VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D190/2007

CATCHWORDS

Domestic building, costs, s109 of the *Victorian Civil and Administrative Tribunal Act* 1998, whether fair to make an order for costs, offer purporting to conform to s112, 113 and 114, discretion, *Calderbank* offer.

APPLICANT	RF Construction Management Pty Ltd (ACN: 074 490 958)
FIRST RESPONDENT	Castlemar Investments Pty Ltd (ACN: 105 053 469)
SECOND RESPONDENT	Dalil Pty Ltd
THIRD RESPONDENT	Avi Rauchberger
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Determination on the papers
DATE OF ORDER	8 December 2009
CITATION	RF Construction Management Pty Ltd v Castlemar Investments Pty Ltd & Ors (Domestic Building) [2009] VCAT 2537

ORDERS

1 The First Respondent must pay the Applicant's costs up to and including 29 June 2007, including reserved costs, to be agreed.

2 The Applicant must pay the First Respondent's costs of and associated with the hearing of 28 April 2009, including reserved costs, to the extent that they concern the Applicant's application under s119 of the *Victorian Civil and Administrative Tribunal* Act 1998, to be agreed.

3 Failing agreement costs are to be assessed by the Principal Registrar pursuant to s111 of the VCAT Act on a party-party basis in accordance with County Court Scale D.

4 There is otherwise no order for costs.

5 Upon payment by or on behalf of the First Respondent of the net sum which it is ordered to pay to the Applicant, or earlier by agreement between the Applicant and the First Respondent, the Third Respondent will be released from his undertakings to the Tribunal of 3 May 2007.

6 There is liberty to apply with respect to Order 5 and any such application will be heard by Senior Member Lothian.

SENIOR MEMBER M. LOTHIAN

REASONS

1 On 26 November 2008 I ordered that Castlemar, the First Respondent, pay the applicant Builder the nett sum of $55,869.64. I reserved interest and costs. On 18 August 2009 I ordered, among other things, that Castlemar pay the Builder a further $6,950.38 for interest. The total payable by Castlemar to the Builder was therefore $62,820.02.

2 I ordered the parties to file and serve written submissions. Castlemar, Dalil Pty Ltd and Mr Rauchberger ("the Castlemar parties") filed a submission on 1 September 2009. The submission revealed that Castlemar made an offer ("Castlemar offer") to settle both proceedings[1] on 14 June 2007. They say that it is an offer to which s112 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") responds and which was not accepted by the Builder.

3 They seek orders that the Builder pay their costs from 14 June 2007 on an indemnity basis, there be no order for costs before 14 June 2007 and that their Counsel be certified for at $3,500 per day for the hearing and $350 per hour for preparation.

4 On 29 September 2009 the Builder filed submissions denying the efficacy of the Castlemar offer, referring to a partial settlement agreement ("November 2008 agreement") and seeking costs pursuant to s109 of the VCAT Act.

5 On 30 September 2009 the proceeding came back before me for a compliance hearing, as the orders had required both parties to file and serve submissions by 1 September 2009. Castlemar was given the right to file a response to the Builder's submissions of 29 September 2009 by 9 October 2009, which the Castlemar parties did. I now determine the costs issue on the papers, as discussed at the compliance hearing of 30 September.

COSTS UNDER S109

6 The Builder submits that it is entitled to costs of the proceeding under s109 of the VCAT Act "if the Tribunal accepts that the Castlemar offer is not valid for any of the reasons [submitted by the Castlemar parties]". For the reasons given below I find that none of the Castlemar parties are entitled to costs under the Castlemar offer, but that it has protected thenm from paying costs from a reasonable time after the date of the offer.

7 Section 109 of the VCAT Act states in part:

s.109:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.

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[1] This proceeding and proceeding D204/2007 which was consolidated into this proceeding on 3 May 2007. See under the heading "The Castlemar Offer" below for the terms of the offer.

(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 subsection (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.

8 The Builder bases its claim on either or both of s.109(3)(d) and (e) of the Act.

9 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should 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. [emphasis added]

(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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

s.109(3)(d) – The Nature and Complexity of the Proceeding

10 The Builder submits, and I accept, that the proceeding has been long and complex. The hearing of the substantive issue took seven days and the sum

awarded to the Builder is substantial, albeit significantly less than the amount claimed. There were a large number of separate items requiring consideration and some were individually of substantial value. I find that the nature and complexity of the proceedings, and the degree of the Builder's success, do justify an award of costs in its favour, even though its net recovery was less than half its claim.

s.109(3)(e) – Any Other Matter the Tribunal Considers Relevant

11 The Builder also submitted that there were factors that should be taken into account under s109(3)(3) of the VCAT Act. These factors included the behaviour of Castlemar's architect, the credibility of the evidence of the architect and Mr Rauchberger, and the apparent attempt of the Castlemar parties to leave the Builder with a worthless determination against Castlemar alone, in circumstances where Mr Rauchberger had admitted during evidence that Castlemar had been paying the legal costs and would have nothing by the end of the hearing.

12 In this case I do not take these matters into account as there have been credibility issues with the evidence of each of the major witnesses as to fact, including Mr Feldman for the Builder.

Fair to make an order for costs

13 I find that it is fair to make an order for costs in favour of the Builder against Castlemar[2] to a date two weeks after the Castlemar offer. For the reasons discussed below, I find that it ceased to be fair for the Builder to be entitled to costs a reasonable time after the Builder received the offer.

THE NOVEMBER 2008 AGREEMENT

14 About a month before I published the decision of 26 November 2008, I instructed the Principal Registrar to write to the parties, inviting them to address me on whether Castlemar entered the building contract as the agent of Dalil. On 13 November 2008 the parties agreed:

> 1. In consideration of [the Builder] agreeing to submit to the Tribunal the document annexed hereto and marked "A" called "Agreed Response to VCAT Letter Dated 28 October 2008", Dalil and [Mr Rauchberger] agree to pay to [the Builder] all amounts which Castlemar may be ordered to pay to [the Builder] in this proceeding.
>
> 2. Dalil and [Mr Rauchberger] release [the Builder] from any claim for costs of the proceeding.

15 The Builder submits that recital F of the November 2008 agreement is relevant:

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[2] Although costs are ordered against Castlemar alone, Dalil and Mr Rauchberger are not released from any obligation to pay costs under the November 2008 agreement.

> The respondents acknowledge that Castlemar entered into the contract as agent for Dalil.

The relevant submission by the Builder is:

> ... the Offer dated 14 June 2007 was made by Castlemar before Mr Rauchberger and Dalil were joined as parties to the proceeding.
>
> As Castlemar was Dalil's agent, and because Dalil has released the [Builder] in respect to costs, Castlemar is deemed to have also released the Applicant.

16 I reject the Builder's submission for two reasons. First, the parties agreed Castlemar was Dalil's agent for the purpose of entering the contract. It does not follow that Castlemar was Dalil's agent for any other purpose and the Builder sued Castlemar directly; not as the agent of Dalil. Second, if the parties all intended Castlemar to give up any entitlement to costs, they would have said so in the agreement. Instead, the other two Castlemar parties were specifically mentioned and Castlemar was not. Castlemar referred me to *Karam v ANZ Banking Group Ltd* [2001] NSWSC 709 at [406] which is on point[3].

17 While the agreement does not release the Builder from any liability it might have to Castlemar, I accept the Builder's submission that it has no liability for the costs of Dalil and Mr Rauchberger, other than any costs previously specifically ordered. I note that the Castlemar parties withdrew their application for Dalil's and Mr Rauchberger's costs on 9 October 2009.

THE CASTLEMAR OFFER

18 Excluding the formal parts, the Castlemar offer dated 14 June 2007 and sent by facsimile to the Builder's solicitors was:

> 1. The Respondent [Castlemar] will pay the Applicant [Builder] $100,000.00 in full and final settlement of the proceedings D190/2007 and D204/2007 ("the settlement sum").
> 2. This offer is made with respect to both proceedings D190/2007 and D204/2007.
> 3. This Offer is made on a without prejudice basis within the meaning of Section 113(1)(b) of the Victorian Civil & Administrative Tribunal Act ("the Act").
> 4. The settlement sum will be paid within 48 hours upon execution of the Terms of Settlement unless the terms of settlement are executed on a public holiday or a Friday, the payment will be made on the following day or Monday after the weekend. [sic]

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[3] "In construing a release … the Court should ascribe to the release the meaning that the release would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time that they signed the document containing the release. … general words in a release are limited to what was specifically in the contemplation of the parties at the time the release was given."

5. This offer shall be open for acceptance until the expiration of the period of 14 days.

6. This offer is made and served in accordance with Part 4 Division 8 of the Act.

19 S112 of the VCAT Act provides in part:

> 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. [Emphasis added]
>
> (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;

20 The Castlemar offer is $100,000.00 with no mention of costs. I therefore find that it was an "all in" offer – an offer inclusive of everything Castlemar might pay or forgo, including costs. As I have found that the Builder is entitled to costs under s109 before the Castlemar offer, under s112(3) I must take into account the costs I would have ordered to the date the offer was made.

21 The Builder commenced proceedings on 23 March 2007, Castlemar commenced proceedings on 27 March 2007 and the Castlemar offer was made less than three months later. By the date of the Castlemar offer there had been two appearances - a directions hearing and a compulsory conference - and the only orders were to attend the compulsory conference and prepare position papers for the compulsory conference.

22 Although neither party has provided an estimate of the costs that would have been ordered on a party-party basis on County Court Scale D, they cannot have been equal to or greater than $37,179.98 – the difference between the Castlemar offer and the orders, exclusive of costs. I therefore find that the orders are not more favourable to the Builder than the Castlemar offer.

The form of the Castlemar offer

23 I note that but for the amount to be paid and the formal parts, the Castlemar offer is identical to an earlier offer made by the Builder to Castlemar on 4 June 2007. The only differences in the substantive words of the offer are that in paragraph 1 the Builder sought $135,000 and in paragraph 4 it sought to be paid in 24 hours rather than 48. It is clear that Castlemar copied the text of the Builder's offer because in the details immediately under "Offer of Compromise", Castlemar has identified itself as "The Applicant".

Time for payment – s113(4)

24 S113(4) provides:

> If an offer provides for the payment of money, the offer must specify when that money is to be paid.

25 As the Builder submits, although the Castlemar offer states that the sum will be paid "within 48 hours upon execution of the Terms of Settlement", the time for payment is not certain where, as the Builder submits:

> The terms of settlement have not been tendered. The applicant does not know what those terms will contain.

Further, the concept of signing "terms of settlement" is contrary to s114(6):

> A party can only accept an offer by giving the party who made it a signed notice of acceptance.

Any terms that the offeror wishes to impose should be included in the offer.

26 Castlemar submits that any defect in form in its offer should not be taken into account. It submits that the Builder is estopped from making the assertion that the Castlemar offer is defective. The basis of the alleged estoppel appears to be that the Builder was the original author of the words used in the offer. Castlemar was entitled to draft its own offer, but did not do so.

27 The requirement that the Builder sign "terms of settlement" means that the Castlemar offer, despite being expressed as an offer to which s112 responds, is not.

Time for acceptance – s114(2)

28 The Builder submits that the Castlemar offer is defective because it was not open for acceptance for long enough. Under s114 of the VCAT Act:

> (1) An offer must be open for acceptance ... until the expiry of a specified period after the offer is made ...
>
> (2) The minimum period that can be specified is 14 days.

29 Castlemar submits that the Castlemar offer expired on 28 June 2007 without acceptance by the Builder and that it was open for acceptance for fourteen days. The Builder submits that the Castlemar offer was served by fax after

4.00pm on 14 June and therefore, in accordance with s141(2) of the VCAT Act, it is taken to have been received on the next business day. The Builder submits that if counting commenced on 15 June, it would expire on 29 June. Further, the Builder submits, analogously with rule 3.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* the day of service is not counted, so the Castlemar offer would have to expire on 30 June 2007 to comply.

30 The Supreme Court Rules do not apply to the Tribunal unless a member orders otherwise under s98(1)(b) of the VCAT Act. Further, Castlemar "specified" 14 days, not a date. The date was only mentioned in the Castlemar parties' submission of 1 September 2009 in paragraph 4:

> On 14th June Castlemar on behalf of the parties made an offer … That offer expired on 28th June, 2007 without any acceptance by [the Builder]..

31 Further there is a difference of opinion about when the Castlemar offer was received. The Builder has provided no supporting evidence for its contention that the fax arrived after 4:00 pm, whereas the Castlemar parties submit that it was received at 3:59 pm and have produced a copy of a transmittal document of "14/08" to support that claim. The one matter that causes me concern with the transmittal document is that it shows two "pages sent". There should have been three – the covering letter upon which the transmittal appears and two pages of the Castlemar offer.

32 The argument appears to be rather technical and of little practical importance as there is no evidence that the Builder attempted to accept the Castlemar offer on 29 or 30 June. It is also clear that the Builder's solicitors were aware of the Castlemar offer as soon as they checked their incoming faxes. However the time limit is an important part of this section of the VCAT Act, which has such a dramatic impact on the rights of the parties. As the learned author Pizer reports[4] "An offer that remains open for less than 14 days is not a settlement offer for the purposes of the VCAT Act."

33 As I do not base my decision upon this submission, it is not necessary for me to find whether the Castlemar offer was open for sufficient time.

The Tribunal's discretion

34 The words "unless the Tribunal orders otherwise" in s112(2) are underlined above because they give the Tribunal the discretion not to make an order for costs, or to determine the type of costs, in favour of a party who has made a compliant offer that has not been accepted.

35 Castlemar submits that there is nothing that justifies exercising the Tribunal's discretion against its interests.

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[4] Annotated VCAT Act 3rd Edition, referring to the unreported *Hillbrick v Transport Accident Commission* at paragraph 4137

Reasonable not to accept the Castlemar offer

36 The Builder submits that it was reasonable to reject (or fail to accept) the Castlemar offer and relies on the Court of Appeal decision in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (2)*[2005] VSCA 298. The Builder acknowledges that Hazeldene concerns an application for indemnity costs consequential upon a *Calderbank* offer.[5] Further, the respondent successfully resisted the appeal against an award of indemnity costs and the appeal did not concern s112 of the VCAT Act.

37 The Builder relies on paragraph 25 of the Hazeldene judgement:

> The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
>
> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed at the date of the offer;
>
> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree rejecting it.

I note that (b) is specifically provided for under s114(2) of the VCAT Act and that Parliament could have made provision that the offer must be "reasonable", but did not. I acknowledge that reasonableness is an aspect of an offer that can be taken into account by the Tribunal.

38 The Builder submits, under paragraph 25(a) of Hazeldene that serving the Castlemar offer in June 2007 was premature, because it was not until January and February 2008, when witness statements were served:

> ... that the [Builder] knew how [the Castlemar parties] intended to argue the issues, or what would be relied upon.

39 I reject the Builder's submission. Settlement offers are based in part upon an assessment of orders likely to be made by the Tribunal, but also upon the desire of parties to make a commercially sensible decision which might assist them to dispose of litigation as early as possible. In Hazeledene the Court of Appeal quoted a policy rationale for making special orders for costs, such as indemnity or solicitor-client orders, where an offer of

[5] *Calderbank v Calderbank* [1975] 3 WLR 586 .

compromise has been rejected. They said it was equally applicable to Calderbank offers[6]:

> The policy objectives were said to be:
>
> (1) To encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its 'bottom line' will be revealed to the court;
>
> (2) To save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and
>
> (3) To indemnify the plaintiff who has made an offer of compromise, later found to be reasonable, ... [emphasis added]

40 I also accept Castlemar's submission that there is apparent inconsistency in the Builder submitting that Castlemar's offer was too early, when the Builder had made its own offer ten days previously.

41 I am not satisfied that the Castlemar offer was made at a time when the Builder could not have made a realistic assessment of the likely outcome of litigation and I decline to exercise the discretion on this basis.

Joinder of Dalil and Mr Rauchberger

42 The Builder submits that the Castlemar offer was made before Dalil and Mr Rauchberger were joined, but the Castlemar offer did not expire until after they were joined. If the Builder had accepted the Castlemar offer before the day of joinder, 19 June 2009, the proceeding would have been at an end. However their joinder meant that if the Castlemar offer were accepted after the order was made, the proceeding between the Builder, Dalil and Mr Rauchberger would not be at an end. As the application to join Dalil and Mr Rauchberger was not made by the Builder until 15 June 2007, any disadvantage caused by their joinder was under the control of the Builder, not Castlemar. I do not take their joinder into account.

CASTLEMAR OFFER AS A *CALDERBANK* OFFER

43 Castlemar submitted that if the Castlemar offer failed the tests under ss113 and 114 of the VCAT Act, it could still be regarded as a *Calderbank* offer. I consider that a properly drawn *Calderbank* offer can be relevant to an order for costs under s109(3)(e)[7] of the VCAT Act, however the lack of detail about the terms of settlement means that, to paraphrase (e) of *Hazeldene* quoted above, the Castlemar offer was insufficiently clearly expressed to be an effective *Calderbank* offer.

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6 At paragraph 21, quoting Hayne JA in *Grbavac v Hart,* who in turn cited the New South Wales Court of Appeal in *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at 724

7 *Borg v Metricon Homes Pty Ltd (Domestic Building)* [2009] VCAT 507

DISCUSSION

44 I find that Castlemar's offer does not strictly comply with the requirements of s112 of the VCAT Act by reason of failing to strictly comply with s114 as it seeks to have the Builder sign a "blank cheque" by requiring signing of terms of settlement that were not annexed to the Castlemar offer. Castlemar submitted:

> The fact that the offers of both [the Builder] and Castlemar used identical language makes it plain that the settlement terms contemplated by the offers were essentially formal and mechanical in nature.

Regrettably, given past dealings between the parties, I am not prepared to make that assumption. I therefore decline to order costs in favour of Castlemar under the offer.

45 Having regard to the obligation to order costs under s109 only if fair to do so, I find that it is fair that Castlemar pay the Builder costs of the proceeding until two weeks after Castlemar's offer was received, being 29[8] June 2007. As described above, I find that it is fair that Castlemar pay the Builder's costs because of the nature and complexity of the proceeding and I would have made an order for costs of the whole proceeding, but for the Castlemar offer.

46 I find the Castlemar offer has the effect of making it unfair that the Builder receive costs a reasonable time after the offer was made, because the amount offered by Castlemar was reasonable. I have chosen 14 days after the offer as the date upon which it became unfair that the Builder should receive costs. I have chosen this period as it is the period allowed by s114 for acceptance of an offer; it has been chosen by Parliament as a period during which an offeree can reasonably be expected to decide.

47 Although s112 does not give a period of grace when an offer is made but not accepted, in this case during the 14 days the Builder could have either negotiated with Castlemar to ensure that it could accept the Castlemar offer, or made its own compliant offer for the same amount. I only make this finding because the Builder's earlier offer had used the same words. It would not be fair to allow the Builder to obtain costs under s109 from a reasonable time after the offer was made, substantially because of a drafting error that was originally its own.

COST INCURRED BY THE BUILDER CONCERNING DALIL AND MR RAUCHBERGER

48 On 26 November 2008 I made orders against Castlemar only, not about the other respondents. I did so because, as I said in paragraph 4 of the reasons of that date, the parties sent the Tribunal a document entitled "Agreed

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[8] I adopt 29 June 2007 as two weeks after the offer in an abundance of caution that the offer might not have actually reached solicitors for the Builder until after 4:00pm on the 14th.

Response to VCAT letter dated 28 October 2008" which I now know depended upon the November 2008 agreement. The nub of the letter was:

> … the parties do not require the Tribunal to make findings or orders … against [Dalil] and [Mr Rauchberger].

It is inconceivable that the November 2008 agreement would have been made if neither Dalil nor Mr Rauchberger were parties to the proceeding, therefore the costs allowed to the Builder include costs concerning Dalil and Mr Rauchberger up to and including 29 June 2007.

COSTS OF THE HEARING OF 28 APRIL 2009

49 Castlemar seeks costs of the hearing of 28 April 2009. Most of the business of the day was taken up the Builder's application for amendment of the orders of 26 November 2008 under the slip rule in s119 of the VCAT Act. The Builder successfully applied for interest but was unsuccessful in its submissions under s119. The arguments under s119 were complex, weak and delayed the ultimate conclusion of this proceeding. They fall within s109(3)(b)(c) and (d) of the VCAT Act. It is fair that the Builder should pay Castlemar's costs of and associated with the hearing of 28 April 2009, to the extent that they concern the application under s119.

MR RAUCHBERGER'S UNDERTAKINGS

50 In June 2007 Mr Rauchberger gave undertakings to the Tribunal as to dealings with his residential property. Upon payment of all the sums ordered by Castlemar, or earlier by agreement of the Builder, Mr Ruachberger will be released from those undertakings.

SCALE OF COSTS

51 Where costs are ordered in Domestic Building disputes of this degree of complexity, they are commonly ordered on County Court Scale D and I so order. Castlemar must pay the Builders costs up to and including 29 June 2007, including reserved costs, to be agreed. The Builder must pay Castlemar's costs of and associated with the hearing of 28 April 2009 to the extent that they concern the Builder's application under s119 of the VCAT Act. Failing agreement costs are to be assessed by the Principal Registrar pursuant to s111 of the VCAT Act on a party-party basis in accordance with County Court Scale D.

SENIOR MEMBER M. LOTHIAN