VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D584/2004

CATCHWORDS

Costs – Successful s.112 VCAT offer of compromise – "All costs" order – Meaning – Indemnity costs.

APPLICANT:	Geftine Pty Ltd
RESPONDENTS:	Dover Beach Pty Ltd (T/as Stone Constructions) & Ors
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Dove
DATE OF HEARING:	19 October 2006
DATE OF REASONS:	30 October 2006

GEFTINE PL V DOVER BEACH PL (DOMESTIC BUILDING) [2006] VCAT 2189

ORDERS

1. That the respondents pay damages to the applicant in the sum of $29,950.00, including $4,000.00 damages in the nature of interest. (Order made on 4th October 2006).
2. That the respondents pay the applicant's costs, to be taxed on County Court Scale "C", on a party and party basis, from the commencement of the proceeding to the 23rd December 2004.
3. That the respondents pay the applicant's costs, to be taxed on County Court Scale "C", on an indemnity basis, from the 23rd December 2004 onwards.
4. With certificates for counsel based on the fees payable pursuant to County Court Scale "C" with such refreshers as the taxing officer allows and the reasonable costs of the preparation of the Tribunal book.
5. That there be a stay for the payment of costs for 30 days.

HIS HONOUR JUDGE DOVE

APPEARANCES:

For the Applicant:	Mr P Baker of Counsel, instructed by Rigby Cooke Lawyers
For the Respondents:	Mr G Hellyer of Counsel, instructed by Hoeys,

Lawyers

REASONS FOR DECISION – COSTS APPLICATION

1 In delivering my reasons in this matter, I awarded the applicant damages in the sum of $29,950.00 (including $4,000.00) damages in the nature of interest. I dismissed the counterclaim of the first and third respondents ("the respondents"). For completeness, I point out that the applicant had released the second respondent from the proceeding prior to the hearing. The dispute related to the construction by the respondents of a residence above commercial premises owned by the applicant.

2 The proceeding came before me again on 19th October, 2006, to enable the parties to make submissions concerning costs.

3 The applicant sought an order for costs upon an indemnity basis from 23rd December, 2004, against the respondents or, in the alternative, that the respondents pay the applicant's costs on County Court Scale "C" as upon a party/party basis.

4 The question of what costs orders should be made requires, in the present case, consideration of two sections of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the *VCAT Act*"). Section 109 of the *VCAT Act* provides the general basis for determination of costs issues. By s.s.(1), the general provision, and legislative preference, is that each party bear his or its own costs of any proceeding brought under the Act. However, later provisions in the section give the Tribunal a discretion, which is broadly based, to award costs in favour of one party against another.

5 The second section of relevance in this proceeding is s.112, a section which permits a party to make a formal settlement offer, which if more favourable to the other party than the outcome of the proceeding, creates a presumption of an order for costs in favour of the party making the offer.

6 Section 109 is as follows:-

"**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;

(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.

(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding."

7 In summary, Mr Baker, counsel for the applicant, put it by way of his primary submission that s.112 of the *VCAT Act* had application, and formed the basis for the awarding of indemnity costs.

8 Section 112 of the *VCAT Act* is in these terms:-

"**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 sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

(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."

9 Mr Baker relied upon a document entitled "Offer of Settlement by the Applicant" dated 23 December, 2004. Mr Hellyer, counsel for the respondents, conceded the document had been served on the respondents' solicitors on or about that date. In conformity with one of the requirements of s.114 of the *VCAT Act*, the time given for acceptance of the offer was expressed to be 21 days.

10 The document was in these terms (formal parts omitted):-

"**TAKE NOTICE**

1. This is an Offer of Compromise served in accordance with Part 4, Division 8 of the *Victorian Civil and Administrative Tribunal Act* 1998.
2. The Applicant offers to compromise its claims against the First & Third Respondents and the First & Third Respondents' counterclaim on the terms that follow.
3. The Applicant pay to the First & Third Respondents the sum of $25,000 ("**the settlement sum**").
4. The Applicant shall pay to the First & Third Respondents such costs, if any, as may be agreed between these parties or, in default of agreement, as may be fixed by the Tribunal ("**the costs**").
5. The costs, if any, shall be paid to the First & Third Respondents within 14 days

of being agreed or fixed, as the case may be.

6. The Applicant shall pay the settlement sum to the lawyer for the First & Third Respondents within 28 days of the Respondents' acceptance of this Offer of Compromise.

7. Subject to the First & Third Respondents accepting the offer set out in paragraphs 1 to 6 hereof, the Applicant offers to settle its claims against the Second Respondent on the basis that the Applicant withdraws or discontinues its claims against the Second Respondent, and thereupon the Second Respondent shall pay all its own costs of and incidental to these proceedings.

7. (sic) Forthwith upon the acceptance of this Offer of Compromise by all Respondents the parties shall do all things and sign all documents to have all matters between all parties hereto arising out of or incidental to these proceedings struck out without adjudication on the merits and with no order as to costs.

8. This Offer of Compromise is made without prejudice.

9. This Offer of Compromise is open for acceptance for a period of 21 days after the day on which it is served.

10. This offer is made without prejudice to the right of the Applicant to submit to the Tribunal that the Respondents are not entitled to any costs in this matter."

11 In the result, the applicant achieved a far more favourable result than that made in the offer, and that was not disputed. However, the respondents attacked the offer on two bases. First, that the offer was ambiguous and uncertain in its terms. Secondly, that it was unfair to give the respondents only 21 days to consider the offer when a significant part of that period was absorbed by the Christmas-New Year holiday period.

12 The first proposition that the offer was uncertain and ambiguous is based upon what is recited in paragraphs 4 and 10 of the offer, which paragraphs relate to costs. Those paragraphs are set out above.

13 The first of these submissions is not without its attraction. It is clear that the applicant was reserving the right to argue, in the event that its offer was accepted by the respondents, that the general provisions of s.109 should apply and that no order for costs should be made. If s.109 applied, a presumption arose that no costs should be ordered to be paid. As s.112 does not contain any provision concerning costs in relation to acceptance of an offer of compromise, the Tribunal would be left to determine the entitlement to costs pursuant to the provisions of s.109. This regime stands

in contrast to the relevant provisions of O.26 Supreme Court Rules. O.26.03 sets out the steps relating to the making of an offer of compromise and to its acceptance. O.26.03(7) is in these terms:-

> "7. Upon the acceptance of an offer of compromise in accordance with paragraph (4), unless the Court otherwise orders, the defendant shall pay the costs of the plaintiff in respect of the claim up to and including the day the offer was served."

14 Thus, it is argued that, under the Rules, the presumption is that a party accepting an offer will recover its costs. The authorities recite that it will fail to do so only in exceptional circumstances. Further, an offer of compromise given under the Rules relates to the claim(s) only; by reason of the sub-rule to which reference has been made above, the Rules take care of costs. The absence of a costs provision in s.112 (or in s.113 to 115) creates for the party receiving the offer the dilemma that it is uncertain whether it will receive its costs, as the Tribunal would be required to consider that question in the light of s.109. It is said that faced with that uncertainty, the Tribunal should not give effect to this offer.

15 Despite the attractiveness of this argument, I do not find it to be valid. The difficulty said to be present in the respondents' minds relates not to the content of the offer, but to the failure of the Parliament to insert into s.112 a sub-section similar to O.26.03(7). As s.112 and the following sections, 113 to 115, are silent on the question of costs, the applicant applied its mind to giving clarity to its offer. It did that by the introduction of paragraphs 4 and 10.

16 The respondents objected that the offer was not clear and precise, referring in support of that contention to the passage in *Williams – Civil Procedure Victoria* @ [1.26.02.30]. I reject that submission. My conclusion overall is that the applicant's offer was as clear and precise as the section allowed.

17 It offered $25,000.00 and further offered to pay the respondents' costs, if the

Tribunal so ordered. In doing so it was echoing the spirit of O.26, by agreeing to pay costs if the Tribunal so ordered. Any complaint of lack of clarity or precision might properly be directed at the drafting of s.112. I am satisfied that the applicant's offer was one given validly in conformity with s.112. It was not objected that the offer failed to comply with s.113 and 114 (see s.112(1)(c)) and I am satisfied that it does. The orders I have indicated I shall make in relation to principal relief show clearly that they are more favourable to the applicant than the offer made by it on the 23rd December, 2004.

18 I turn then to the second submission of the respondents; namely that the giving of the offer immediately before the Christmas break gave the respondents too little time for appropriate consideration, even though 21 days for acceptance was given. Although it was not spelt out, I assume it was being contended that, as the Supreme Court Rules state that time fixed by those Rules shall not run between 24 December and 9 January, those days should be excluded from consideration when calculating the minimum period of 14 days during which the offer shall remain open as required by s.114(2). There are two immediate answers to that submission. First, neither the *VCAT Act* nor the Rules make any provision for a period during which time shall not run. Secondly, the concept of a summer vacation does not exist at VCAT, where the Tribunal resumes sitting in early January. The giving of 21 days was a sensible act having regard to the onset of Christmas but it was not necessary. I reject the submission.

19 Accordingly, I conclude that the applicant is entitled to an order that the respondents pay all costs from that last date, unless I am persuaded to otherwise order. To this I shall return.

20 As s.112 does not deal with the question of costs prior to the date of the offer, it is necessary to determine what order should be made in relation to

those costs by giving effect to s.109.

21 The principal argument directed by the respondents to s.109 was that as I had found that the contract was void against the builder by reason of its failure to have registration as a domestic builder and its failure to have the necessary statutory insurance, being breaches of the *Building Act*, the applicant should not have its costs. It was said that the applicant, in seeking a declaration, had relied upon s.133 of the *Domestic Building Contracts Act* 1995, only, as the basis for that declaration. There is no substance to this submission. The applicant, in its submissions supporting the making of a declaration, relied heavily upon the dual absences of registration and insurance cover, and based that reliance on the fact that they were breaches of key requirements of the *Building Act*.

22 For the applicant, a bold first submission was made that its costs prior to 23rd December, 2004 should be taxed on a full indemnity basis and paid by the respondents. Underlying that submission was the assertion that the respondents' actions were high handed and improper and in breach of their statutory obligations, thus creating exceptional circumstances which, if justice be done, entitled the applicant to indemnity costs from the commencement of the proceeding. In its outline of submissions on costs, the applicant identified 14 matters which it said justified this approach.

23 I do not intend to examine this submission in fine detail. Suffice it to say that the matters raised justify an order for costs against the respondents for that period on a party-party basis, but not for indemnity costs. Further, this was fundamentally commercial litigation in which the applicant was successful, and that factor also is significant in determining to make a costs order in its favour pursuant to the provisions of s.109(2) it being fair to do so. Accordingly, I propose to order that the respondents pay the applicant's costs to be taxed on County Court Scale "C" from the commencement of the

proceeding to the 23rd December, 2004.

24 I return then to the costs order I should make for the period from 23rd December 2004. I have determined that the offer was one given properly in compliance with s.112 to 115. This creates a presumption in favour of the applicant concerning costs. I have endeavoured to give expression to the submission that I should otherwise order and I have rejected that submission. It follows, and I conclude, that the applicant should recover all costs from the 23rd December, 2004. The term "all costs" is an unusual term. In the legislation and the Rules, costs have traditionally been identified as "Party-Party Costs", "Solicitor and Client Costs", and "Costs on an Indemnity Basis" (see O.63.28). The amplitude of each such expression is explained in O.63.29 to 31.

25 Because the term "all costs" is not defined, debate has ensued about whether it should be interpreted as meaning solicitor client costs or indemnity costs. In *Duggan v MGS Products Pty Ltd* [2002] VCAT 1764, Deputy President Macnamara said that as there were no words of qualification of "all costs" the term meant that the party was entitled to a full indemnity and that costs on a full indemnity basis should be awarded. I agree that the plain meaning of the words is such that an order for costs on a full indemnity basis should be given in the present case.

26 The distinction between solicitor-client costs and indemnity costs is to be seen in comparison of the wording of O.63.30 with that in O.63.31. The major practical difference appears to lie in the shifting of the onus, the effect of which may be significant in some cases, but not in others.

27 In the present case, there is a need for a limitation in one respect. If this action had been able to have been brought in the County Court, the damages awarded barely propelled it into Costs Scale "C". I propose to order that costs be taxed on Scale "C" and to restrict any certificates I give to

that Scale. It was a small claim on any view. The applicant pursued certain claims for rectification which were trivial and other claims which failed. In each case time was expended in pursuing them. To the extent that I limit indemnity costs to Scale "C", I otherwise order as provided for in s.112(2).

28 This is not a case where justice is done by allowing, for example, fees to counsel based on County Court Scale "D", or on the going Supreme Court rate. Likewise, the Registrar or other taxing officer will have to consider whether, in the context of my comments, it is unreasonable to allow expenses to experts which are in excess of the sums set down in the Costs Schedule.

29 In the result, I propose to make the following costs orders:

1. That the respondents pay the applicant's costs, to be taxed on County Court Scale "C", on a party and party basis, from the commencement of the proceeding to the 23rd December, 2004.

2. That the respondents pay the applicant's costs, to be taxed on County Court Scale "C", on an indemnity basis, from the 23rd December 2004 onwards, with certificates for [ ].

3. I shall hear counsel concerning certification.

HIS HONOUR JUDGE DOVE