**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. BP1162/2015

## CATCHWORDS

Costs – section 109, 112, 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998.*

| | |
|---|---|
| **APPLICANT** | Irene Antczak |
| **RESPONDENT** | Tara Roach Pty Ltd (ACN 128 839 690) |
| **WHERE HELD** | Melbourne |
| **BEFORE** | B Thomas, Member |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 25 August 2016 |
| **DATE OF ORDER AND REASONS** | 4 November 2016 |
| **CITATION** | Antczak v Tara Roach Pty Ltd (Building and Property) [2016] VCAT 1859 |

## ORDER

1. The respondent must pay the applicant's costs of the proceeding from 11 February 2016 to be agreed, but failing agreement on a standard basis pursuant to the County Court Scale, to be assessed by the Costs Court.

B Thomas
**Member**

**APPEARANCES:**

| | |
|---|---|
| For Applicant | Mr N Gallwa, of Counsel |
| For Respondents | Mr Ravi Sinha, Director |

## REASONS

### BACKGROUND

1 In this proceeding on 31 May 2016, I ordered the respondent to pay the applicant the sum of $20,108.00 as damages for the cost of rectification of defective building works carried out by the respondent at the applicant's residence in Ardeer.

2 The applicant now seeks an order for costs pursuant to sections 109 and 111 or sections 111 and 112 of the *Victorian Civil and Administrative Tribunal Act 1998* (the Act). The application was heard on 25 August 2016.

### THE TRIBUNAL'S DISCRETION AS TO COSTS

3 **Section 109** of the Act provides that each party to a proceeding is to bear its own costs; however the Tribunal may, if it is satisfied that it is fair to do so, order a party to pay all or a specified part of the costs of another party.

4 The relevant provisions of section 109 are –

> (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 the proceeding.
>
> (3) The Tribunal may make an order under subsection (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 claim 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.

5 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20] Gillard J set out the approach to be taken by this Tribunal when considering an application for costs pursuant to section 109 of the Act, and concluded that the Tribunal should approach the question on a step by step basis -

(i) the prima facie rule is that each party should bear its own costs of the proceeding;

(ii) the Tribunal may make an order awarding costs, being all or a specified part of costs, **only if it is satisfied that it is fair to do so**. That is a finding essential to making an order.

(iii) in determining whether it is fair to do so, to award costs the Tribunal must have regard to the matters stated in section 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e), the Tribunal may also take into account any other matter that it considers relevant to the question.

6 His Honour at [19] noted that whilst section 109(3) lists the various matters to be considered, section 109(3)(e) operates to extend those matters to include any other matter that the Tribunal may consider relevant; that is, the matters listed are not exhaustive.

7 **Section 112** of the Act makes provision for a costs order where a party has rejected a settlement offer by another party.

8 The relevant provisions are –

(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 it's orders are or are not 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 Pursuant to section 114 the Act, the minimum period and offer can be open for acceptance is 14 days.

## THE SUBMISSIONS OF THE PARTIES

### Section 109(3)(a)

10 The respondent was legally represented until at least 7 March 2016. He relied on a report by Mr Arvinder Lamba dated 17 January 2016 as his expert. Mr Lamba's report did not comply with the VCAT Practice Note for an expert report, and as found by the Tribunal, he was simply being an advocate for the respondent. In this respect, the applicant submits that the respondent failed to comply with section 109(3)(a).

11 I am not satisfied that Mr Lamba's poor practice as an expert is the kind of failure that justifies an order under 109(3)(a).

### Section 109(3)(c)

12 The applicant further submits that section 109(3)(c) favours her as –

(a) the respondent was wholly unsuccessful and ordered to pay the entire amount of the applicants claim;

(b) the respondent failed to obtain a building permit for the works; and

(c) the respondent's defective work resulted in –

(i) a finding by the Building Practitioners Board that Mr Sinha had committed six breaches of the *Building Act 1993;* and

(ii) suspension of Mr Sinha's registration as a building practitioner for a period of three months.

13 I do not consider that the mere fact that the applicant was successful in her claim entitles her to a costs order in her favour. Further, I do not consider that the finding and penalty imposed by the Building Practitioners Board is relevant to the issue of costs in this proceeding.

### Section 109(3)(d)

14 The applicant submits that under section 109(3)(d), the nature of the proceeding was complex, as the applicant was obliged to engage Mr Cross as an expert, and rely on his evidence, which involved detailed references to the Building Code of Australia and various Australian Standards.

15 This proceeding was a relatively simple residential building dispute involving the demolition and reconstruction of a veranda to the applicant's residence. I do not therefore consider it was in nature particularly complex. The respondent disagreed with the method and extent of rectification proposed by Mr Cross and was also of the view that the cost of rectification as estimated by Mr Cross was excessive. I consider he was justified in defending the applicant's claim and his defence was not vexatious or frivolous.

### Section 109(3)(e)

16 The applicant also submits that the various settlement offers she made are "other matters" the Tribunal should take into account under section 109(3)(e). However, as the applicant also relies on section 112 of the Act, I do not consider that offers are relevant as "respondent's conduct".

17 Finally, the applicant submits that the respondent in inspecting the defective work was "drawn out and meandering". However, I do not accept that the applicant was prejudiced by the fact that it took from mid-November 2015 to mid-January 2016 for the respondent's expert to inspect the work.

18 Therefore, I find that there is no justifiable reason to depart from the prima facie rule that each party should bear its own costs of the proceeding.

### Section 112

19 On 11 February 2016, the applicant made a written "without prejudice save as to costs" offer to accept $14,000.00 plus her costs to date on a standard costs basis in accordance with County Court scale. This offer was not accepted by the respondent. The applicant submits that as the Tribunal's order of $20,108.00 is not more favourable to the respondent than the applicant's 11 February 2016 offer, and further that the Tribunal ordered that the respondent pay the entire amount assessed by Mr Cross as the costs of rectification, the respondent acted unreasonably in rejecting that offer.

20 The applicant relied on *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* (2005) 13 VR 435 at [12] (Hazeldene's case) as authority for the propositions that –

a) the respondent, as the unsuccessful party, bears the onus of proving that the costs claimed by the applicant are unreasonable; and

b) the public policy rationale of offers of compromise is to encourage the saving of costs and avoiding the risks and delays of litigation and to indemnify a party who has made an offer found to be reasonable, against costs later incurred.

21 The applicant submits that had the respondent accepted her offer of 11 February 2016, she would have saved considerable costs and avoided the risks and delays of the litigation.

22 The respondent submits that it has always been ready and willing to settle this matter since as early as 2013 -

a) on or about 19 June 2013, when the applicant made a complaint to the Victorian Building Authority;

b) on or about 17 September 2013, when the parties entered into negotiations after the applicant lodged a complaint with Consumer Affairs Victoria;

c) on 30 September 2015, when the respondent made a Calderbank offer to the applicant to refund to the applicant the full sum of $5,600.00 paid by the applicant; and

d) on 29 February 2016, when the respondent offered to pay $14,000.00 for the rectification works.

23 The respondent says that the applicant's settlement offer dated 11 February 2016 of $14,000.00 plus legal costs was rejected as the legal costs were not specified, and at the time the offer was made, even if the applicant was successful, the Tribunal would need to determine whether costs should be paid under section 112 of the Act.

24 The respondent also relied on Hazeldene's case at [49] to [50] -

> …a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
>
> (a) The stage of the proceeding at which the offer was received;
>
> (b) The time allowed to the offeree to consider the offer;
>
> (c) The extent of the compromise offered;
>
> (d) The offeree's prospects of success, assessed as at the day of the offer;
>
> (e) The clarity with which the terms of the offer were expressed;
>
> (f) Whether the offer foreshadowed and application for an indemnity cost in the event of the offeree's rejecting it.

25 The respondent submits that the applicant's offer of compromise dated 11 February 2016 was made only a few weeks before the hearing. Given that the quantum of the rectification works was in issue, the respondent's prospects of success were unknown. The offer did not expressly state what the legal costs were or provide an estimation. The terms of the offer were not expressed with clarity and therefore, in accordance with section 112 (3) (b), it cannot be taken as a better outcome than what has been awarded by the Tribunal. Hence, it was not unreasonable for the respondent to reject the offer.

26 In this context, the respondent relies upon *Premier Building & Consulting Pty Ltd v Spotless Group Ltd* (No. 13) in which it was noted that -

> What, then, is meant by 'unreasonable' in this context? A decision to accept or not an offer of this kind will ordinarily be based upon the offeree's perception of its ultimate chances of success, that is, it involves a prediction as to the likely outcome of the trial. At the time the debate about costs occurs, the trial will normally be over, the event will have demonstrated that the prediction which underlay the decision was not fulfilled, that it was erroneous or even imprudent.

27 The applicant's offer of 11 February 2016 was for $14,000.00 plus costs to that date on a standard cost basis. The period for acceptance of the offer

was 14 days and the date for payment was stated. I am satisfied that the applicant's offer dated 11 February 2016 complies with sections 112, 113 and 114 of the Act. The issue for determination by the Tribunal is therefore whether rejection of that offer by the respondent was unreasonable.

28 The applicant's building expert, Mr Cross, provided a report dated 12 July 2015, in which he costed the rectification works at $20,108.00. A copy of his report was served on the respondent under cover of a letter from the applicant's solicitors dated 30 July 2015, which advised the respondent that the applicant was prepared to accept that sum in settlement of her claim. The respondent did not respond to that letter and proceedings were commenced in the Tribunal on 1 September 2015. On 30 September 2015, the respondent offered $5,600.00 in settlement of the applicant's claim. On 14 October 2015, the applicant invited the respondent to reconsider its offer of $5,600.00 by repeating her offer of 30 July 2015. The Respondent did not respond and on 11 February 2016, the applicant served her offer of compromise of $14,000.00 plus costs to date on a standard cost basis. On 29 February 2016, the respondent offered the sum of $14,000.00 inclusive of both damages and costs.

29 It was not until mid-November 2015 that the respondent sought to inspect the building works and it was not until 16 January 2016 that Mr Lamba, the respondent's expert, inspected the works and provided a report. I consider that between 30 July 2015 and 30 September 2015 when the respondent made its offer of $5,600.00, it had more than ample time in which to consider Mr Cross's report, arrange its own inspection, and respond to the report. I do not accept that the difficulty in engaging an expert witness due to the holiday period, is a satisfactory explanation for the delay in doing so. It took in excess of six months from receipt of Mr Cross's report for the respondent to have the works inspected. Then having received the applicant's offer of compromise, it elected to take issue with Mr Cross's quantification of the cost of rectification. In this regard, I note that the respondent was legally represented until at least 7 March 2016.

30 I therefore find that the respondent acted unreasonably in failing to accept the applicant's offer of compromise dated 11 February 2016. I note that unreasonably failing to accept or rejecting an offer is not a necessary element under s112. However, it is a factor in my decision to exercise my discretion in favour of the applicant.

31 I will order that the respondent shall pay the applicant's costs from 11 February 2016 on a standard basis, in the absence of agreement, to be assessed by the Costs Court

B Thomas
**Member**