VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

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| BUILDING AND PROPERTY LIST | | vcat reference No. BP1396/2019 |
| CATCHWORDS | | |
| Domestic building dispute and project management dispute – proceeding previously determined in applicants’ favour and respondent ordered to pay applicants damages – application for costs and interest by applicants – whether applicants require leave of the Court due to respondent’s bankruptcy – application for interest struck out – *Victorian Civil and Administrative Tribunal Act 1998* (Vic) – ss.109, and 114 whether fair to order costs – order made for respondent to pay applicants’ costs. | | |
| first APPLICANT | Axia Building Group (Australia) Pty Ltd (ACN 610 590 415) | |
| SECOND APPLICANT | Theodoros Papadopoulos | |
| RESPONDENT | Julia Lo | |
| BEFORE | Member N Feeney | |
| HEARING TYPE | Hearing On the papers | |
| DATE OF SUBMISSIONs | Applicant: 13 May 2024  16 September 2024 and 11 November 2024 in reply (bankruptcy issue) | |
|  | Respondent: 2 September 2024  11 November 2024 (bankruptcy issue) | |
| DATE OF ORDER and REASONs | 8 January 2025 | |
| CITATION | Axia Building Group (Australia) Pty Ltd v Papadopoulos (Building and Property) (Costs) [2025] VCAT 27 | |

# Order

1. The respondent is to pay the applicants’ costs of the proceeding in an amount to be agreed between the parties and failing agreement, in an amount to be assessed by the Costs Court on the standard basis pursuant to the *County Court costs scale* as defined in Rule 1.13 of Chapter I of the Rules of the County Court as in force on 31 December 2024.
2. That part of the applicants’ application dated 14 May 2024 seeking orders for interest is struck out.
3. Any further application for interest is reserved, with liberty to apply. **I direct the principal registrar to refer any further application for interest to Member Feeney**.

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| N Feeney  **Member** |  |  |

# Reasons

1. This is an application dated 14 May 2024 by the applicants for an order that the respondent pay their costs of the proceeding and interest (‘application’) following the determination of the proceeding by orders and reasons dated 26 March 2024[[1]](#footnote-2) (‘decision’).
2. In the decision I ordered the respondent pay the first applicant the amount of $216,812.74 (‘amount payable’) comprised as follows:

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|  | In respect of the building contract (after allowing a set off for amounts payable by the first applicant to the respondent): | $15,716.57 |
|  | In respect of the variation agreement: | $98,500.00 |
|  | In respect of the project management agreement between the first applicant and the respondent: | $102,596.17 |

1. In the application the applicants advised the Tribunal that they have received notice that the respondent is a bankrupt.
2. The applicants requested that the application be determined on the papers and the respondent did not object to the application being determined on the papers.
3. The applicants and the respondent have filed submissions in relation to the application including the effect of the bankruptcy (‘bankruptcy issue’), and the applicants also rely upon an affidavit of their lawyer Chris Papadopoulos dated 30 April 2024.

## Bankruptcy issue

1. Section 58(3)(b) of the *Bankruptcy Act 1966* (Cth) (‘*Bankruptcy Act*’) provides as follows:

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) …

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

1. In the covering email from their lawyers enclosing the application, the applicants advised that they would be seeking leave from the Court under s 58(3)(b) of the *Bankruptcy Act* to proceed with the application.
2. Subsequently, by email dated 16 September 2024, the applicants’ lawyers advised that they were not of the view that the applicants required leave under the *Bankruptcy Act* on the grounds that:
   1. The order for costs and interest would be made after the commencement of the bankruptcy and would therefore not be a provable debt as defined in the *Bankruptcy Act* and as such, bringing the application would not infringe s 58(3). They referred to the decision of *Wakeling v Wade* [2011] FCA 1452 (‘*Wakeling*’) at [12] and *Da Vesi Construction Group Pty Ltd v De Andrade* [2021] FCA 1033 (‘*Da Vesi Construction Group*’) at [32] in support of this submission.
   2. An application for costs and interest is not a “fresh step” in the proceeding within the meaning of s 58(3)(b), given that final judgment has already been delivered.
3. The respondent submits that leave of the Court is required as the debt arose from the claims made in the pre-bankruptcy proceeding.
4. The issue is whether the applicants claim for costs and interest is a proceeding in respect of a provable debt as defined in the *Bankruptcy Act* which would require leave under s 58(3)(b) to either commence or continue as a fresh step.
5. That the relief sought in the application is tied to the pre-bankruptcy claims made in the proceedings is not determinative as to whether the claim is in respect of a provable debt.
6. In the Federal Court decision of *Wakeling*, it was held that costs orders made after the commencement of bankruptcy are not considered provable debts and, consequently, do not require leave under s 58(3)(b). This principle was further reaffirmed in *Da Vesi Construction Group*, where the Federal Court confirmed that costs orders made post-bankruptcy are not provable debts and do not require leave to be pursued.
7. Whilst not referred to by the parties, I note that these Federal Court decisions are consistent with the High Court decision in *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56 (‘*Foots*’), which established that a court order requiring a person to pay costs is a provable debt in that person's bankruptcy only if the order is made prior to the date of bankruptcy.
8. Therefore, as any order for costs will be made after the date of bankruptcy[[2]](#footnote-3), I accept the applicants’ submissions that their application for costs is not in respect of a provable debt and they can make their application without first seeking leave of the Court.
9. However, neither of the authorities referred to by the applicants consider whether an application for interest is, or is not, an application in relation to a provable debt.
10. The applicants seek interest on the amount payable under either the building contract, the project management agreement, s 53(2)(b)(ii) of the *Domestic Building Contracts Act 1995* (‘*DBC Act*’), and s 184(2)(b)(ii) of the *Australian Consumer Law and Fair Trading Act 2012* (‘*ACLFT Act*’). The applicants claim for interest accrued from the date that the respondent was required to make payments under the building contract and the project management agreement or alternatively from the commencement of the proceeding.
11. I am not persuaded that an application for interest can be made, without obtaining the leave of the Court under s 58(3)(b) of the *Bankruptcy Act*.
12. In the decision of the South Australian Court of Appeal in *Leadenhall Australia Pty Ltd v Doma & Anor* [2024] SASCA 77 the Court held that bankruptcy-period interest forms part of a single debt which is a provable debt for the purposes of s 58(3) of the *Bankruptcy Act*.[[3]](#footnote-4)
13. Further I do not accept the submission that the delivery of the decision means that the claim for interest is not a fresh step in the proceeding, in circumstances where it was one of the claims made in the proceeding and I reserved that claim in the proceeding pending a future application.
14. As such I will strike out that part of the application seeking orders for interest. There will be liberty to make a further application, should leave of the Court be given at a future time.

## Costs sought by the Applicants

1. Both applicants seek their costs. The second applicant is the director of the first applicant and any claims by the second applicant were made in the alternative to the first applicant’s claims all the claims of the proceeding were intertwined. There are no submissions made by the respondent that I should only make orders in relation to the costs of the first applicant. I am therefore satisfied that it is appropriate to consider both applicants’ costs of the proceeding.
2. The applicants seek their costs of the proceeding under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (‘*VCAT Act*’).
3. The primary position under s 109 of the *VCAT Act* is that parties bear their own costs of a proceeding in the Tribunal. Unlike in the courts, success in a proceeding does not by itself justify an order for costs, something further must be shown.[[4]](#footnote-5) The Tribunal does have a discretion to order costs but only if it is satisfied that it is fair to do so and, in determining whether it is fair to do so, the Tribunal must have regard to the matters in s 109(3).[[5]](#footnote-6)
4. For conduct to fall within s109(3), it is required to be more than simply being successful in defending or bringing a claim.[[6]](#footnote-7)
5. The applicants submit it is fair that the respondent pay their costs because:
   1. the applicants had a relatively strong case (as articulated from the beginning of the proceeding) based on the documents, compared to the incredibly weak counterfactual (not backed by documents) of the respondent. They submit that the respondent put forward numerous defences that had no tenable basis (including her alleged difficulties with English);
   2. the proceeding was made unnecessarily complex by the respondent's decision to run a counterfactual, together with numerous defences in law that required substantial work (as exemplified in her tediously lengthy closing submissions, which demanded a thorough response); and
   3. The respondent failed to accept the applicants’ Calderbank offer of 11 March 2021. The offer was to settle the proceedings for a payment by the respondent to the applicants of $219,766.60 which they submit is a position agreed to be more favourable than what the respondent now finds herself in, including after her costs of the hearing that were subsequently incurred are taken into account.
6. In response the respondent submits it is not fair that she pays the applicants’ costs because:
   1. the applicants caused the parties to incur additional costs because of a number of amendments of their pleadings. The hearing originally listed for 24 November 2020 was adjourned at a directions hearing held on 28 October 2020 by reason of the late discovery of a substantial volume of materials by the applicants. The applicants were ordered to pay the respondent’s costs of the directions hearing of $750. The duration of the hearing was substantially extended because of the manner of cross-examination by the applicants’ counsel;
   2. the applicants ultimately only succeeded in respect of approximately 50% of the value of their claim and abandoned various aspects of their claim (in particular, in respect of the substantial claim for a profit share) at the hearing. The respondent succeeded in respect of part of her counterclaim, and the applicants made other concessions that further reduced the damages awarded. Whilst she ultimately was not successful in defending the claims, she did not conduct the proceeding in a way that caused any substantial increase in costs, nor did I run defences that were without merit;
   3. the proceeding was not one of substantial quantum; and
   4. whilst she accepts the result of the hearing was worse than the Calderbank offer of 11 March 2021, the offer was made less than a month before the hearing, Even if such an offer was effective to give rise to a costs liability, it could only have been effective from the date of expiry of the offer. However, the offer was only expressed by the letter to be open for 7 days and s 114(2) of the *VCAT Act* provides that the minimum period for an offer is 14 days. Accordingly, the offer of 11 March 2021 cannot form the basis of an order by the Tribunal that she pays the applicants’ costs.

### Whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding – s109(3)(a)

1. The respondent submits that additional costs were incurred due to the applicants amending their claims.
2. At the commencement of hearing the applicants’ claims were contained in an Amended Points of Claim dated 3 April 2020 in accordance with orders dated 10 February 2020. On the third day of the hearing I gave leave, by consent, for the applicants to file and serve Further Amended Points of Claim dated 7 April 2021. I did not require the respondent to file Points of Defence to the Amended Points of Claim on the basis that anything not admitted during the hearing would be taken to be in issue. Before the hearing concluded the applicants made an application to amend the Further Amended Points of Claim, however at a directions hearing on 9 September 2021, I refused them leave to do so. I also made an order for costs in respect of the application in favour of the respondent.
3. It is common for claims, and also defences, to be amended during proceedings and where appropriate, orders for costs may be made.
4. However, I am not satisfied that this reason alone weighs in favour against an order for costs.

### Whether a [party](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/s115a.html#party) has been responsible for prolonging unreasonably the time taken to complete the proceeding – s109(3)(b)

1. The respondent submits that the hearing was adjourned due to the applicants providing late discovery and then the length of the hearing was substantially due to the manner of cross-examination by the applicants’ counsel.
2. I note that the applicants were ordered to pay some costs of the respondent for the directions hearing at which the hearing was adjourned.
3. I made no findings in the decision about the nature and extent of the cross-examination of the by the applicants’ counsel. Whilst Ms Lo was subject to lengthy cross examination this was reasonable because:
   1. much of the evidence was about conversations between the parties.
   2. the difficulties in interpreting the emails between the parties;
   3. Ms Lo’s evidence that she sometimes agrees to things to be polite even if she does not mean what she said; and
   4. that Ms Lo did not always answer directly questions put to her.
4. I am not satisfied that this reason alone weighs in favour against an order for costs.

### The relative strengths of the claims made by each of the parties, including whether a [party](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/s115a.html#party) has made a claim that has no tenable basis in fact or law – s109(3)(c)

1. The applicants submit that an order for costs should be made due to the relative strengths of the claims made by each of the parties.
2. That I accepted many of the claims made by the applicants and only some of the claims being made by the respondent does not of itself establish that any particular claims were stronger or not tenable. Both the applicants and the respondent put their claims and defences on many alternate bases.
3. However, ultimately the applicants did enjoy a significant amount of success with their claims. In their amended points of claim the applicants sought an order for $421,141.60, in their closing reply submissions this amount was reduced to $257,343.60 and I found after allowing for some small amounts payable to the respondent, that the respondent must pay $216,812.74. This is a considerable amount for which the respondent denied liability, except in relation to a relatively small amount of about $12,000 for the building contract (after allowing a set off to her). However, whilst I did not accept many of the defences or explanations given by the respondent I made no findings that they were without merit.
4. The applicants’ claim was based on documentation signed by the respondent. which I accepted to a greater extent that the respondent’s verbal evidence.
5. Weighing the claims I am satisfied that the applicants’ claim was relatively stronger than the defences of the respondent and does weigh in favour of an order for costs in favour of the applicants.

### The nature and complexity of the proceeding – s109(3)(d)

1. The hearing lasted five days and the closing written submissions made by the parties were extensive and numbered over 170 pages.
2. The claims, counterclaims and defences in the proceeding were relatively complex. There were three written agreements in dispute, a building contract, a variation agreement and a project management agreement, as well as claims about other verbal agreements that were all in dispute. There were also allegations made by Ms Lo of misrepresentation, unilateral mistake, unconscionability, past consideration and whether sections of the *DBC Act* had been complied with. There was extensive evidence given about the interactions between the parties and other relevant persons over a three-to-four-year period up to eight years before the hearing commenced.
3. Both the applicants and respondent put their claims and defences on a number of alternate bases.
4. The respondent submits says that the proceeding was not one of substantial quantum but I am satisfied that the amount the respondent was ultimately ordered to pay the first applicant of $216,812.74 is reasonably substantial.
5. For these reasons, I am satisfied that the nature and complexity of the proceeding weighs in favour of an order for costs in favour of the applicants.

### Any other matter the Tribunal considers relevant – s109(3)(e)

1. The parties agree that:
   1. the applicants made an offer to the respondent in a Calderbank offer of 11 March 2021, to settle the proceedings for a payment by the respondent to the applicants of $219,766.60;
   2. the offer was open for acceptance for 7 days;
   3. the respondent did not accept the offer; and
   4. the outcome of the proceeding was not more favourable to the respondent.
2. I accept the respondent’s submission that the offer does not comply with the provisions of s 114 of the *VCAT Act*. Therefore, there is no presumption that the applicants will be awarded their costs if the outcome of the proceeding is not more favourable to the respondent. However an offer that is unreasonably rejected it is still a matter that can be taken into account under s 109(e) of the *VCAT Act* in consideration whether it is fair to award costs.[[7]](#footnote-8)
3. To determine whether the rejection of the offer was unreasonable in the circumstances, the Tribunal may be guided by the principles discussed in *Hazeldene’s Chicken Farm Pty Ltd v Victorian Workcover Authority (No.2)* [2005] VSCA 298 (‘*Hazeldene’s*’) at [25].[[8]](#footnote-9)
4. Those principles are:
   1. the stage of the proceeding at which the offer was received;
   2. the time allowed to the offeree to consider the offer;
   3. the extent of the compromise offered;
   4. the offeree’s prospects of success, assessed as at the date of the offer;
   5. the clarity with which the terms of the offer were expressed; and
   6. whether the offer foreshadowed an application for [indemnity] costs in the event of the offeree’s rejecting it.
5. At the time the offer was made the applicants claim was for the amount of $421,141.60, therefore the offer was a significant compromise.
6. The offer was made reasonably close to the hearing which commenced on 6 April 2021. At that time, the respondent was legally represented and initial witness statements and discovery had been exchanged between the parties. I am satisfied that the respondent was in a position to assess her prospects of success by the time the offer was made.
7. The affidavit of Chris Papadopoulos states:

8. I have no record of the respondent or her solicitor responding to this letter, and I do not believe that she did, in the nature of a counteroffer, requesting an extension of time, or at all.

9. I further have no record, and do not recall, the respondent making any offer to pay my clients a sum of money throughout the proceeding

1. Given the upcoming hearing, and that no response to the offer or request for further time to consider the offer was received, I am satisfied that 7 days was a reasonable time to consider the offer.
2. I am satisfied that the offer made in April 2021 weighs in favour of it being fair to make an award for costs in favour of the applicants.

**Conclusion as whether it is fair to make an order under s 109**

1. In *Vero Insurance Limited v The Gombac Group Pty Ltd* [2007] VSC 117 Justice Gillard said at [22], said:

Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule.

1. After considering the totality of all the matters, I am satisfied, particularly due to the complexity of the proceeding but also to a lesser extent the unreasonable failure to accept the offer and the strength of the applicants’ claims based on documents being relatively stronger than the respondent’s defence and counterclaim, that it is fair to exercise the Tribunal’s discretion under s 109(2) and make an order the respondent pay the applicants’ costs.

## What costs orders should be made

1. The standard basis is the usual basis upon which costs are ordered.[[9]](#footnote-10)
2. The applicants seek their costs of the proceeding on a standard basis to 18 March 2021 (being the expiry of the Calderbank offer), and thereafter on an indemnity basis. Costs on an indemnity basis are warranted only in exceptional circumstances, for example where a party has engaged in contumelious or high-handed conduct.[[10]](#footnote-11)
3. The failure to accept the Calderbank offer and the failure of the respondent to make any offers to settle the proceeding does not satisfy me that indemnity costs should be ordered in circumstances where the ordinary position in the Tribunal is that the parties bear their own costs. I am not satisfied that exceptional circumstances exist and that costs should be awarded on an indemnity basis.
4. The respondent submits that if costs are awarded, it should only be costs incurred after the Calderbank offer expired – that is from 18 March 2021. I accept that this might be a relevant consideration in determining what cost orders it might be fair to make if this is the only relevant ground which weighs in favour of an order for costs. However as I am satisfied that there are other bases upon which also weigh in favour of an order for costs, I am satisfied that an order should be made for the costs of the proceeding.
5. In accordance with rule 1.07 of the *VCAT Act*, unless the Tribunal otherwise orders, the applicable scale of costs is the *County Court costs scale* as defined in Rule 1.13 of Chapter I of the Rules of the County Court as in force on 31 December 2024, being a fee, charge or amount that is 80 per cent of the applicable rate set out in Appendix A to Chapter I of the Rules of the Supreme Court as in force on 31 December 2024.
6. Section 111 of the *VCAT Act* provides that the Tribunal may order that the costs be assessed by the Costs Court.
7. Therefore, I will make orders that the respondent pay the applicants’ cost of the proceeding and, if the parties cannot agree on the amount of those costs, that the amount is to be assessed by the Costs Court on the standard basis pursuant to the *County Court costs scale*.

## Conclusion

1. I will make orders in accordance with these reasons.

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| N Feeney  **Member** |  |  |

1. *Axia Building Group (Australia) Pty Ltd v Lo* [2024] VCAT 278. [↑](#footnote-ref-2)
2. The parties did not disclose the date of bankruptcy however it was not disputed it occurred prior to the application being made. [↑](#footnote-ref-3)
3. *Leadenhall Australia Pty Ltd v Doma & Anor* [2024] SASCA 77, [414]. [↑](#footnote-ref-4)
4. *Fasham Johnson Pty Ltd v Ware* [2004] VCAT 1708, [12] per SM D Cremean. [↑](#footnote-ref-5)
5. *Vero Insurance Ltd v The Gombac Group* [2007] VSC 117, [20] – [22] per Gillard J. [↑](#footnote-ref-6)
6. # *Fotopoulos v Landmark Building Design Pty Ltd* [2021] VCAT 656 at [47].

   [↑](#footnote-ref-7)
7. *Parkins v Procycles (Hornsby) Pty Ltd* [2022] VCAT 421 at [103]. [↑](#footnote-ref-8)
8. *Parkins v Procycles (Hornsby) Pty Ltd* [2022] VCAT 421 at [105] – [106]. [↑](#footnote-ref-9)
9. Ibid. [↑](#footnote-ref-10)
10. [*Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*](http://www.westlaw.com.au/maf/app/link/doc?cite=13%20VR%20483&type=FirstPoint) (2005) 13 VR 483; [2005] VSCA 165 at [92]; [*Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd*](http://www.westlaw.com.au/maf/app/link/doc?cite=%5B2011%5D%20VCAT%201406&type=FirstPoint)[2011] VCAT 1406 at [13]. [↑](#footnote-ref-11)