VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP439/2017

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Section 16 *Building Act 1993* – work undertaken without building approval; whether breach of implied warranties under s 8 of the *Domestic Building Contracts Act 1995*; Damages – whether liquidated damages clause constitutes a penalty – calculation of damages – whether claim in restitution consistent with claim for loss of bargain – duty to mitigate.

APPLICANT	Helena Shao
RESPONDENT	Lazaros Pontidis
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	15 September and 1 November 2017
DATE OF ORDER	15 November 2017
CITATION	Shao v Pontidis (Building and Property) [2017] VCAT 1865

ORDERS

1. The Respondent must pay the Applicant $63,067 on the Applicant's claim.
2. Pursuant to s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*, the Respondent must pay the Applicant's costs of the proceeding fixed in the sum of $1,090.55
3. Pursuant to s 115 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Respondent must pay the Applicant $807 being reimbursement of the application filing fee and the daily hearing fee.
4. Pursuant to s 104(5) of the *Victorian Civil and Administrative Tribunal Act 1998* the Applicant must pay Hudson Raei $254.55, being the fees and allowances of Hudson Raei in answering a summons to appear at the Tribunal hearing on 1 November 2017.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Ms H Shao, in person
For the Respondent	Mr L Pontidis, in person (by telephone on 1 November 2017)

REASONS

INTRODUCTION

1. The Applicant is the owner of a residential property located in Murrumbeena. In 2016, she entered into a contract with the Respondent under which the Respondent agreed to undertake landscaping work and other building work (**'the Contract'**).

2. The parties fell into dispute after the municipal building surveyor issued a *Building Notice*, stating that a substantial component of the work performed by the Respondent was undertaken without building approval.

3. The Applicant contends that the Respondent breached the terms of the Contract by undertaking building work without first obtaining building approval. She claims damages against the Respondent totalling $68,187, plus the costs of this proceeding, making a total claim of $72,232.[1]

THE EVIDENCE

4. Both the Applicant and the Respondent appeared in person and gave sworn evidence concerning the making of the Contract and other relevant background matters. In addition, the Applicant produced and relied upon two building inspection reports. The first report was prepared by Francis Ho, building designer, who adopted the contents of his report and gave further evidence elaborating on certain aspects of his report. The second report was prepared by Hudson Raei, building practitioner registered in the category of domestic building (unlimited) and commercial builder (unlimited). Mr Raei also adopted and elaborated on the contents of his report.

5. The Respondent did not adduce any expert evidence, apart from his own evidence going to some of the technical matters raised by the two experts engaged by the Applicant. Nevertheless, the Respondent cross-examined both Mr Ho and Mr Raei on technical matters raised by them.

BACKGROUND

6. It is common ground that the parties entered into the Contract in late July 2016. The Contract is evidenced by a written quotation prepared by the Respondent, which sets out the scope of the work and the contract price of $54,625. The scope of the work included both hard and soft landscaping work, in addition to other building work. That other building work was comprehensive. It included the removal of

[1] As at July 2017.

existing sheds located on the Property and the construction of a small outbuilding, which the parties have referred to as the *gym room* ($17,500). It also included removing an existing pergola and constructing a new pergola ($3,925), supplying and laying Merbau timber decking ($4,500) and arranging for the supply and installation of a glass pool balustrade ($3,750), amongst other work. According to the written quotation, the combined cost of all of the other building work (as opposed to the hard and soft landscaping work) was $25,925.

7. The Applicant said that, although the Respondent's written quotation did not specify a date for completion, the parties had subsequently agreed that the works would be complete by 6 November 2016. She produced an email dated 19 October 2016 which stated, in part:

> The agreed completion date is Sunday, 6 November 2016. If the job is satisfactorily completed on or before that date, then we will pay you an extra $1000. However, if you are unable to complete the job by 6 November 2016, then a daily penalty rate of $50 is payable by you.
>
> Please reply to confirm that you agree to the above working/payment schedule and also the incentive and penalty payments.

8. By email correspondence dated 20 October 2016, the Respondent replied, in part:

> Hi Helena,
>
> I accept the terms of the penalty rates if job is not completed on due date.

9. According to the Applicant, the Respondent's attendance on site slowed considerably after 19 September 2016. She said that between that date and 9 October 2016, the Respondent did not attend site. She recounted that he arrived on site on 27 October 2016 but only to deliver materials. She said that on 28 October 2016, the Respondent attended site at 1 PM but again only to deliver materials.

10. The Applicant said that the Respondent next attended her property on 2 November 2016 but only for two hours, and then again on 14 November 2016 but left at 1 PM. She recalled that the Respondent also attended on 17 November 2016 but again only for a few hours.

11. The Applicant recalled that on 25 November 2016, a municipal building surveyor from the City of Glen Eira inspected the site and reported on the works completed as at that date. That inspection culminated in the municipal building surveyor issuing an *Emergency Order* and a *Building Notice* under the *Building Act 1993*. The *Emergency Order* is dated 2 December 2016 and states, in part:

> 4 The reason why this Order was issued is that:

4.1. Swimming pool at the rear of the property does not have a pool barrier that complies with AS 1926.1 Swimming pool safety – Fencing for swimming pools.

5 The Owner is required within 7 days of the service of this Order to:

5.1. Carry out the following building work or other work to make the building/land safe:

5.1.1. Install a temporary pool barrier around the swimming pool that complies with AS 1926.1 Swimming pool safety – Fencing for swimming pools.

12. According to the Applicant, the reason why the *Emergency Order* was issued was because the Respondent dismantled the existing pool fence, in order to carry out works under the Contract, but did not install any temporary pool fencing.

13. The *Building Notice* is dated 7 December 2016 and relates to the gym room, and the construction of the pergola and deck. It states, in part:

3 Pursuant to section 106 of the Act, I am of the opinion that:

3.1 building work has been carried out on the building/land without a building permit required by the Act in that:

3.1.1 a detached outbuilding at the rear of the property, the veranda and decks attached to the existing dwelling have been constructed without a building permit being in force contrary to Part 3 Division 1 S 16 (1);

3.2 building work has been carried out on the building/land in contravention of the Building Regulations 2006 in that:

3.2.1 the footing systems of the structures cannot be verified in accordance with Australian Standard AS2870;

3.2.2 the structures cannot be verified for compliance in accordance with Australian Standard AS1684.2 (timber framing);

3.2.3 the siting of the outbuilding and deck have not been assessed in accordance with Part 4 Building Regulations 2006 (siting matters);

3.2.4 the detached outbuilding and decking have not been provided with the minimum fire resistance level as required by part 3.7.1 of the Building Code of Australia;

3.2.5 the structures have been constructed without evidence of a termite barrier protection used, contrary to part 3.1.3 of the Building Code of Australia and Australian Standard AS3660;

3.2.6 mandatory inspections as required under the Building Act 1993 and Building Regulation 2006 have not been carried out.

3.2.7 stormwater on the detached outbuilding and Veranda has not been connected to the legal point of discharge as required by the Building Code of Australia and the Australian Standard AS/NZA 3500.3.

3.3 the building/land is a danger to the life, safety or health of any member of the public or any person using the building in that:-

3.3.1 working smoke alarms have not been installed in accordance with regulation 707 of the Building Regulation 2006;

3.3.2 access to the swimming pool has not been restricted in accordance with AS 1926.1 Swimming pool safety – Fencing for swimming pools;

3.3.3 the western and northern boundary fence to be minimum of 2400 mm in height around the swimming pool barrier. Note: Adjoining owner to agree to this or a screen independent of the fence to be erected;

3.3.4 the copper pipe attached to the dwelling brick wall on the eastern side abutting to the swimming pool gate is climbable.

…

5 You are required to SHOW CAUSE within 30 days of the service of this Notice:

5.1 Why you should not carry out the following work in relation to the building/land

5.1.1 demolish and remove the illegal Works, being the detached outbuilding at the rear dwelling, veranda and decks;

5.1.2 install a pool barrier …

…

14. According to the Applicant, the Respondent did not return to her property after that inspection on 25 November 2016. No work was undertaken by the Respondent in response to the *Emergency Order* or the *Building Notice*.

15. It is common ground that as at that date, the Applicant had paid the Respondent $38,457.

THE CLAIM

16. The Applicant claims loss totalling $68,187, plus the costs of engaging experts and other costs of this proceeding. The $68,187 is made up as follows:

    (a) reimbursement of monies paid to the Respondent: $38,457;

    (b) the cost of demolishing the existing structures built: $13,800;

    (c) liquidated damages for delay: $15,600; and

    (d) hire of temporary swimming pool fence: $330.

FINDINGS

Did the Respondent breach the Contract?

17. Evidence was given by Mr Raei and Mr Ho, the experts engaged on behalf of the Applicant. They both detailed various defects in the building work undertaken by the Respondent. Apart from the evidence given by the Respondent himself, no independent expert evidence was adduced on his behalf.

18. Mr Raei gave evidence in relation to most if not all of the work performed by the Respondent. In relation to the gym room, he stated:

> … We cannot determine the viability of the structure because there is no permit for the design and construction of this building, no evidences of structural design assessment and approval by a qualified engineer and the contractor engaged is not a registered building practitioner. We recommend the owners to demolish and remove the new room constructed, finalise the design and acquire relevant permits, and then engage a registered building practitioner to complete their intended gym.

19. Mr Raei also commented on the incomplete timber decking and pergola, which replaced the original open space at the rear of the property. In his report, he stated:

> … The timber decking is too close to the ground and some timber joints are touching the existing paving which limits the ventilation space. The supports also do not follow a recommended standard. The decking can be raised and new supports to fix this problem however the major concern is that the timber used seems to be 90 x 45 MGP10 pine suitable for internal framing and not the recommended H3 or LOSP treated pine to resist termite attack. As such we recommend demolition and removal of the existing decking. The pergola structure beside the untreated timber specification has structural concerns… One may attempt to restore the structure but considering the untreated timber pine and structural design problems we strongly advise demolition, redesign and construction based on the relevant standards and building permit requirements and by registered building practitioner.

20. The Respondent disputes that he used untreated pine in the construction of the timber decking. Regrettably, Mr Raei was unable to see any stamping on the timber used in the construction of the timber decking. He conceded that if treated pine had been used in the construction of the decking subfloor, then subject to obtaining building approval, remedial work could have been undertaken to remedy the other defects in that work.

21. Even if expert evidence had been adduced by the Respondent, disputing the opinion expressed by the experts engaged by the Applicant, I am of the view that the failure to obtain building approval leads to the inexorable conclusion that the gym room, timber decking and pergola cannot remain standing – if the Applicant is to comply with the *Building Notice*. The *Building Notice* does not mention obtaining 'retrospective' building approval, if indeed that can be obtained. Compliance with that *Building Notice* requires demolition. No alternative solution is proffered in the *Building Notice*, nor was any compelling evidence given by either party to avoid that harsh result.

22. Therefore, I find that the only feasible option in order to comply with the *Building Notice* is for the gym room, decking and pergola to be demolished.

23. The Respondent contends that the responsibility for obtaining building approval rested with the Applicant. He said that he was not a 'builder' and was initially engaged to only undertake landscaping work but was requested to undertake further work relating to the construction of the gym room, outdoor decking and pergola. He said that he told the Applicant that building approval would be required and that it was her responsibility to obtain that. The Applicant vigorously disputed any discussion concerning building approval. She said that she trusted the Respondent to ensure that the work to be undertaken by him complied with any regulatory requirements.

24. Section 16 of the *Building Act 1993* expressly prohibits a person from carrying out building work unless a building permit has been issued and is in force. It is undisputed that the Respondent undertook building work which required building approval. Indeed, the Respondent conceded that he knew that building approval would be required, although he was of the view that obtaining building approval was a matter for the Applicant to organise.

25. There is no evidence to suggest that the Respondent believed that building approval had been obtained prior to him undertaking the works. Indeed, the fact that there was no request made for an inspection of the footing systems (which would have been mandatory if a building permit had been issued) leads me to infer that the Respondent must have known that there was no building approval for the proposed works.

26. It is beyond doubt that the building work undertaken by the Respondent constitutes *Domestic Building Work* within the meaning of that term as defined under the *Domestic Building Contracts Act 1995* and that the Contract therefore falls within the definition of a *major domestic building contract*, as defined under s 3 of that Act. Section 8 of that Act imports certain warranties about the work to be carried out into every domestic building contract. Those warranties include a warranty that:

> … the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;

27. I find that in the circumstances of this case, the Respondent failed to comply with those warranties by performing building work in contravention of the *Building Act 1993*. In my view, it is irrelevant who was responsible for obtaining building approval because the fact remains that the Respondent undertook building work without approval. Even if it had been a term of the Contract that the Applicant was responsible for obtaining building approval (although I make no finding to that effect), no work should have been undertaken until that approval was obtained.

28. Further, I do not accept the Respondent's evidence that he discussed the need for building approval with the Applicant prior to undertaking the works. In my view, it is unlikely that the Respondent would raise that issue with the Applicant but then make no further enquiries as to whether building approval had been obtained and simply proceed to undertake the works in blissful ignorance of that fact.

29. One of the objects underlying the *Domestic Building Contracts Act 1995* is to ensure that there are proper standards in the carrying out of

domestic building work. The legislation places onerous obligations on builders to ensure that they comply with the regulatory framework relevant to domestic building. In that sense, the Act shifts the risk of non-compliance onto the party that is (or should be) best placed to understand those risks; namely, the builder, even though the outcome may seem harsh. In the present case, the Applicant must demolish the noncomplying work. She can only rebuild that work after she obtains building approval. That would not have occurred but for the fact that the Respondent either did not obtain or did not wait until building approval had been obtained before commencing work.

30. Therefore, I find that the Respondent is in breach of the Contract by undertaking a substantial part of the work under the Contract, in contravention of the *Building Act 1993*.

Damages

31. According to Mr Raei, the cost of demolishing and rebuilding all building work undertaken by the Respondent is $81,800, made up as follows:

    (a) demolishing gym room: $8,000;

    (b) demolishing the timber decking and screen behind the gym: $5,800;

    (c) rebuilding the gym room, including design but excluding permits: $39,500; and

    (d) removing and rebuilding the pergola and associated decking: $28,500.

32. There is no evidence contradicting Mr Raei's evidence. Given that the *Building Notice* did not mention the timber decking and screen behind the gym ($5,800), it would appear that this work did not contravene s 16 of the *Building Act 1993* (although Mr Raie has raised some concern about the adequacy of this building work). Nevertheless, even if the timber decking and screen behind the gym is ignored for the purpose of calculating damages, I find that the reasonable cost to demolish and rebuild the gym room, pergola and timber decking amount to $76,000, based on Mr Raei's uncontested evidence.

33. However, the Applicant does not seek damages in that amount or, at least on one view, damages based upon demolishing and rebuilding the works performed by the Respondent, as assessed by Mr Raie. Instead, she merely seeks reimbursement of monies paid to the Respondent ($38,457), plus the cost of demolishing the existing structures, as assessed by Mr Raie ($13,800), as well as delay damages and reimbursement of associated costs. Leaving aside her claim for delay damages ($15,600) and her costs associated with this proceeding, her

claim, insofar as it relates just to the rectification and completion of the works, amounts to $52,587, which is far less than the cost of demolishing and rebuilding the works – in order to comply with the *Building Notice* – as assessed by Mr Raie ($76,000).

34. That being the case, her claim appears to be partly in restitution (repayment of monies paid to the Respondent) and partly for loss of bargain (cost of demolition, delay and out-of-pocket expenses). In my view, measuring damages or relief in that way is not permissible because there is an inherent inconsistency in the two approaches, given that a claim in restitution assumes, theoretically, that no contract existed. The Applicant must elect whether she seeks restitution (repayment of monies paid) or alternatively, damages for breach of contract. She cannot claim both.

35. In *Baltic Shipping v Dylan (*1993) 111 ALR 289, the High Court of Australia considered the relationship between restitution and damages claims. Mason CJ, summarised the Court's position as follows:

> … the earlier cases support the view … that full damages and complete restitution will not be given for the same breach of contract. There are several reasons, first; restitution of the contractual consideration removes, at least notionally, the basis on which the plaintiff is entitled to call on the defendant to perform his or her contractual obligations. More particularly, the continued retention by the defendant is regarded … as against conscience or, in modern terminology, as an unjust enrichment of the defendant because the condition upon which it was paid, namely, performance by the defendant may not have occurred. But equally, that performance, the deficiencies in which damages are sought, was conditional upon payment by the plaintiff. Recovery of the money paid destroys performance of that condition.
>
> Secondly, the plaintiff will almost always be protected by an award of damages for breach of contract, which in appropriate cases will include an amount for substituted performance or amount representing the plaintiff's reliance loss. (299-300)

36. Ordinarily, damages for breach of contract (loss of bargain damages) are assessed on the basis of placing a party in a position had the contract been properly performed. In *Robinson v Harman*,[2] Parke B set out this principle as follows:

> … that where a party sustained a loss by reason of the breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[3]

[2] [1848] 154 ER 363.
[3] Ibid, 365.

37. Similarly, in *Gates v City Mutual Life Assurance Society Limited*,[4] the High Court of Australia explained this principle in the following terms:

> In contract, damages are awarded with the object of placing the party in the position in which he would have been had the contract been performed…[5]

38. If damages are calculated by adopting the above principle, the cost to put the Applicant in a position in which she would have been had the Contract been performed (work that complied with the *Building Act 1993*) requires a large component of the work to be demolished and rebuilt, once building approval is obtained. As indicated above, Mr Raie has opined that the cost of doing that work is $76,000, which is more than the amount claimed by the Applicant, insofar as her claim relates to rectification and completion of the works. Having said that, the Applicant conceded that there was other work undertaken by the Respondent which represents some value to her. This included clearing the front and rear gardens and possibly re-using some of the materials already supplied on-site. Moreover, $16,168 remained to be paid under the original Contract. If damages were to be calculated according to contract law (loss of bargain damages), this would need to be deducted from the cost to rectify or complete the works in order to determine the Applicant's <u>net</u> loss.

39. Therefore, in the absence of evidence to the contrary, I assume, for the purpose of assessing damages, that the Applicant has taken these factors into account in claiming an amount that is less than what would otherwise be the case if damages were calculated according to contract law. Even if that is not the case, I see no reason why an applicant cannot 'discount' their claim. In particular, there is no rule of law that prevents an applicant from claiming a lesser amount to what the evidence proves as being the actual loss occasioned by the breach of contract.

40. Given that the Applicant's method of calculation results in an amount that is less than what I find to be her loss, had damages been calculated according to contract law, and having regard to s 53(1) of the *Domestic Building Contracts Act 1995*,[6] I find that the reasonable cost to rectify and/or complete the works is $52,587.

Damages for delay

41. The Applicant claims liquidated damages in the amount of $15,600, which is calculated at $50 per day over the period 7 November 2016

[4] (1986) 160 CLR 1.

[5] Ibid, 11.

[6] Section 53(1) of the *Domestic Building Contracts Act 1995* states that the Tribunal may make any order it considers fair to resolve domestic building dispute.

until 15 September 2017 (312 days) *or when the case is settled, whichever is the latest*.

42. No issue was raised that the daily rate claimed did not represent a genuine pre-estimate of loss. This is surprising given that the Applicant remained in occupation during the construction period and presumably, intends to do likewise during demolition and reconstruction.

43. Historically, courts have struck out 'penalty' clauses stipulating a sum payable on breach of contract when the sum *is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach, rather than a genuine pre-estimate of the loss likely to be caused by a breach of the contract*.[7] However more recently, the High Court of Australia in *Paciocco v ANZ*,[8] re-considered the rule against penalties. The court found that the factors, when assessing whether a clause is 'extravagant or unconscionable', are not limited to measuring the pre-estimate of loss against what may be potentially recoverable by way of contractual damages but may also include other matters which are of 'special interest' to the innocent party.

44. In the present case, it is beyond doubt that delay in completing the works will exacerbate the inconvenience caused by the construction of the works, given that the whole or a substantial part of the rear garden, including the pool, and front garden are unusable until work is completed or substantially completed. Whether this inconvenience qualifies as a *special interest*, in the sense contemplated by the High Court in *Paciocco*, is unknown. Nevertheless, it is arguable that where delay is occasioned as a result of the Respondent's breach of contract, damages for loss of amenity, damages for distress and disappointment or where the delay is inordinate, aggravated damages, may have been claimed.

45. Therefore, I find that it was open for the parties to agree on a liquidated damages clause as it *makes for greater certainty by allowing the parties to determine more precisely their rights and liabilities consequent upon breach or termination*.[9] In my view, $50 per day is not a sum which could be said to be *extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach*.

46. However, I do not accept that, in the present case, it is open for the Applicant to claim liquidated damages indefinitely. It is a well-recognised principle of law that a party claiming damages is under a duty to take all reasonable steps to mitigate the loss consequent upon

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[7] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.
[8] *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 2.
[9] *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 193.

breach.[10] Although I accept that there may be some delay in securing another builder to demolish and rebuild the noncomplying work, there must be some reasonable end date from which to calculate damages for delay.

47. Regrettably, neither of the experts who gave evidence on behalf of the Applicant commented on this issue. Nevertheless, doing the best I can with the evidence before me and having regard to the original Contract construction period, I find that liquidated damages should extend to no further than 30 June 2017. I have formed that view based on the following observations and assumptions.

48. According to the Applicant, the works commenced on or about 26 July 2016, after the deposit was paid. The work should have been completed by 6 November 2016. That equates to a construction period of 103 days.

49. The Applicant's evidence, which I accept, is that the Respondent failed to return to her property after 26 November 2016. I accept that given the lateness in the year, it would have been difficult to secure another builder to undertake demolition and reconstruction before, say February 2017. To that date, I add the original construction period of 103 days (15 May 2017), plus a further 2 weeks to allow for demolition works and obtaining building approval. Therefore, I will allow liquidated damages at $50 per day from 7 November 2016 until 29 May 2017, amounting to 203 days. This equates to a liquidated sum of $10,150.

Other loss claimed

Temporary pool fence

50. The Applicant also claims the cost of hiring a temporary swimming pool fence, in order to comply with the *Emergency Order*. Her evidence, which I accept, is that she spent $330 on hiring that temporary fence. I will allow that amount.

Building architecture fee

51. The Applicant also claims for the cost of preparing plans in order to obtain building approval. The Applicant produced a quotation from *Digitecht Design* dated 11 December 2016 in the amount of $2,750. That quotation contemplates measuring up and preparing plans to satisfy the *Building Notice* and liaising with consultants.

52. In my view, the work of preparing plans and obtaining building approval is not work contemplated by the original Contract. The written quotation prepared by the Respondent, evidencing the Contract,

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[10] *Tuncel v Renown Plate Co Pty Ltd* [1976] VR 501, 504.

is specific in the work that is to be carried out. It does not mention obtaining building approval, nor does it mention preparation of architectural drawings.

53. Notwithstanding the fact that the Respondent was in breach of the Contract, by undertaking work in the absence of any building approval, I find that the Respondent is not liable to pay for the cost of obtaining building approval or preparation of architectural drawings, if there was no obligation to do so under the original Contract. Accordingly, this aspect of the Applicant's claim is unproven and therefore, dismissed.

Expert witness charges

54. The Applicant claims the cost of engaging Mr Raie in the amount of $836, plus the cost payable to Mr Raie, for his fees and allowances in having to answer the summons to attend the hearing on 1 November 2017.[11]

55. Expert witness charges fall to be determined under s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). They comprise costs of the proceeding.

56. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of the Act. Section 109 of the Act states:

> **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;

[11] The amount of $254.55 was determined to be the *fees and allowances* of Mr Raie in answering the summons to appear and give evidence at the hearing on 1 November 2017. That sum was payable by the Applicant to Mr Raie pursuant to s 104 (4) and (5) of the *Victorian Civil and Administrative Tribunal Act 1998*.

(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.

57. In *Vero Insurance Ltd v The Gombac Group Ltd*,[12] Gillard J stated:

> [20] In approaching the question of any application for costs pursuant to s 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.

58. In my view, it was entirely appropriate for the Applicant to engage Mr Raie to inspect and report on the work performed by the Respondent, especially in circumstances where the Applicant's claim relied, in part, upon expert evidence. Consequently, I am of the opinion that it would be fair that the Respondent pay those costs as costs in the proceeding.

[12] [2007] VSC 117.

59. Accordingly, I will order that the Respondent pay the Applicant's costs of $1,090.55.

VCAT application fee

60. The Applicant also claims reimbursement of the application filing fee of $458.60 and the daily hearing fee of $348.40. Section 115B of the Act states, in part:

> (1) At any time, the Tribunal may make any of the following orders –
>
> (a) an order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding, within a specified time;
>
> …

61. Section 115C of the Act states further:

> …
>
> (2) Subject to subsection (3), a party who has substantially succeeded against another party in a proceeding to which this section applies is entitled to an order under section 115B that the other party reimburse the successful party the whole of any fees paid by the successful party in the proceeding.

62. In the present case, the Applicant has substantially succeeded in her claim against the Respondent. Accordingly, the presumption that the Respondent must reimburse the Applicant for the fees paid by the Applicant applies. Although the Tribunal retains the discretion not to order reimbursement of those fees, I do not consider that discretion should be exercised in the present case. In particular, none of the factors set out under s 115C(3) of the Act apply in this case.

63. Accordingly, I will order that the Respondent reimburse the Applicant $807 being the fees paid by the Applicant in this proceeding.

CONCLUSION

64. Having regard to my findings set out above, I will order that the Respondent pay the Applicant a total of $64,964.55, made up as follows:

Description	Cost
Cost to rectify or complete the works	$52,587
Damages for delay	$10,150
Reimbursement of temporary pool fence hirer	$330

Costs of the proceeding	$1,090.55
Reimbursement of application filing fee and daily hearing fee	$807
TOTAL	**$64,964.55**

SENIOR MEMBER E. RIEGLER