VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D159/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, costs, s109, s112 and offer to settle, discretion, party-party, solicitor-client or indemnity, certify for an expert not called to give evidence, certify for counsel

FIRST APPLICANT	Jason Borg
SECOND APPLICANT	Grace Borg
RESPONDENT	Metricon Homes Pty Ltd (ACN 005 108 752)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	13 March 2009
DATE OF ORDER	25 March 2009
CITATION	Borg v Metricon Homes Pty Ltd (Domestic Building) [2009] VCAT 507

ORDER

1 The Applicants must pay the Respondent's costs. Failing agreement, the costs are to be assessed by the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 as follows:

> Up to and including 13 June 2008, on a party-party basis on County Court scale C, and
>
> From and including 14 June 2008 on an indemnity basis.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants	Mr I. McEachern of Counsel
For the Respondent	Mr B. Carr of Counsel

REASONS

1 On 10 December 2008 I dismissed the Applicants' claim against the Respondent, and reserved costs. The Respondent now seeks costs under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") to 13 June 2008 on a party-party basis, and costs from 14 June 2008 under s112 of the VCAT Act on an indemnity basis in circumstances where a settlement offer dated 11 June 2008 was sent to the Applicants' solicitors.

THE S109 APPLICATION

2 Section 109 of the Act provides in part:

s.109:

(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 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 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.

3 The Respondent bases its claim from the commencement of the proceeding to 13 June 2008 on one or more of s109(3)(c), (d) and (e) of the Act.

4 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should 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, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

s.109(3)(c) – The Relative Strengths of the Claims made by each of the Parties

5 The true proceeding was one where the Applicants' household insurer sued the Respondent by subrogation to recover $22,125.00 paid by the insurer to the Applicants for damage to their floor. The damage was alleged to have been caused by the Respondent's failure to properly plumb their home in two areas.

6 The incontrovertible fact is that the application was dismissed. That alone might not be enough to demonstrate that a party has fulfilled the requirements of s109(3); it is not limited to matters where a claim or a defence has no tenable basis in fact or in law. The Applicants failed to establish the causal link between the alleged fault and the damage suffered, and as Mr Carr of Counsel for the Respondent said, they chose not to seek expert advice. Had they done so they might have appreciated the inconsistency between the alleged cause of the floor damage and the physical evidence.

7 I find that the Applicants' claim was sufficiently weak, legally and factually, to justify an order for costs in favour of the Respondent, which I will order.

s.109(3)(d) – The Nature and Complexity of the Proceeding

8 The hearing was for three days, concerned a fairly modest sum and was mainly a factual argument. I do not have to decide whether the proceeding was sufficiently complex, or otherwise of such a nature to justify an order for costs on this ground alone. It inhabits the grey area where the answer is not obvious.

s.109(3)(e) – Any Other Matter the Tribunal Considers Relevant

9 Mr Carr submitted that as the "true" applicant is an insurance company litigating with a large building company, the dispute should properly be characterised as a commercial dispute between substantial parties. He provided no authority to support his view that I should characterise the dispute differently, depending on the parties to it. I am disinclined to do so

by analogy with decisions such as *Pacific Indemnity Underwriting Agency Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 and *Sabroni Pty Ltd v Catalano* [2005] VCAT 374. Both concerned invitations to treat Domestic Building disputes as a special case where the parties should expect a costs order. In both cases the invitation was firmly declined.

Scale

10 I accept the submission of Mr Carr that the appropriate scale for costs to 13 June 2008 is County Court Scale C, on a party-party basis.

THE S112 APPLICATION

11 As mentioned above, the Respondent's solicitors sent the Applicants the first of two settlement offers expressed to be made in accordance with ss 112, 113 and 114 of the Act. The first offer was to pay the Applicants $3,500.00 inclusive of costs and interest within 30 days of acceptance of the offer and was dated 11 June 2008. The Applicants counter-offered in similar terms to be paid $20,000.00 plus interest and costs, dated 26 June 2008 and the second offer from the Respondent, dated 9 July 2008, was identical to the first, except the offer was to pay $7,000.00.

12 I find that the settlement offer of 11 June 2008 made by the Respondent to the Applicants is in accordance with the provisions of ss 112, 113 and 114 of the Act. Section 112 provides:

> 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.

13 I also find that the order made in the proceeding is not more favourable to the Applicants than the offer. The result, dismissal of the Applicants' claim, is less favourable to the Applicants than receiving $3,500.00. Regardless of the fact that the offer was all inclusive of costs and interest, something is better than nothing.

The Tribunal's discretion

14 The Tribunal has a discretion under S112(2), which provides:

> 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. [Emphasis added]

Section 112 is the opposite of s109. The Tribunal starts with the presumption that a party who has made an offer to which s112 responds will get an order for costs, but the Tribunal has a discretion. I find that discretion is as to both whether to order costs at all, and if so, the amount.

15 Mr McEachern of Counsel for the Applicants submitted that I should not make an order for costs in circumstances where the letter accompanying the first settlement offer contained alleged factual inaccuracies, which failed to alert the Applicants to the weakness of their case. He called in aid two decisions concerning *Calderbank v Calderbank* [(1975) 3 All ER 333] offers, *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority* [2005] VSCA 298 and *Fletcher Insulation (Vic) Pty Ltd v Renold Australia Pty Ltd (No 2)*[2006] VSC 292.

16 As Mr Carr said, even if decisions regarding costs in the Supreme Court affected by *Calderbank* offers are relevant to this statutory scheme, the facts in *Fletcher* in particular, differ markedly. In that case, the party making the offer had greater means of knowing the facts relevant to reasonableness of accepting the offer, whereas in this proceeding, the Applicants had access to witnesses and the means of fully informing themselves.

17 Further, I note that the result of a *Calderbank* offer in the Supreme Court is closer to the scheme under s109 of the VCAT Act than it is to that under s112. In *Hazeldene* the judgement quoted with approval Redlich J in *Aljade and MKIC v OCBC* [2004] VSC 351 where he rejected a presumption in favour of costs beyond Supreme Court scale if a *Calderbank* offer was more favourable to the offeree, and said the weight of authority:

> ... strongly points to an approach that involves no preconception about when the rejection of a Calderbank offer should lead to the making of a special costs order. It will do so where it is concluded that the rejection of the offer was unreasonable.

18 The Applicants have failed to provide a basis upon which I should exercise my discretion against awarding the Respondent costs consequent upon the offer of 11 June 2008.

Type and scale of costs

19 Both parties referred me to the decision of Deputy President Aird in *Body Corporate Strata Plan No 405967 No 1 v Brady Constructions Pty Ltd* [2008] VCAT 2305. I refer in particular to paragraph 75 where she said:

> Where a party chooses not to make an offer under s113-115 it seems to me that any order for costs should be on a party-party basis unless there are exceptional circumstances. [Emphasis added]

Following analysis, she made an order for indemnity costs from the date of an offer to which s112 responded.

20 Mr McEachern also referred to my decision in *Ashjam v Carroll* [2007] VCAT 661 where there was an offer which was not accepted and which was more favourable to the offeree than the orders in the substantive matter. I made no order for costs for the period before the offer and made an order on a party-party basis for the period after the offer. I exercised a discretion not to order indemnity or solicitor-client costs because of the acrimonious relationship between the parties and the lateness of the offer. Such considerations do not apply in this proceeding.

Indemnity or solicitor-client costs?

21 Both indemnity and solicitor-client costs could fulfil the description of "all costs". The difference is theoretically small, although it shifts the burden of proving that costs are (or are not) reasonable. In accordance with the joint judgement in *Hazeldene* at paragraph 12:

> Where costs are taxed on a solicitor-client basis, the party in whose favour the order is made is able to recover all costs reasonably incurred and of a reasonable amount. The party recovering its costs must satisfy the Court that the costs claimed are reasonable in the circumstances. Where costs are ordered to be taxed on an indemnity basis, on the other hand, a party is able to recover all its costs other than those shown to have been unreasonably incurred or of an unreasonable amount. It is the unsuccessful party which bears the onus of satisfying the court that the costs claimed are unreasonable.

22 The next paragraph deplored the difference which had arisen between costs of the trial (indemnity basis) and the appeal (solicitor-client) and expressed a preference from indemnity costs.

23 There have been occasions when the Tribunal has awarded solicitor-client costs – *Panieras v Home Owners Warranty and Craigleith Constructions Pty Ltd* [2000] VCAT 53 and *Hanley v Transport Accident Commission* [2002] VCAT 420. Recent decisions have tended to award indemnity costs as "all costs" and in light of the preference of the Court of Appeal for indemnity costs (albeit in very different circumstances) I adopt their reasoning and find that the Applicants must pay the Respondent's costs on an indemnity basis from the date the offer was made.

Request to certify for Mr Don Hunt, expert

24 At the costs hearing, the Respondent requested that I certify for its expert, Mr Don Hunt. Mr Hunt did not give evidence and no expert report by him was filed. On 10 November 2008, on the third day of the hearing, I indicated to the parties that the involvement of experts could assist me and no mention was made of Mr Hunt's advice to the Respondent. The costs recoverable by the Respondent do not include any costs of, or associated with, the appointment of Mr Hunt and the advice he gave.

Request to certify for Counsel

25 The application for costs occupied most of the morning of 13 March 2009. That afternoon at 2.20 p.m. the Tribunal received a facsimile from solicitors for the Respondent stating that Mr Carr had inadvertently overlooked to request that the Tribunal certify for counsel and advising that a copy of the letter had been sent to solicitors for the Applicants.

26 It is not necessary for the Tribunal to certify for counsel in circumstances where counsel's fees are included in costs on County Court Scale C and all but unreasonable costs are included in indemnity costs. I decline to specifically certify for counsel, but make no comment as to whether the Respondent should recover all or part of the fees charged to it by counsel. It is therefore unnecessary for me to consider whether I should consider a submission made in the absence of a party by letter after the hearing had concluded.

SENIOR MEMBER M. LOTHIAN