr Joachim Mueller
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for summary judgment upon admission Application for costs
DATE OF HEARING	18 January 2006
DATE OF ORDER	6 June 2006

ORDER

1. Order the Respondent to pay to the Applicant the sum of $133,654.55 plus $115,985.49 interest, making together the sum of $249,640.04.

2. Order the Applicant to pay the Respondent's costs reserved on 7 March 2005 and any costs thrown away by reason of the adjournment of the hearing on that day.

3. Save as aforesaid, order the Respondent to pay the Applicant's costs of this proceeding including reserved costs, such costs, if not agreed, to be assessed by the Registrar in accordance with the Supreme Court Scale on the following bases:
   (a) As to the costs up to and including first two days of the hearing which commenced on 18 October 2004, on a party / party basis; and

(b) Otherwise, on a solicitor / client basis.

4. Pursuant to s.74(1) of the Victorian Civil and Administrative Tribunal Act 1998, leave is granted to the Respondent to withdraw his counterclaim and it shall be marked withdrawn.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr P. Bingham of Counsel
For the Respondent	Mr G. Bloch of Counsel

REASONS FOR DECISION

Background

1. This proceeding concerned a claim by the Applicant Builder for the balance alleged to be due pursuant to a domestic building contract entered into between the parties for the construction of a substantial dwelling house in Mount Eliza. The matter came before me for hearing in October 2004 and, following submissions from the parties I decided that I would first determine as a preliminary point what the contract between the parties was.

2. The determination of this preliminary point took longer than the time that had been allocated for the full hearing. The matter was adjourned part heard on 29 October 2004 and, due to the non-availability of counsel and witnesses, did not resume until February 2005. Finally, on 3 March 2005 I made a preliminary finding as to what the contract was. The reasons for the finding are set out in a 28 page decision. In summary, the contention of the Respondent that the contract was a cost plus contract failed as did his claims for rectification and a determination that the Applicant was estopped from enforcing the full terms of the contract. It would be fair to say that the Applicant was successful in the preliminary hearing and the Respondent wholly failed.

3. Following the preliminary determination the matter was listed for hearing on several dates but was adjourned for a variety of reasons. Then, on 2 December 2005, on the application of the Applicant, an order was made (inter alia) requiring the Respondent to provide access to the subject premises to the Applicant's expert witnesses, its legal advisors and representatives. The order contained detailed directions for destructive testing and specific provisions were made setting out the manner in which the inspection should take place. Directions of a more general nature were also given and the matter was refixed for hearing on 6 March 2006.

4. On the evening of 6 December 2005 a letter was received by the Tribunal by facsimile transmission in the following form:

> "*We refer to the above matter.*
>
> *Our client instructs us to:*

withdraw his counterclaim; and

accept the applicant's claim".

An identical letter was received by the Applicant's solicitors.

This application

5. On 8 December 2005 the Tribunal received a facsimile transmission from the Applicant's solicitors referring to the Respondent's letter and requesting that the proceeding be listed for directions as soon as possible. Possible dates were suggested. A letter was received from the Respondent's solicitor on the same day setting out the dates upon which his counsel was available.

6. On 15 December 2005 a notice was sent to the parties to the effect that a directions hearing would be held at 9.15 a.m. on 20 December 2005. On that day Mr Bingham of Counsel appeared on behalf of the Applicant and Mr Champion, solicitor, represented the Respondent. Mr Bingham sought judgment on the Applicant's claim in the sum of $133,654.55, being the amount claimed plus interest, calculated at the contract rate, and indemnity costs. He also sought an order for the return of certain documents belonging to the Applicant that had been in the possession of one of the Respondent's witnesses, Mr Charlton.

7. Mr Champion indicated that he had received very late notice of the directions hearing and his Counsel, Mr Bloch was not available. He said the amounts involved were substantial and sought to have the hearing adjourned until Mr Bloch was able to be present. After some discussion I adjourned the matter to 18 January 2006.

The hearing

8. At the adjourned hearing Mr Bloch appeared for the Respondent and Mr Bingham again appeared for the Applicant. Mr Bloch indicated that the Respondent would withdraw his counterclaim and consent to judgment in the principal sum sought in the application namely, $133,654.55. He submitted there should be no order made for interest nor any order for the Applicant's costs.

9. Both Counsel made extensive written and oral submissions on the questions of costs and interest which I have found very helpful. At the outset I asked both counsel how I could make any order without hearing the full proceeding when there was no consent by the parties as to what should be ordered. I will deal with this problem first and then consider the claim for costs.

The effect of the letter

10. The letter from the Respondent's solicitors stating that he accepts the Applicant's claim does not purport to be an offer and even if it was, there is no suggestion that the Applicant accepted it. Mr Bingham submitted that the letter is an admission of the claim. I think this is correct. In the case of ***SFJ Pty Ltd v Brady Constructions Company Pty Ltd*** [2001] VSC 487 the Defendant's solicitors wrote an open letter to the Plaintiff's solicitor on the following terms:

> *"I refer to our recent communications in the above regard. We confirm that we are instructed by our clients to admit liability in this matter. We advise that the issue of quantum remains to be finalised".*

11. Following receipt of this letter the Plaintiff's solicitor filed a summons in the Court seeking an order pursuant to the provisions of Rule 35.04 of the ***Supreme Court rule***s. That rule provides as follows:

> *"35.04 Judgment on Admissions (1.1) Where a party makes admissions of fact in a proceeding, whether by his pleading or otherwise, the Court may, on the application of any other party, give the judgment or make the order to which the Applicant is entitled on those admissions. (2) The Court may exercise its powers under paragraph (1) without waiting for the determination of any other question in the proceedings".*

12. The Listing Master granted the application and ordered that judgment be entered against the Defendants with damages to be assessed. On appeal, Beach J pointed out that the Defendants did not seek to resile from the admission of liability made in the letter but contended that the order could not have been made because it was not an admission made in a proceeding. His Honour rejected that contention and said (at paragraphs 14 ff.):

"An admission of liability is comparable to a plea of guilty to a criminal charge. It is an admission of every fact a Plaintiff would otherwise be required to establish to entitle the Plaintiff to the entry of judgment in his or her favour".

13. His Honour referred to the comments of Barwick C J in ***re Registered Trademark "Certina"*** (1970) 44 ALJR 191 as authority for the proposition that admissions upon which the Court may be asked to act under a similar rule were not limited to admissions formally made in pleadings or in response to a Notice to Admit. His Honour concluded (at paragraph 21):

"I can see no good reason for not construing the words "in a proceeding" when used in Rule 35.04 as meaning "in reference to a proceeding in relation to a proceeding or with regard to a proceeding".

14. There is no equivalent to Rule 35.04 in the rules of this Tribunal. Under the ***Victorian Civil and Administrative Tribunal Act 1998*** ("the VCAT Act") The Tribunal has power to summarily dispose of proceedings by giving leave to withdraw (s.74), summarily dismiss unjustified proceeding (s.75) or summarily dismiss for want of prosecution (s.76) but in this instance it is the Applicant who is seeking summary determination. By s.78 of the VCAT Act the Tribunal may determine proceedings in favour of an applicant if it believes that a respondent to a proceeding is conducting it in a way that unnecessarily disadvantages the applicant but that is not the situation here.

15. The general procedure of the Tribunal is governed by s.98 of the VCAT Act which provides as follows:

"(1) The Tribunal—

(a) is bound by the rules of natural justice;

(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;

(c) may inform itself on any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the

requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

(2) Without limiting sub-section (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.

(3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.

(4) Sub-section (1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice."

16. The function of the Tribunal is to decide each case in accordance with the principles of natural justice and it is required to do so with as little formality, technicality and as much speed as the circumstances of the case permit. It would be inconsistent with this requirement for speed and economy to require formal proof of matters that are the subject of admissions. It would also be inconsistent with the section to allow a proceeding to continue when the applicant's entitlement to relief has been admitted by the Respondent. In such circumstances the appropriate course would be to determine the admitted claim in favour of the applicant. Accordingly, notwithstanding the absence of any provision corresponding to rule 35.04 I think the Tribunal should proceed in a similar way.

17. A court has a discretion whether to give judgment on an admission, *"[b]ut in a clear case a proper exercise of the power will obviate the delay involved in a hearing and avoid unnecessary expense"* (see ***Williams Civil Procedure*** R35.04.5). In cases before this Tribunal that are in the Domestic Building List, in addition to the sections already referred to, powers are conferred on the Tribunal by s.53 of the ***Domestic Building Contracts Act 1995*** ("the DBT Act"). Subsection (1) of that section states:

"The Tribunal may make any power it considers fair to resolve a Domestic Building Dispute."

Subsection (2) sets out certain orders the Tribunal may make *"without limiting"* the power conferred by subsection (1). Amongst these is, as Mr Bloch pointed out, a power to award *"damages in the nature of interest*".

18. In deciding whether or not to give judgment in the proceeding on an admission of the claim, the Tribunal has a discretion either under s. 53, in the case of a Domestic Building dispute, or in any case, under s.98. In the exercise of this discretion, the Tribunal should be guided by the considerations referred to in s.98. Generally, the avoidance of unnecessary delay and expense will militate in favour of giving judgment.

Withdrawal of an admission

19. Leave is required to withdraw admissions made pursuant to r 35.02(1) and other rules of court (see ***Williams*** r 35.1.45). The early authorities suggested that leave was required to withdraw an admission even if it was made outside the rules of court. In ***Harvey v Croydon Union Rural Sanitary Authority*** (1884) 26 Ch.D 249 an admission was made in open court in a Chancery suit but the party making it sought to withdraw it before judgment was passed and entered. The Court of Appeal held that it could not be withdrawn in the absence of mistake or some other sufficient ground Cotton LJ said (at p. 255:

> *"If a consent is given through error or mistake, there can be no doubt that the court will allow it to be withdrawn if the order has not been drawn up. But the question is very different whether, when counsel, being duly authorised have given a consent there being no mistake or surprise in the case , the party can arbitrarily withdraw that consent."*

and later on the same page:

> *"…it must be understood henceforth to be the rule that a consent given by the client cannot be arbitrarily withdrawn."*

In the same case Lord Coleridge agreed and added that it was "quite settled" that in the Queens Bench Division, such a consent could not be withdrawn at all.

20. A much less stringent view was expressed by Denning MR in the more recent case of ***H. Clark (Doncaster) Ltd v Wilkenson*** [1965] 1 Ch 694. That was another case where the admission was made by counsel. His Lordship said (on p.703):

"An admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn…But otherwise an admission can be withdrawn…It can be withdrawn if the other party has not been prejudiced, or indeed, if any prejudice can be compensated by costs."

Danckwerts LJ and Salmon L.J. agreed.

21. This Tribunal is a creature of statute and although it must decide cases before it according to normal legal principles, where any such principle concerns the manner in which a hearing should proceed or the manner in which a party should be allowed to prove his case, care must be taken to ensure that there is no inconsistency between the legal principles to be applied and the statutory framework within which the Tribunal operates. However I do not believe that it would be inconsistent with s.98 to hold a party to an admission if it has not been withdrawn or to refuse to permit it to be withdrawn if the withdrawal would cause prejudice to the other party for which that other party could not be compensated by an order for costs.

22. Mr Bingham submitted that the Applicant would be prejudiced if the Respondent were permitted to withdraw the admission. He pointed out that, because the admission was made, the Applicant cancelled arrangements for the subject premises to be inspected by a large number of experts who had been assembled at considerable expense. He also pointed out that the trial date was lost and if it were now refixed a very substantial delay would have been caused with the usual evils that entails in expense and the fading of the recollection of witnesses in a case that has already been very extensively delayed.

23. A party's right to contest a case brought against him is fundamental. In order to justify depriving him of that right by preventing him from withdrawing an admission he has made, substantial prejudice to the other party would need to be demonstrated; that is, prejudice going beyond mere annoyance or inconvenience. However I do not need to consider whether or not to allow the admission to be withdrawn because I think a proper analysis of the dispute I have before me is not

that the Respondent is seeking to withdraw his admission but rather, that he disputes what it means. Mr Bloch has made no application to withdraw it and I do not understand from his submissions that the Respondent wants to resile from the letter his solicitors wrote on his behalf. Indeed, it is clear that the Respondent does not wish to proceed with the hearing and does not propose to call any evidence. The real argument between counsel was what the admission means and that is what I have to determine.

What does the letter mean?

24. The terms of the letter are quite unequivocal. They communicate the fact that the Respondent is withdrawing his counterclaim and accepting the Applicant's claim. The withdrawal of a claim requires the leave of the Tribunal (see s.74(1) of the VCAT Act). By s.74(2)(b) the Tribunal may make an order that the withdrawing party pay all or any part of the costs of the other party to the proceeding.

25. The words used in the letter do not suggest that it is to be an acceptance of the claim some time in the future; rather, it appears to be a present acceptance of the claim. It does not qualify the words "the applicant's claim" and so must be interpreted to mean all of the Applicant's claim as it was when the communication was made.

26. I think "the applicant's claim" at that time must mean what it was claiming, as set out in the prayer for relief at the end of its Amended Points of Claim dated 25 February 2003. For the sake of brevity the items making up the claim may be summarised as follows:

    (a) The sum of $133,654.55, which is claimed on four alternate bases. It is not disputed that there should be judgment for that.

    (b) Various determinations of dates relevant for the purpose of various provisions in the contract. No judgment is sought in regard to these.

    (c) Orders restraining the Respondent from calling upon or dealing with a bank guarantee. No judgment is sought in regard to this.

    (d) An order for the return of the bank guarantee. No judgment is sought in regard to that.

(e) Interest on any sum ordered pursuant to the claim in (a) at the rate provided by the contract or by statute. Judgment is sought in regard to this at the contract rate of 15%. This is disputed.

(f) Costs. This is also disputed.

(g) Such further or other orders as the Tribunal deems appropriate. The order sought for the return of documents is presumably intended to be under this head. The Respondent has agreed to return them.

27. The facts relied upon to justify the granting of this relief are set out in the preceding pages of the document. The facts alleged in regard to the claim for interest are as follows:

(a) There were terms of the contract that:

(i) the Respondent was to pay the Applicant's progress claims within 14 days of their issue;

(ii) interest on outstanding progress claims was payable at 15% per annum;

(b) the Respondent failed to pay the following progress claims:

Date	**Amount**
29/05/2000	$72,255.85
31/07/2000	$ 9,517.20
31/08/2000	$15,304.30
20/12/2000	$36,577.20

[These progress claims total $133,654.55, the principal sum claimed.]

28. There is no mention in the Points of Claim or prayer for relief about the documents sought to be returned, no doubt because their existence only came to light during the hearing. Since they were not part of the "claim" they cannot be part of any admission and so I cannot make an order for their return on a motion for judgment. The Respondent has agreed to return them. The Applicant must be content with that or commence fresh proceedings for their return.

The claim for interest

29. Neither side has sought to adduce any evidence. Instead Mr Bingham moves for judgment on the basis of the admission constituted by the letter. He says that the claim for interest is part of the claim and so has been admitted. Further, he asserted that, at the hearing on 20 December, the Respondent's solicitor, Mr Champion accepted that interest was payable and that it was only a matter of calculation. Mr Bingham suggested that one of the bases for adjourning the matter on 20 December was that interest would be running in favour of the Applicant. I have listened to the recording of the proceeding on that day, as I told the parties I would, and it is true that similar words to those suggested were said, but they were said by me, not by Mr Champion. I cannot spell out from what Mr Champion said on that day any acknowledgment that the claim for interest was admitted or not resisted.

30. Mr Bloch denied that the letter constituted an admission of the claim for interest. He said that the claim referred to in the letter as being admitted was the principal sum claim, not interest accruing upon it. He submitted that interest is usually looked at apart from the principal claim, much, he said, as costs are separately regarded. He submitted that interest can only be awarded pursuant to s.53 (2)(b)(ii) of the DBC Act. He said that under that section I had a discretion whether to award interest and that I should not in this case because of the manner in which the case had been conducted, the Applicant's delay in commencing the proceedings and then serving them on the Respondent and the failure of the Applicant to properly document the transaction which made disputation between the parties more likely.

31. In response to my question to both counsel about how I could determine the dispute over interest without hearing evidence, Mr Bloch made some suggestions, including an invitation to consider the evidence already before me. He said the Respondent would call no further evidence. Mr Bingham objected to such a course and reaffirmed his reliance on the admission constituted by the letter.

32. I can only determine this motion for judgment for interest on the basis upon which it is made that is, on the admission. I should determine whether or not the

Respondent has admitted liability for interest. That in turn depends upon whether the claim admitted by the letter includes the claim for interest. I cannot look at any evidence apart from that because it is clear from the witness statements and what I have been told that if the case were to proceed there would be more evidence to be called. I cannot decide part of the case on only part of the evidence.

33. It must be borne in mind that, where summary determination is sought on the basis of an admission the Tribunal is acting upon admitted facts, not proven facts. The admission must be sufficient to entitle the applicant to relief (see ***Neville v Matthewman*** [1894] 3 Ch 345). Mr Bingham is seeking orders on the basis of admissions, not on the basis of any evidence led. Facts not admitted must be established by evidence which would have to be led in the usual way and be subject to cross-examination. The Respondent would have to have an opportunity to answer it and adduce contrary evidence. That would be done by re-listing the matter for a full hearing but neither party has requested that I do that. There is no evidence to be called by either side and so both parties are confined or bound by the admissions made in the letter.

34. The prayer for relief includes as part of the claim a claim for interest, either under the contract or by statute. Since the claim is admitted, the admission includes that claim for interest. However the interest is claimed on two different bases and each would be calculated at a different rate.

What rate?

35. No power to award interest or damages in the nature of interest has been conferred upon this Tribunal by the VCAT Act. Such a power must be conferred by an enabling enactment relevant to the particular case (see ***Alphaprint Pty Ltd v Streamline Partitioning*** [2000**]** VCAT 398 per Mc Namara DP). For the purpose of this case, the power is to be found, as Mr Bloch submitted, in s.53 (2)(b)(ii) of the DBC Act, already referred to. Mr Bloch suggested that making an award under that section requires the exercise of a discretion by the Tribunal. That is not strictly so. The Tribunal must find that it is "fair" in the circumstances to award interest and such a finding would not be made until the conclusion of the case. Hence any interest awarded pursuant to that section could not really be sought

until then. A claim for such interest in a prayer for relief is not a claim for something to which the Applicant is presently entitled but rather, notice to the Respondent that an application will be made for an award of interest which may or may not be successful. A letter sent before the case has been determined admitting the claim is more likely to refer to a claim for interest under the contract which was then claimed to be due rather than an alternate claim for interest that would be made at the conclusion of the case and the award of which would depend upon a future finding by the Tribunal. Further, the claim for statutory interest is only sought in the alternative. Since the claim is admitted, recourse need not be had to the alternate claim. I think the admission is of the claim for interest due under the contract, at the contract rate of 15%.

36. Mr Bingham provided me with calculations of the interest made by his instructor at the contract rate, allowing 14 days for the period the Respondent had to pay the claim. I think this methodology is correct but the calculation needs to be made up to the date of this order. On this basis I assess interest at 15% up to and including 6 June 2006 at $115,985.49 on all of the outstanding progress claims.

The claim for costs

37. Mr Bingham seeks an order for the Applicant's costs of the whole proceeding on an indemnity basis. Mr Bloch opposes the application and says that the Applicant should be ordered to pay the Respondent's costs because of the many breaches by the Applicant with the requirements of the ***Domestic Building Contracts Act 1995*** and the manner in which the case was conducted.

38. Both sides filed affidavits as to a telephone conversation between Mr Mackie of the Applicant and the Respondent in which, according to Mr Mackie, the Respondent admitted that there was nothing wrong with the house, that it had been built without defects, that he knew he was wrong in taking the action he had and was sorry for what he had done, referring, according to Mr Mackie, to the commencement and continuation of the proceeding. The Respondent filed an affidavit in which he agreed that he telephoned Mr Mackie in an attempt to resolve the matter but denied having made any statement to the effect alleged by Mr Mackie. He said there were serious defects in the design and construction of

the house. An affidavit by an architect, Mr Alsop, was also filed on behalf of the Respondent setting out evidence that he would have given had the matter proceeded.

39. Submissions were made by both counsel as to whether or not the conversation was privileged. Both Mr Mackie and the Respondent were present but after I queried the value of the evidence and the utility of the process where it was one word against the other, neither of them was cross-examined. Even if the conversation is not privileged and I accept Mr Mackie's account of what was said I cannot see how it assists me. The use sought to be made of it was that the defence and counterclaim were vexatious and had no substance at all. However it is clear from the evidence led to date that there were some problems with the house although their extent was disputed. There were also real disputes about the air conditioning and the landscaping, although I cannot say how I would have decided them. It was also not disputed by the Applicant that the form of contract used and the manner in which the transaction proceeded breached many provisions of the DBC Act. Whatever remorse the Respondent might have expressed in the telephone conversation, as to which I make no findings, it is not accurate to say that the defence and counterclaim lacked any substance at all and were vexatious.

The offer of compromise

40. On 8 July 2004 the Applicant served an offer of compromise upon the Respondent to the effect that it would accept $95,000 plus party/party costs on County Court Scale "D". The offer was open for acceptance for 14 days after service. Mr Bingham relied upon s.112 of the VCAT Act which is as follows:

> ***"Presumption of order for costs if settlement offer is rejected***
> *112. Presumption of order for costs if settlement offer is rejected*
> *(1) This section applies if-*
> *(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and*
> *(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 the 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".

The orders to be made are considerably less favourable to the Respondent than the offer of compromise.

41. Mr Bloch submitted that the offer was not in accordance with s.112 because it did not comply with s.113(4) in that it did not specify when the money was to be paid. Mr Bingham submitted that that sub-section should only apply when the offeror is to pay the money but it is not so limited by its wording and I think Mr Bloch is right. However, although not complying with the section it is nonetheless an offer to compromise the matter, albeit not in accordance with the Act. Had the Respondent accepted the offer when it was made a great deal of costs would have been saved. It is well settled that an offer to compromise a proceeding that is not accepted is relevant to the question of costs where the other party does no better at trial (***Cutts v Head*** [1984] Ch290).

42. Mr Bingham submitted that the Respondent should pay indemnity costs because his case was untenable. In this regard he relied on ***Colgate Palmolive Company v Cussons Pty Ltd*** (1993) 46 FCR 225. The fact that a party carries on untenable litigation is a significant factor in the awarding of costs. In ***Fountain Selected Meats Pty Ltd v International Produce Merchant Pty Ltd*** (1998) 81 ALR 397 Woodward J said (at p.401):

> "I believe that it is appropriate to consider awarding "solicitor" and "client" or "indemnity" costs whenever it appears that an action has been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or to

clearly establish a law. Such cases are, fortunately, rare. When they occur, the court will need to consider how it should exercise its unfettered discretion".

43. In ***Coshot v Learoyd*** (Federal Court of Australia 23 March 1999 per Wilcox J – unreported), in considering a "Calderbank" offer said at p.17 of the judgment:

> *… it does not follow that non acceptance of a Calderbank (or even an Order 23 offer) must lead to an order for indemnity costs: the court must still consider the whole of the circumstances. However, whether or not it is correct to talk about a "prima facie" presumption, non acceptance of an Order 23 offer should at least be regarded as providing the offeror a good start in the task of persuading the court to award more than party/party costs".*

44. I considered these authorities and others in the case of ***Paleka v Suvak*** [2000] VCAT 58 and concluded:

> *"Generally, party/party costs should be awarded. Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party/party costs if they are unsuccessful. Solicitor/client costs are ordered when the party against whom the order for costs is being made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy. That is, the circumstances justify a harsher order than even solicitor\client costs".*

45. In the recent case of ***Pacific Indemnity Underwriting v Maclaw No 51 & Anor*** [2005] VSCA 165 the Court of Appeal suggested, albeit in a different context, that party/party costs were the norm.

The Respondent's conduct

46. Mr Bingham said the Respondent "has accepted the justice of the Applicant's claims" and abandoned its counterclaim, he has made admissions as deposed to by Mr Mackie and that if he had any genuine concern about defects he would have claimed on his insurer. Mr Bingham said I should infer that he withheld payment and then defended the proceeding in an attempt to obtain a discount on the price of building the house. He suggested that the Respondent had succeeded in this tactic in regard to fees due to the architect and a geotechnical engineer but I am not launching into an enquiry into the dealings the Respondent had with these

people. I am concerned with his conduct vis a vis the Applicant in regard to this case.

47. As Mr Bloch pointed out, there are many reasons why a party might abandon the defence of a proceeding, particularly one as lengthy and complex as this. In his affidavit the Respondent gave reasons for doing so which were not related to any belief on his part that his case lacked substance. Mr Mackie's allegations were denied and it is simply not possible for me to decide which view to accept. Speculating as to the Respondent's motives in abandoning his counterclaim and the defence of the Application is not going to assist me. Although it is relevant to consider the relative strengths of the Applicant's and the Respondent's cases I cannot safely do that because I have not heard all of the evidence. The manner in which the case was conducted is certainly relevant and I will now proceed to consider that.

48. Mr Bingham pointed to the failure of the Respondent to pay his share of the transcript cost or the costs I had ordered him to pay until I specifically directed him to do so. He also referred to a number of false and inflated claims the Respondent made in his original counterclaim that were later withdrawn at the hearing. I found the Respondent had made these claims in his original material and that they were unjustified. On that basis I considered his credit as a witness to be adversely affected. My reasons for that view are set out in the reasons for decision given earlier. Insofar as these matters might have caused the Applicant to incur extra costs they are relevant, otherwise they are not. The only extra cost I find in this regard is the cost of obtaining the evidence of Mr Parrhammer who was called to rebut a claim that turned out to have been quite false.

The "cost-plus" issue

49. The significant criticism to make of the Respondent's case was his insistence that the contract was a cost plus contract. This allegation was made for the first time in Amended Points of Defence and Counterclaim filed on 5 August 2005. This was followed by an application on behalf of the Respondent for further discovery to seek documents as to (inter alia) what the actual cost of the building works was. This was a very substantial shift in the Respondent's case made very late, the

hearing being listed for 18 October. The Respondent was ordered to pay the Applicant's costs of this further discovery.

50. Shortly after the hearing commenced it became apparent that the question whether or not the contract was a cost plus contract or a fixed price contract would have to be determined separately because Mr Bloch proposed to cross-examine the Applicant's witnesses as to the cost to the Applicant of carrying out each item of the building work and materials. This would have had the affect of increasing the length of the hearing very substantially indeed. Mr Bingham applied for the point to be dealt with separately and Mr Bloch opposed the application.

51. As it turned out I determined that the contention that it was a cost plus contract was without merit. Had I not split the case in this way the Applicant would have been put to enormous trouble and expense in producing evidence that would not have been of any assistance in determining the matters that were really in issue. Insofar as the costs of the hearing were directed to the argument that the contract was a cost plus contract they were wholly wasted pursuing an unmeritorious claim by the Respondent. However, much of the evidence given was also relevant to the main point in issue so not all the costs incurred during the hearing were wasted.

The changes to the counterclaim

52. Mr Bingham also complains about the manner in which the counterclaim was pursued. Until shortly before the hearing commenced it appeared that his case was based upon an expert report from Rider Hunt and the Applicant's expert evidence was focussed on what that report had said. Shortly before the hearing another expert, Mr van Ravenstein was engaged and produced a further report dated 8 October 2004, which costed the defects at $116,193.28, although not all of the defects were costed. This was only 10 days before the hearing. In October 2004, Further Amended Points of Defence and Counterclaim were filed and served, claiming $250,783.27 in damages, which included the figure calculated by Mr van Ravenstein. After the preliminary point was determined the counterclaim grew even more with the filing of further reports. The changing nature of the Respondent's case in regard to the counterclaim must inevitably have caused

considerable additional expense in that, as new allegations were made, they had to be investigated and further reports provided.

The various adjournments

53. On 3 March 2005 a very lengthy supplementary report was filed on behalf of the Applicant by its existing expert Mr Ellis which attempted to answer the new allegations although it did contain some new material. I can appreciate the difficulties the Mr Ellis was labouring under but this was only 4 days before the date fixed for the resumption of the hearing after the determination of the preliminary points. I adjourned the hearing to 15 June and directed the Respondent to file and serve any expert's report in reply by 18 April 2005. On 14 June 2005 I vacated the hearing date for the following day because the Respondent was not ready. I ordered the Respondent to pay the Applicant's costs thrown away but reserved the costs of the application itself since directions had been given.

54. On 26 October 2005 the matter came before me on an application for an order for inspection. It was then apparent that the defects complained of were growing, both in number and severity, and so I ordered the Respondent to file and serve further particulars of his counterclaim with a self executing order to secure compliance. An order for access was made and the trial date was adjourned to March 2006.

55. On 2 December 2005 the matter came before me again on a complaint by the Applicant that access to the premises was not provided by the Respondent and seeking to strike out paragraphs of the Counterclaim that appeared to be designed to raise yet again the notion that the contract was a cost-plus contract. I gave directions for inspection including permitting destructive testing. The application to strike out paragraphs 34-40 of the points of counterclaim was reserved for further consideration. An application to have the Respondent dealt with for contempt was referred to the Registrar for listing before a Judicial Member. The letter was received by the Registry from the Respondent's solicitors admitting the claim shortly afterwards and so the strike out application never had to be determined.

56. Reviewing the conduct of the matter since the commencement of the hearing I am satisfied that the costs have been increased considerably due to the growing and changing nature of the counterclaim, obstructiveness by the Respondent in refusing access to the premises and his continuing to take unmeritorious points in defence, even after the preliminary point had been decided against him. The one time that I think he was in the right was the adjournment of the 7 March hearing when the matter was adjourned principally because of the late service of Mr Ellis' report, which was not just responsive as was suggested at the time but extended to other matters that could not have been dealt with in time.

The conduct of the Applicant

57. Mr Bloch submitted that much of the disputation was caused by the state of the documentation of the transaction itself which was the responsibility of the Applicant. There is some justification in this. It was a domestic building contract but the DBC Act was not complied with in numerous respects. Nevertheless, a formal contract was signed and then, when the scope of works was reduced by deleting the swimming pool and pool house, a substitute contract was signed. Non-compliance with the Act might have entitled the Respondent to some relief if the matter had proceeded but it was no reason for taking such an meritorious line of defence, nor did it justify him conducting the case in the manner in which he did. I do not accept Mr Bloch's submission that breach of the Act should of itself impact on costs except in regard to the cost of proving the breaches and no evidence was ultimately led by the Respondent.

Conclusion

58. I am dealing with the costs of a proceeding where, due to the admission of the Respondent the Applicant has succeeded. Not having heard all of the evidence I am not able to make findings on particular issues. The enormous expense of conducting this litigation which is due in no small way to the manner in which the Respondent has chosen to conduct it is such as to warrant an order for costs. Much of this conduct would warrant an order for indemnity costs but that would be going too far because not all the costs of the preliminary hearing were wasted and his conduct thereafter, although vexatious, was not blameworthy enough to warrant such an onerous order. Weighing all of the above considerations I think it

is fair to make an order for solicitor/client costs with respect to the hearing that commenced on 18 October 2004 and continued on 7 and 8 February 2005, including the submissions made, save for the first 2 days of that hearing, which shall be assessed on a party/party basis. In doing this I am attributing the first two days to the case as a whole, as distinct from the preliminary point. It is impossible to make a precise division between the two but I think that would be fair. Costs of the conduct of the proceeding apart from the hearing itself shall also be on a solicitor/client basis, apart from the costs of the adjournment of 7 March 2006. As to that, the Applicant will pay the Respondent's costs but there is no reason to assess those otherwise than on the normal party/party basis. Given the magnitude and complexity of the litigation and the amounts at stake the Supreme Court scale is warranted.

SENIOR MEMBER R. WALKER