

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D144/2008

CATCHWORDS

Settlement offer accepted by applicant, respondent refuses to pay settlement sum, section 115 of the *Victorian Civil and Administrative Tribunal Act 1998*, costs

APPLICANT	Forty Third Janelda Pty Ltd
RESPONDENT	Beverley Allen
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	9 February 2009
DATE OF ORDER	19 February 2009
CITATION	Forty Third Janelda Pty Ltd v Allen (Domestic Building) [2009] VCAT 138

ORDER

- 1 The Respondent shall pay the Applicant the sum of \$20,500.00 forthwith.
- 2 The Respondent shall pay the Applicant's party/party costs up to and including 13 November 2008. In default of agreement such costs are to be assessed by the Principal Registrar on County Court Scale 'C'.
- 3 The Respondent shall pay the Applicant's costs of and incidental to its application for reinstatement and its application under s115 of the *Victorian Civil and Administrative Tribunal Act 1998*. Such costs to be paid on an indemnity basis and in default of agreement are to be assessed by the principal registrar.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr N. McPhee, Solicitor
For the Respondent	Ms B. Allen in person

REASONS

- 1 In November 2007 the respondent owner engaged the applicant builder to carry out rectification works. This followed a successful claim under a policy of home warranty insurance in relation to works carried out by another builder. The contract price was \$66,990 of which \$26,699 has been paid. The contract provided for a 10% deposit which has been paid. Three progress payments, each of \$20,097 were to be paid upon certification by Raymond Martin that a third, then two thirds of the works were complete, and finally that practical completion had been achieved. \$20,000 has been paid as part payment of the first progress claim but the second and final payments have not been, although each stage has been certified by Mr Martin. Practical completion was certified by Mr Martin as having been achieved on 22 January 2008.
- 2 Following the failure by the owner to pay the outstanding balance, the builder commenced proceedings on 28 February 2008 seeking payment of the outstanding balance of \$40,291 plus interest and costs. Points of Defence and Counterclaim were filed on 31 July 2008 and Amended Points of Defence and Set Off and/or Counterclaim were filed on 10 September 2008. The owner claimed that the works carried out by the builder were defective in that they had not adequately addressed the water proofing and drainage problems works. She claimed the cost of rectification of the works at \$67,297 as estimated by Mr Robert Quick of Buildspect. She also sought reimbursement of the cost of the Buildspect report and inspection fees of \$1,410.30 and damages for physical inconvenience, distress, loss of enjoyment and loss of amenity by reason of the defective state of the works with the amount to be assessed by the tribunal, interest and costs.
- 3 On 14 November 2008 the tribunal received notice from the owner's then solicitors that the matter had settled. This was confirmed by the builder's solicitors on 18 November 2008 and on the same date the following consent orders were made:
 1. That the proceedings (both claim and counterclaim) be struck out with a right of re-instatement.
 2. The Respondent to pay the Applicant's costs on a party/party basis on County Court Scale "C", in default of agreement to be assessed by the Registrar.
- 4 On 16 December 2008 the builder's solicitor wrote to the tribunal advising the settlement monies had not been paid and requesting reinstatement of the proceeding and an urgent directions hearing. On 19 December 2008 they wrote again advising that the builder was making an application under s115(c) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*').

- 5 The application was set down for hearing on 22 January 2009. At 3.09 p.m. on 21 January the tribunal received a Notice of Solicitor Ceasing to Act from the owner's solicitors.
- 6 Two affidavits in support of the builder's application were filed by facsimile on 21 January 2009 at approximately 6.00 p.m. At the hearing, given the late receipt of a Notice of Solicitor Ceasing to Act for the owner I could not be satisfied that the owner was aware of the contents of the two affidavits. In the circumstances, whilst accepting that the payment had not been made and ordering that the proceeding be reinstated, I considered it inappropriate to hear the application under s115 of the *VCAT Act*. Orders were made for the service of all affidavits on the owner and for her to file and serve affidavit material in reply.
- 7 An affidavit in reply was filed on 6 February 2009. At the hearing of this application on 9 February 2009 the builder was represented by Mr McPhee, solicitor and the owner appeared in person.
- 8 Mr McPhee confirmed that his client was seeking orders under s115(c) of the *VCAT Act* and in the alternative an order under s115(a). Section 115(a) and (c) provide:

If an offer is accepted, but the party who made the offer does not comply with its terms, the Tribunal, at the request of the party who accepted the offer, may—

(a) make an order giving effect to the terms of the offer; or

...

(c) if the party who accepted the offer is the applicant, make an order awarding the applicant any or all of the things asked for in the application. (emphasis added)

The application under s115

- 9 Mr McPhee submitted that as the builder was the applicant it was entitled to an order under s115(c) awarding it "*any or all of the things asked for in the application*": payment of the outstanding balance under the contract of \$40,291 plus interest and costs.
- 10 It is clear that any orders, or the terms of the orders, made under s115 are entirely at the discretion of the tribunal. It does not automatically follow that an order should be made under s115(c) if the party who accepted the offer was the applicant. In this case the applicant's claim was for payment of the sum of \$40,291. Following the usual practice in the Domestic Building List, rather than lodging a separate application as a cross-claim, the respondent counterclaimed for the estimated cost of rectification works of \$67,297 plus the other claims as set out above. An applicant is defined in s3 of the Act as '*a person who makes an application*'. An application is defined as '*an application to the Tribunal*'. An application fee is payable and was paid. In my view a respondent lodging a counterclaim, instead of a separate application, is clearly making an application.

- 11 Having regard to ss 97 and 98 of the *VCAT Act* it would, in my view, be grossly unfair for the tribunal to award the applicant *'any or all of the things asked for in the application'* where a respondent, having counterclaimed for an amount exceeding the amount claimed by the applicant, then made an offer in settlement (of the whole proceeding, including the counterclaim), which was accepted by the applicant, failed to make payment of the settlement sum.
- 12 I do however consider it appropriate that other than in exceptional circumstances the tribunal should make an order under s115(a) *'giving effect to the terms of the offer'*. At the time the settlement offer was made by the owner she was represented by experienced solicitors. There is no allegation or suggestion that the offer was made without instructions. Rather the owner has simply refused to pay the settlement sum.
- 13 The owner gave evidence confirming the contents of her affidavit filed on 6 February that she is not prepared to pay the settlement sum because she believes that the plumbing compliance certificate is invalid and that accordingly the building contract is invalid. Mr Craig Cartwright, a director of the applicant builder, has deposed to the works having been carried out by his brother, Stuart Cartwright, the licensed plumber who issued the plumbing compliance certificate. The owner disputes this and says that she has photographs of all those who attended on site and carried out works, and that the plumbing works were carried out by Craig Cartwright and his apprentice, not by Stuart Cartwright.
- 14 The owners's allegations are serious and I understand she has referred them to the Plumbing Industry Commission for investigation. This is a matter for the Plumbing Industry Commission and, if her complaint is upheld, she may wish to seek legal advice as to the appropriate course of action. However this does not provide her with any excuse for not making payment of the settlement sum. Further, if the complaint is upheld it will not mean that the building contract is of itself invalid.
- 15 In her affidavit and in response to a question from me during the hearing, the owner confirmed that many of her concerns arise out of what she contends are the failure of the builder to rectify the waterproofing and drainage problems. In her affidavit she refers to specific items of work which she believes were not carried out by him or are defective. Many of the alleged defects were part of her counterclaim and are referred to in Mr Quick's report which she relied on in support of her counterclaim.
- 16 As noted during the hearing, the owner has agreed to compromise this proceeding, being the builder's application and her counterclaim, by agreeing to pay the builder approximately half of the balance outstanding under the contract. In other words, upon payment of the settlement sum she will retain approximately \$20,000.00 of the outstanding balance of \$40,291 which she is free to apply towards carrying out the rectification works she claims are still necessary. If there are new matters about which she has

become aware, since the offer was made and accepted, then she can, of course, issue a new application. Any new application will be decided on its merits.

- 17 This hearing is about whether the tribunal should make an order under s115 of the *VCAT Act*. For the reasons discussed above I am satisfied the tribunal should make an order under s115(a) to give effect to the settlement offer. I will therefore order that the owner pay to the builder the settlement sum of \$20,500.00 and the builder's costs of the proceeding which, as set out in the settlement offer and the order made on 18 November 2008, are the builder's party-party costs to be assessed on County Court Scale "C".

Costs

- 18 The builder seeks its costs of and incidental to the application for reinstatement and its application under s115. This application is made under s53(1) of the *Domestic Building Contracts Act 1995*:

The Tribunal may make any order it considers fair to resolve a domestic building dispute

and s109 of the *VCAT Act* and in particular to s109(3)(b):

The Tribunal may make any order under sub section 2 only if satisfied that it is fair to do so, having regard to whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding.

I also consider it relevant to have regard to s109(3)(e):

Any other matter the Tribunal considers relevant.

- 19 In this proceeding the respondent owner made an offer of settlement under ss112, 113, 114 and 115 of the *VCAT Act*. The offer is best summarised in paragraph 3 of the owner's former solicitors in their letter dated 30 October 2008:

Our client offers to resolve the whole proceeding on the basis that our client will pay to your client applicant a total sum of \$20,500.00 plus County Court Scale party-party costs on Scale "C" in full and final settlement of your client's claims in the proceedings against our client. This offer also takes into account and satisfies our client's counterclaim in the proceeding.

...

This offer remains open to be accepted for a period of fourteen (14) days and upon acceptance payment of the principal sum of \$20,500.00 will be made within thirty (30) days and the costs component upon either assessed agreement or assessment by the Tribunal.

- 20 The offer was accepted by the builder and the consent orders referred to above were made by the tribunal on 18 November 2008. I note the owner was legally represented until 21 January 2009.

- 21 I am satisfied that it is appropriate for the Tribunal to exercise its discretion under s109(2) of the *VCAT Act* and order the respondent to pay the applicant's costs of the reinstatement application and this application. There is simply no excuse for the owner's failure to make payment of the settlement sum. It may be that she has been misguided in her understanding about the impact of the further matters she raises in her affidavit and, in particular, her concerns about the validity of the plumbing compliance certificate. However, as discussed earlier in these reasons, many of the matters raised in her affidavit are matters that were fairly and squarely raised in her counterclaim and her expert's report. They are matters which were known to her and presumably taken into account in deciding upon the settlement offer.
- 22 The builder seeks its costs on an indemnity basis. Whilst it is clear that orders for indemnity costs must only be made in exceptional circumstances, I am satisfied that this is one of those. It would be unfair for the builder to incur any costs because of the unwarranted refusal of the owner to pay the amount **she** offered the builder to settle the proceeding, and which it accepted. I will therefore so order.

DEPUTY PRESIDENT C. AIRD