VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP420/2018

CATCHWORDS

Costs decision; applicant awarded $20,800 on her claim; respondent awarded $12,124 on his counterclaim; respective entitlements set off with the result that the respondent must pay the applicant the sum of $8,676; respondent served three offers and contends that each one enlivens s 112 of the *Victorian Civil and Administrative Tribunal Act 1998;* applicant contends that none of the offers complies with s 112 because of lack of nexus between offer and orders made; application by respondent for indemnity costs on the basis that the applicant conducted the hearing vexatiously.

APPLICANT	Maria Tambassis
RESPONDENT	Andrew Gribbin t/as Inner Melbourne Landscapes
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	13 December 2018
DATE OF ORDER	1 October 2019
CITATION	Tambassis v Gribbin t/a Inner Melbourne Landscapes (Building and Property) [2019] VCAT 1521

ORDER

1 The applicant must pay the respondent's costs on the standard basis from 24 April 2018.

2 In default of agreement, such costs are to be taxed by the Costs Court on the default scale stipulated in Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2018*, namely the *County Court costs scale*.

MEMBER C. EDQUIST

APPEARANCES:

For the Applicant	Mr N Jones, of Counsel
For the Respondent:	Mr N J Philpott, of Counsel

REASONS

INTRODUCTION

1 On 24 April 2019 I published orders with reasons. The orders I made included the following:

> 1 I declare that the applicant is entitled to an award of $20,800 on her claim.
>
> 2 I also declare that the respondent is entitled to an award of $12,124 on his counterclaim.
>
> 3 The entitlement of the respondent to an award of $12,124 is to be set off against his obligation to pay to the applicant the sum of $20,800, with the result that the respondent must pay to the applicant the net sum $8,676.
>
> 4 Costs are reserved. Any application for costs by either party must be made within 60 days.
>
> 5 The issue of whether any party is to reimburse to another party any fee under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is also reserved. Any application for fees is to be made within 60 days.
>
> 6 Leave is reserved to the applicant to apply for interest. Any application for interest is to be made within 60 days.

2 Mrs Tambassis made no application for interest, costs or reimbursement of fees. However, Mr Gribbin made an application for costs including reimbursement of the Tribunal fees he had paid. Mr Gribbin's costs application was listed before me on 3 September 2019. Because of the complexity of the arguments raised, I reserved my decision.

THE KEY ISSUES

3 At the hearing it became clear that Mr Gribbin is seeking an order that his costs of the proceeding be paid on an indemnity basis. Mr Gribbin relies on three offers made during the course of the proceeding which he says comply with the requirements of s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the VCAT Act**).

4 Mrs Tambassis disputes Mr Gribbin is entitled to the costs on the basis that s 112 has *not* been enlivened. In order to understand her argument, it is necessary to have regard to the words of the statute, and then to the specific terms of the offers. First, however, it is necessary to give some background to the dispute in order to give context to this decision.

BACKGROUND

5 Mrs Tambassis owns a house in Stonehaven Avenue, Malvern East. In late 2016 she and her husband elected to re-do the driveway and upgrade some landscaping in the front garden. To this end she accepted a quotation from Mr Gribbin. The work got underway in January 2017, and was completed by the middle of February. Shortly after Mr Gribbin left the site, Mrs Tambassis, became concerned about the quality of some of the work. On 17

March 2017 there was a critical meeting onsite attended by herself, her husband and her brother on the one hand, and Mr Gribbin's father, Alan Gribbin, on the other. Following this meeting, Mr Gribbin Senior left the site without having undertaken any rectification or investigative work.

6 After an unsuccessful conciliation conference conducted by Domestic Building Dispute Resolution Victoria on 4 December 2017, Mrs Tambassis issued this proceeding seeking substantial damages. Mr Gribbin filed a counterclaim seeking payment of the balance of the contract sum, namely $12,124.

7 The dispute principally concerned the failure of three types of pavers laid under the contract. The pavers in dispute were bluestone pavers laid in the driveway, bluestone drop face pavers, and edging pavers. There was a separate dispute about the failure of a paved area, constructed for the purpose of bin storage, to drain.

8 Both parties were legally represented throughout the dispute, and filed pleadings. The proceeding initially came on for hearing before me on 6 August 2018. Mrs Tambassis was represented by Mr Jones of Counsel, and Mr Gribbin was represented by Mr Phillpott of Counsel. Mrs Tambassis gave evidence, and called as an expert witness Mr Clinton Eldridge of Buildcheck. The proceeding was adjourned part heard, and was completed on 13 December 2018.

RELEVANT PROVISIONS IN THE VCAT ACT

9 The first relevant section in the VCAT Act is s 112, which provides:

> 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 subsection (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.

10 Because s 112 refers to both s 113 and to s 114, it is necessary to have regard to both those sections as well. They respectively provide:

113 Provisions regarding settlement offers

(1) An offer may be made—

(a) with prejudice, meaning that any party may refer to the offer, or to any terms of the offer, at any time during the proceeding; or

(b) without prejudice, meaning that the Tribunal is not able to be told of the making of the offer until after it has made its orders in respect of the matters in dispute in the proceeding (other than orders in respect of costs).

(2) If an offer does not specify whether it is made with or without prejudice, it is to be treated as if it had been made without prejudice.

(3) A party may serve more than one offer.

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

114 Provisions concerning the acceptance of settlement offers

(1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.

(2) The minimum period that can be specified is 14 days.

(3) An offer cannot be withdrawn while it is open for acceptance without the permission of the Tribunal.

(4) In deciding whether to give permission, the Tribunal may examine the offer, even if it was made without prejudice.

(5) If the offer was made without prejudice, a member of the tribunal who examines it for the purposes of subsection (4) can take no further part in the proceeding after determining whether or not to give permission.

> (6) A party can only accept an offer by giving the party who made it a signed notice of acceptance.
>
> (7) A party may accept an offer even though it has made a counter-offer.

11 I now turn to the three offers made by Mr Gribbin. The first offer was dated 23 April 2018. It is to be noted that this offer was made just a month after the proceeding was initiated, and a year and a day prior to the decision being delivered. The offer was expressed to be "without prejudice save as to costs" and was relevantly expressed as follows:

> We are instructed to make the following offer of settlement on behalf of our client:
>
> > 1 Our client pay your client the sum of $15,000.00 within 30 days of receiving assigned Notice of Acceptance pursuant to s 114(6) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic);
> >
> > 2 Each party release the other and indemnify one another against any other claim arising from or incidental to the agreement entered into on or around 26 September 2017 to perform landscaping and other work at [the Mrs Tambassis's address, deleted for privacy reasons].
> >
> > This offer shall remain open for 14 days from the date of this letter….
> >
> > In the event that your client does not accept this offer and our client obtains an outcome more favourable than the one offered in in this correspondence will be produced to the Tribunal in support of our client's application for indemnity costs pursuant to s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

12 The second offer was made on 23 May 2018. It was titled "offer with prejudice". It was of greater value than the first offer as it was an offer by Mr Gribbin to settle the claim by paying $15,000 plus $467.80 by way of reimbursement of the filing fee plus payment of the amount paid by Mrs Tambassis for the expert report of Buildcheck dated 5 May 2015. It was similar to the first offer in so far as it also required the parties to release and indemnify the other in relation to claims arising from or incidental to the agreement entered into on or around 26 September 2017 to perform landscaping and other work at Mrs Tambassis's address (**the landscaping agreement**). It also expressly referred to s 112 of the VCAT Act. However it differed from the first offer as it spelt out how the amount of $15,000 had been calculated.

13 The third offer was dated 18 July 2018, that is to say, less than three weeks before the commencement of the hearing. Like the first offer, it was expressed to be "without prejudice save as to costs." The offer contained in the letter was expressed in the same way, in all relevant respects, as the first offer, save for the fact that it was for $24,000 rather than $15,000.

Is s 112 enlivened?

14 Counsel for Mr Gribbin spent some time analysing the offers and contending that they complied with each of the requirements of s 112, including compliance with s 113 and s 114. Counsel for Mrs Tambassis broadly accepted these contentions, and raised only one reason as to why s 112 did not apply. This was that the requirement contained in ss 112(1)(d), namely that the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer, had not been met.

15 The submission advanced on behalf of Mrs Tambassis had 2 limbs. It was highlighted that each offer was an offer by Mr Gribbin to pay money coupled with a requirement that there should be mutual releases and indemnities in respect of any claim arising from or incidental to the landscaping agreement. It was contended firstly that, because of the requirement for a release and an indemnity, there was an insufficient relationship between the outcome of the proceeding and the offer. Secondly it was said that the release and indemnity must have had some value to Mr Gribbin, otherwise they would not have been asked for. As Mr Gribbin had failed to demonstrate that value, Mr Gribbin could not discharge the burden arising under ss 112(1)(d) of demonstrating that the value of the Tribunal's award was not more favourable to Mrs Tambassis than the offer itself. I now address these arguments in turn.

Was there an insufficient relationship between the outcome of the proceeding and the offer?

16 In support of Mrs Tambassis's argument that there was an insufficient nexus between the outcome of the proceeding and the offer, reference was made to four different VCAT decisions. The first of these was *Stonnington City Council v Roscon Developments Pty Ltd,* a town planning decision[1]. Only two pages of the decision were handed up. The Tribunal's attention was drawn to paragraph 46 where it was stated:

> We agree … that for section 112 to be applicable in any proceeding there must be a relationship between the outcome of the proceeding and the offer. Putting it another way it appears to us that the Tribunal should be able to make an order in terms of the offer.

17 Mrs Tambassis's counsel used this passage as the foundation for an argument that the Tribunal should find that none of the offers in the present case enlivened s112 because of the requirement for a release and an indemnity, in circumstances where neither of these things had been sought by Mr Gribbin in his counterclaim.

18 In aid of this argument Mrs Tambassis's counsel referred me to *Sherwood v Sherwood*[2], a costs decision arising from a partition dispute determined by Senior Member Riegler (as he then was) in 2014. Senior Member Riegler said this about the operation of s 112 of the VCAT:

[1] [2004] VCAT 1611
[2] [2014] VCAT 1037

> 37 The evident purpose of a s 112 offer; and offers of compromise generally, is to provide costs protection for the offeror and a punitive incentive for the offeree to settle the proceeding, rather than having the matter determined by the Tribunal. The possibility of having an adverse costs order made against the offeree encourages that party to focus on the issues, the risk of litigation and the costs of continuing with the litigation. That process is part of the evaluation that an offeree must undertake when considering whether to accept an offer or not.

19 Of relevance to the present dispute is the following passage in the decision, which was highlighted by Mrs Tambassis's counsel:

> 38 However, difficulties arise when an offer of compromise is not expressed in a similar form to the relief granted. In those circumstances, it may not be appropriate to order costs pursuant to s 112 of the Act because a like with like comparison is either impossible or requires manipulation or re-characterisation of either the offer or the outcome in order to establish whether the offer of compromise was more favourable than the determination. In my view, an offer of compromise should be expressed clearly and reflect an outcome that is substantially in the same form as the relief sought in the claim. Otherwise, it becomes too difficult for an offeree to evaluate whether the offer should be accepted or not.

20 The third decision referred to was a *Water Act* case recently decided by Senior Member Farrelly, *Speechley v Midway Ltd*[3]. In that case, by its lawyer's letter dated 24 February 2017, the respondent had made an offer of settlement made on a "without prejudice save as to costs" basis ("**the 24 February 2017 offer**")**.** In the letter, a number of issues were raised. The letter then set out an offer of settlement by which the respondent offered to pay the applicant $200,000 subject to conditions. One of the conditions was that the applicant release the respondent from liability for all claims in the proceeding and a number of other claims. This is the context in which Senior Member Farrelly said, at [51]:

> However, in my view the 24 February 2018 offer should be disregarded because of the broad nature of the releases sought.

21 The fourth case brought to the Tribunal's attention by Mrs Tambassis's counsel was *Toonalook Straights Pty Ltd v Jeuken-Sims*[4], a decision of Judge Bowman sitting as a Vice President of the Tribunal in 2003. In that case, Judge Bowman declined to take into account some settlement offers made by the applicant. At [20], His Honour observed that "the settlement offers seem to me to have some elements of confusion about them".

22 Counsel for Mr Gribbin acknowledged that there was a requirement that for an offer to be effective for the purposes of s112, the offer had to have a relationship to the orders made in the proceeding. However, he emphasised that each case had to be looked at on its own merits. He pointed out that

[3] [2018] VCAT 246
[4] [2004] VCAT 127

because only two pages of the decision in *Stonnington City Council v Roscon* had been handed up, it was not known in what way the offer did not relate to the award made. I accept the submission, and put that case to one side.

23 It was then contended that the facts in *Sherwood v Sherwood* were so far removed from those in the present case that it was of no assistance.In *Sherwood v Sherwood*, the hearing had taken place in late July 2014. In the previous month, an offer had been made for the purposes of s 112 by which the applicant offered to settle the proceeding by making a payment to the respondent of $30,000 on the basis that the respondent would sign all necessary documents to transfer to the applicant all the respondent's right title and interest in the property, and vacate the property and remove all her goods within 30 days of acceptance of the offer. Each party was to bear their own costs. Ultimately the property was offered for sale at a public auction, but no bids were received. In February 2014, the respondent purchased the property for $535,000. At [30] Senior Member Riegler observed that in assessing the value of an offer made for the purposes of s 112, difficulties arise where the terms of the offer differ from the type of relief granted. He illustrated the point at [31], noting that there was no monetary determination. Consent orders had provided for the sale of the property by way of public auction, but the offer did not contemplate that the property be sold. At [32] Senior Member Riegler noted that the offer contemplated that the respondent divest herself of all her right, title and interest in the property, and observed that this never occurred, nor was it ordered.

24 I think it is clear that the facts in *Sherwood v Sherwood* are far removed from those in the present case, and I accept Mr Gribbin's submission that it is not relevant.

25 Counsel for Mr Gribbin then sought to distinguish *Speechley v Midway Ltd*. The wide nature of the releases demanded by Mr Gribbin in the letter of offer of 24 February 2017 was highlighted. Reference to [25] of Senior Member Farrelly's decision makes it clear that Mr Gribbin's point is well made. That the Speechley's should release Midway Ltd from all liability for all claims in the proceeding was only one of the conditions of settlement. The respondent was also to be released from:

> all claims of whatever nature and howsoever arising, whether past present or future, including any claims in relation to water or settlement run-off of any nature from [the respondent's property] and claims and complaints to our clients certification or accreditation bodies profit in relation to water or settlement run-off from respondent's property.

26 In these circumstances, it is readily understandable that Senior Member Farrelly, at [51] disregarded the offer of 24 February because of the broad nature of the releases sought. He commented:

> In my view it is plainly unreasonable to expect the applicants to have accepted an offer that includes a release from unknown potential future events.

27 Counsel for Gribbin finally turned to *Toonalook v Jeuken-Sims*, and submitted that it was of no assistance in the present case because of the unusual nature of the conditions of settlement offered. For instance, at [22] there was reference to a condition of an offer that Ms Jeuken-Sims desist with her objection to Toonalook installing flag poles. Reference to the decision indicates that Judge Bowman thought that this issue was not, and never had been, part of the proceeding. At [21], there was reference to a term requiring Ms Jeuken-Sims to re-install clock faces and workings in a certain manner, and to provide operating instructions and a service manual. Judge Bowman observed that this claim had long since disappeared. In these circumstances I think it is clear this case does not assist to resolve the present issue.

28 In summary, of the four cases relied on by Mrs Tambassis, I consider *Speechley v Midway Ltd* to be the most relevant. The open-ended nature of the releases sought by the respondent in its offer in that case has been discussed. They are clearly distinguishable from the release and indemnity demanded by Mr Gribbin in the current case, which are limited to claims arising from or incidental to the landscaping agreement.

29 Having dealt with the authorities relied on by Mrs Tambassis, counsel for Mr Gribbin then contended that there was a direct connection between each of the offers made and the outcome of the proceeding for these reasons:

(a) Mrs Tambassis had made a claim for damages for defective workmanship. That claim was allowed, and damages were assessed at $20,800.

(b) Mr Gribbin had brought a counterclaim for the balance of the contract sum. The claim was successful, and Mr Gribbin was awarded $12,124.

(c) Mrs Tambassis was obligated to bring all her claims regarding Mr Gribbin's defective workmanship at once, and there was now an issue estoppel regarding all claims extant at the time of the hearing.

(d) As Mrs Tambassis had received damages in respect of Mr Gribbin's defective workmanship, she was responsible for repairing the paving.

(e) The determination of Mrs Tambassis's claim and Mr Gribbin's counterclaim put the parties in the same position they would have been in had they signed mutual releases because the claim and the counterclaim had been disposed of.

(f) The fact that each offer had also required the giving of mutual indemnities was irrelevant because:

(i) all past claims were now the subject of issue estoppel; and

(ii) the prevention of any future claim against Mrs Tambassis was in her hands because she was the party responsible for repairing the paving.

I accept this argument.

30 Counsel for Mrs Tambassis suggested that by giving an indemnity in respect of all future claims Mrs Tambassis would be precluded from

recovering contribution from Mr Gribbin in the event that a third party, such as a visitor, suffered personal injury by tripping on the paving. I do not think there is a real prospect of any such recovery proceeding being successful, as I accept the argument put on behalf of Mr Gribbin that it is Mrs Tambassis who now has sole responsibility for protecting against such an eventuality.

31 Because the required release and indemnity are limited to claims arising from or incidental to the landscaping agreement, and because past claims have been resolved, and Mrs Tambassis is in a position to limit her exposure to future claims, I find that there is sufficient linkage between the nature of each of the offers made and the orders ultimately made.

32 On this basis, I find that each of the offers in the present case are in a form that enlivens 112 of the VCAT Act.

Section 112(1)(d) - offer not more favourable to the Mrs Tambassis than the orders made

33 I now turn to the ancillary argument raised on behalf of Mrs Tambassis to the effect that Mr Gribbin has not demonstrated that "the orders made by the Tribunal are not more favourable to the other party than the offer " because the value of the release and indemnity were not stated.

34 I note that the obligation of the Tribunal under ss112(1)(d) is to form an opinion about this matter. I address the offer dated 23 April 2018 first, as it is the lowest in monetary value. As noted, Mr Gribbin offered to resolve the dispute on the basis he paid Mrs Tambassis $15,000 provided the parties gave mutual releases and indemnities against any other claim arising from an incidental to the landscaping agreement.

35 In the event, the Tribunal ordered Mr Gribbin to pay to Mrs Tambassis the sum of $8,676. On this basis, it can be seen that in monetary terms the offer was more than $6,000 more advantageous to Mrs Tambassis than the orders ultimately made.

36 As I have already remarked, the effect of the simultaneous resolution of the claim and counterclaim is that by operation of the principle of issue estoppel the parties are placed in the same position as if they had executed mutual releases. I accordingly can see no reason to attach a monetary value to the requirement in the offer for mutual releases.

37 It remains to consider the separate requirement in the offer that Mrs Tambassis indemnify Mr Gribbin in respect any other claim arising from or incidental to the landscaping agreement. As noted, any possible claim up to the conclusion of the hearing has been dealt with. And, as also noted, the prevention of any future third party claim is now in the hands of Mrs Tambassis. I can see no reason to place a monetary value on Mr Gribbin’s demand for this indemnity.

Section 112(3)

38 By way of completeness, I now address the requirement arising under s112(3) that in determining whether the orders made 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.

39 Mrs Tambassis's counsel made no submission that the orders ultimately made were not more favourable to her than the first offer, taking into account any costs that the Tribunal would have ordered on the date the first offer was made. Perhaps that is not surprising, as the argument would have been hard to sustain given, that no material was submitted by Mrs Tambassis in opposition to Mr Gribbin's claim for costs. I put this issue to one side.

40 For all these reasons, I have no hesitation in forming the opinion that the orders made in the proceeding are not more favourable to Mrs Tambassis than the first offer. I accordingly conclude that the first offer complied with s112.

41 As I have formed this opinion about the first offer, it is not necessary to address in any detail whether the second offer and the third offer complied with s112, as Mrs Tambassis did not dispute that the first offer made by Mr Gribbin survived the making of the second and third offers.

Is there a reason why the Tribunal should not award costs under s112(2)?

42 As I have formed the view that the first offer complies with s 112 of the VCAT Act, it is necessary to consider whether there is any basis for the Tribunal to order otherwise than that Mrs Tambassis (being the party who did not accept the offer) pay all of the costs after the offer was made of Mr Gribbin (being the offering party).

43 Counsel for Mr Gribbin submitted there was no reason why the Tribunal should exercise the discretion arising under s 112(2) otherwise than to award costs. Counsel for Mrs Tambassis made no specific submission on the point, as the basis for Mrs Tambassis's defence to the claim for costs was that s 112 had not been enlivened. I find that there is no reason for me to order otherwise than that Mr Gribbin is entitled to an order that Mrs Tambassis pay all his costs after the offer was made.

Time from which costs run

44 Mr Gribbin's submission was that costs should be awarded from the date of the first offer. His counsel submitted that this was the case, notwithstanding that the second and third offers have been made. In support of this submission, reference was made to s113(3) which entitles a party to serve more than one offer. Counsel for Mrs Tambassis did not contest this submission. Accordingly, I accept that costs are to be ordered with effect from the day after the making of the first offer. As the offer was made by email, I find that the date of service of the offer was 23 April 2018. The result is that I find that costs are to be awarded from and including 24 April 2018.

INDEMNITY COSTS OR STANDARD COSTS

45 Both sides accepted that the effect of the decision of the Court of Appeal in *Velardo v Andomov*[5], coupled with the 2013 change to Supreme Court Rule 63.28 was that the reference to the recovery by a party entitled to costs under s112(2)of "all costs" was ,in the absence special circumstances" an entitlement to costs assessed on the standard basis.

Ugly Tribe Co Pty Ltd v Sikola

46 Counsel for Mr Gribbin argued that special circumstances existed of the type referred to in *Ugly Tribe Co Pty Ltd v Sikola*[6]. In that case, as the Court of Appeal had remarked in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[7], Harper J had identified the following circumstances as warranting a special costs order, noting that the categories of circumstances are not closed:

> (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
>
> (b) the making of an irrelevant allegation of fraud;
>
> (c) conduct which causes loss of time to the court and to other parties;
>
> (d) the commencement or continuation of proceedings for an ulterior motive;
>
> (e) conduct which amounts to a contempt of court;
>
> (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and
>
> (g) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.

47 Counsel for Mr Gribbin confirmed he was relying only on the grounds identified at (c) - conduct which causes loss of time to the court and to other parties and (f) - the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law.

Conduct which causes loss of time

48 In respect of (c), counsel for Mr Gribbin referred to the failure of Mrs Tambassis to call her husband on the first day the hearing, and the fact that he was called on the second day the hearing. Mrs Tambassis's counsel argued that the submission was misconceived, because Mr Tambassis was a necessary witness. He had been a party to the critical conversation that took place at Mrs Tambass's house in March 2017 attended by Mrs Tambassis, her husband and her brother on the one hand, and Mr Gribbin's father on the other. It was submitted that if Mr Tambassis had not been called, an adverse inference might have been drawn against Mrs Tambassis to the effect that Mr Tambassis's evidence would not have assisted her case.

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[5] [2010] VSCA 38 at[47(2)]
[6] [2001] VSC 189
[7] [2015] VSCA 216

49 I accept this submission. I was surprised when it was indicated in Mrs Tambassis's opening that Mr Tambassis was not going to be called. Had he not been called, without adequate explanation, it would have been open to me to make an adverse finding under *Jones v Dunkel*[8] against Mrs Tambassis.

50 Mr Gribbin's counsel sought to strengthen the argument by referring to the manner in which Mrs Tambassis obtained leave to have her husband give evidence on the second day of the hearing. The circumstances in which this occurred are set out in the reasons for decision published on 24 April 2019, at [101-103], as follows:

> 101 Having regard to the matter in which the application to call Mr Tambassis was made after the applicant's evidence had otherwise closed, I must consider whether it would be a denial of natural justice to the respondent if I was to have regard to that evidence. I say that because of the manner in which notice was given to the to the respondent regarding the intention to call Mr Tambassis. This notice was given in a letter dated 6 December 2018 from Mrs Tambassis's solicitors which, omitting formal or irrelevant parts, read as follows:
>
> > I confirm that my client will invite the Member to inspect the site, whether on the next hearing date of 13 December 2018 or subsequently unaccompanied by and in the presence of the parties.
> >
> > Moreover, my client intends to call evidence from George Tambassis with respect to allegations made by your client regarding an alleged discussion between George Tambassis and your client's father. It is envisaged that George Tambassis's evidence will be limited to that subject matter and at the hearing duration will not be materially affected as a result.
>
> 102 When Mr Philpott, on the half of the respondent, objected to Mr Tambassis giving evidence as to the state of the pavers, Mr Jones responded that his application to call Mr Tambassis at the opening of the day's hearing had not been qualified in any way. I do not accept that submission. The application to call Mr Tambassis made by Mr Jones was clearly coloured by written notice given to the respondent and copied to the Tribunal to which I have just referred.
>
> 103 In the circumstances, I consider that the respondent was ambushed by Mr Tambassis's evidence about the state of the pavers.

51 Although I accept that Mr Gribbin may have been misled by Mrs Tambassis's solicitors letter of 6 December 2018 regarding the extent of the evidence that was intended to be given by Mr Tambassis, I do not think all the circumstances that the behaviour of Mrs Tambassis's solicitor, and counsel at the hearing, justify an award of indemnity costs in respect of the entire proceeding. The effect of their actions was that Mr Tambassis gave more evidence than might reasonably have been anticipated by Mr Gribbin, particularly in relation to the state the tiles. However, as noted, Mr

[8] (1959) 101 CLR 298

Tambassis should always have been called as a witness, and had an application to call him been made on a full and frank basis, I think it is very likely I would have agreed to the application.

52 The key point is that Mr Tambassis was a necessary witness, I do not think it can be said Mrs Tambassis unneccessarily extended the hearing by calling him on the second day. I note that, in any event, the hearing was concluded on that day, and so the hearing was not extended by the fact that he was called.

53 In all the circumstances, I do not regard this issue is one which should result in a substantial financial burden being placed on Mrs Tambassis over and above an award of costs on the standard basis.

The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law

54 Mr Gribbin's submission on this issue on the fact that at the hearing Mrs Tambassis's case was opened on the basis that there had been a total failure of consideration, and that she was entitled to a refund of all the money she had paid. At the same time, it was contended that she was entitled to damages to rectify the work. This was never sustainable as a matter of law, as illustrated by the High Court's decision in *Baltic Shipping Co v Dillon*[9].

55 The error in this aspect of the case was highlighted in the justification of the sum of $15,000 that constituted the central part of the second offer of 23 May 2018. Mrs Tambassis's insistence, after that offer had been made, in proceeding with a case that was legally flawed may well have had a catastrophic effect because it almost certainly meant that the case could not be settled. However, I cannot be sure about this, because Mrs Tambasis put in no material in response to Mr Gribbin's claim for costs, and so there is no direct evidence as to why Mrs Tambassis refused the offers.

56 It seems that Mrs Tambassis either misunderstood or overlooked the legal principle underpinning *Baltic Shipping Co v Dillon,* or made a serious miscalculation as to the likely outcome of the case. For whatever reason, she did not accept the first offer, the second offer or even the third offer. With the benefit of hindsight, it is clear that she should be accepted the first offer. From the same vantage point, the third offer looks to have been a very generous one. For her mistaken understanding, oversight or miscalculation, Mrs Tambassis must pay a price.

57 In my assessment, it is fair that the price she should pay is to bear the burden of Mr Gribbin's costs as from 24 April 2018 on the standard basis. I do not accept the Mr Gribbin's submission that his costs should be paid on an indemnity basis because of Mrs Tambassis's error in seeking both damages and a return of that portion of the contract sum that had been paid. I say this because the underlying cause of this litigation was the defective work that had been performed by Mr Gribbin. This not altered by the fact that Mr Gribbin sent his father to the site with the intention of carrying out tests and undertaking some work, and that Mr Gribbin Senior was denied

[9] (1993) 176 CLR 344

the opportunity to carry out any rectification work. These matters just meant that litigation became inevitable. Mrs Tambassis's case was not hopeless in the sense that, unless she ended the litigation by accepting an offer from Mr Gribbin, she was always going to get a positive award. Each of the three offers put by Mr Gribbin demonstrates this.

58 As Mrs Tambassis's case cannot be said that to have been hopeless, I find that it is not appropriate to award costs on an indemnity basis to Mr Gribbin.

59 In summary, I will order that Mrs Tambassis pay Mr Gribbin his costs of the proceeding from 24 April 2018, on the standard basis. In default of agreement, the costs are to be taxed by the Costs Court on the default scale stipulated in Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2018*, namely the *County Court costs scale*.

MEMBER C. EDQUIST