VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO D776/2009

CATCHWORDS

BUILDING DISPUTE – Correction order under s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* – relevant factors to consider. Costs – ss 109 and 112 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether an enhanced costs order should be made – whether an offer of settlement made in another proceeding is relevant to the exercise of the Tribunal's discretion. Interest – whether damages in the nature of interest is to be added to an assessment made under s 13(3)(b) of the *Domestic Building Contracts Act 1995*.

APPLICANT	Charterarm Investments Pty Ltd (ACN 054 052 934) (under external administration)
FIRST RESPONDENT	Clynton Roberts
RESPONDENT BY COUNTERCLAIM	George Bougioukas (excused from attending)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	26 May 2015
LAST DATE FOR FILING WRITTEN SUBMISSIONS	5 June 2015
DATE OF ORDER	9 June 2015
CITATION	Charterarm Investments Pty Ltd v Roberts Costs (Building and Property) [2015] VCAT 836

1. The First Respondent's application for an order pursuant to s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. The First Respondent must pay the Applicant's costs of the remitted proceeding from 27 March 2014 on a standard basis in accordance with the *County Court Scale of Costs* to be agreed between the parties, failing which to be taxed by the Victorian Costs Court.

SENIOR MEMBER E RIEGLER

REASONS

Introduction

1. On 22 April 2014, I ordered that the First Respondent (**'the Owner'**) pay the Applicant (**'the Builder'**) $211,279.19. That amount represented what I found to be the cost of the Builder having carried out building work, plus a reasonable profit, in respect of a building project undertaken by it for the Owner in East Malvern.

2. The determination of the Builder's claim was made pursuant to s 13(3)(b) of the *Domestic Building Contracts Act 1995*, after it was found that the Builder had infringed s 13(2) of that Act. The net amount ordered in favour of the Builder took into account an amount previously ordered in favour of the Owner in determination of the Owner's counterclaim. My calculation of the Builder's claim is set out in detail in my *Reasons* dated 22 April 2014.

3. The current application concerns two aspects of my orders and *Reasons* dated 22 April 2014; namely:

   (a) An application by the Owner, in which he seeks an order correcting my *Reasons* and orders on the ground that my calculations contain an arithmetic error.

   (b) An application by the Builder, in which it seeks an order that the Owner pay its costs of and associated with this proceeding.

4. In support of the Builder's application for costs, it relies upon two offers of compromise. Consequently, the question whether my calculations contain an error are critical in determining the Builder's application for costs.

Section 119 application

5. Section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**) states:

   > The Tribunal may correct an order made by it if the order contains –
   >
   > (a) a clerical mistake; or
   >
   > (b) an error arising from an accidental slip or omission; or
   >
   > (c) the material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
   >
   > (d) a defect of form.

6. Section 119 is directed at correcting mistakes or omissions. It is not an avenue for appeal or to challenge findings made by the Tribunal on questions of fact or law: *Autodesk v Dyson (No 2)*.[1]

[1] (1993) 176 CLR 300 at 303.

7. As Senior Member Walker stated in *Cosgrove v Housing Guarantee Fund*:

> The section cannot be used as a substitute for an appeal. It is there to fix a mistake that has been made and it must be a mistake such that, had it occurred to me at the time I would not have made it. I would have picked it up and fixed it at once.[2]

8. The Owner's correspondence dated 24 April 2015 sets out what the Owner contends is an error in my calculations. The relevant parts of that correspondence are:

> We are writing to you because of our concern that there may be an error in paragraph 41 of your Reasons which, if we are correct, will have a significant bearing on the outcome.
>
> In paragraph 13 of your Reasons, you make a finding that the owner spent $129,283.60 on completing the building works.
>
> In paragraph 38 of your Reasons, you state that "the aggregate cost of construction *including what the owner paid to complete the building works* … was $1,408,041.45 …".
>
> You have then used that figure to which you have added the reasonable profit of $100,788.87 to calculate the total cost of the building works.
>
> Our concern is that in calculating the "shortfall" in paragraph 41, you do not appear to have deducted the amount paid by the owner to complete the building works, namely the sum of $129,283.60, which may simply have been an oversight on your part.
>
> If we are correct in this view, we would request that you amend the Order made on 22 April 2015 to take this error of calculation into account.

9. Contrary to what is stated in the above correspondence, the calculations set out in my *Reasons* do not add the sum of $100,788.87, representing *reasonable profit*, to the figure of $1,408,041.05. The figure of $1,408,041.05 merely represented the total building cost, excluding GST but including the amount expended by the Owner after the Builder left the building site. That figure was used to calculate the percentage multiplier for the purpose of determining what *reasonable profit* should be added to the cost of the building work undertaken by the Builder (as opposed to the total building cost).

10. Once the percentage multiplier figure of 7.1% was determined, *reasonable profit* was calculated by multiplying that percentage figure by the amount found to be the value of the building work undertaken by the Builder ($1,419,561.56), to arrive at a figure of $100,788.87 (inclusive of GST). This amount was then added to the amount found to be the value of the building work undertaken by the Builder to arrive at an aggregate figure of $1,520,350.43.

[2] [2006] VCAT 463.

11. From that amount, payments made by the Owner to the Builder ($1,279,500) plus direct payments made by the Owner to suppliers of the Builder ($10,535.24) were deducted leaving a balance of $230,315.19 (inclusive of GST). The amount previously determined in favour of the Owner's counterclaim ($19,036) was then set-off leaving a net balance of $211,279.90 owing to the Builder.

12. Having regard to the matters referred to above, I do not accept that there has been any error made in the calculations in the manner suggested by the Owner. In my view, the assertion that amounts paid by the Owner to complete the building works should have been deducted from the amount to be received by the Builder is misconceived because those amounts relate to expenditure incurred after the Builder had left the building site. Those amounts do not relate to payments made in respect of any work undertaken by the Builder. Therefore, those amounts were not relevant to the assessment of the cost of the building work undertaken by the Builder or the amount paid either to the Builder or directly to its suppliers on its behalf.

13. Accordingly, the application to correct the *Reasons* is dismissed.

Costs prior to 17 July 2013

14. Mr Smith, solicitor for the Builder, argued that the Builder's costs of the proceeding should be paid by the Owner on a *standard basis* from 27 March 2014, being the date that the Applicant filed an *Application for Directions/Orders*, in which it sought to have its claim re-assessed under s 13(3)(b) of the *Domestic Building Contracts Act 1995* until 17 July 2014 and thereafter, on an *indemnity basis*.

15. The re-assessment of the Builder's claim arose as a consequence of a partially successful appeal initiated by the Owner against my determination dated 8 March 2013.[3] In that appeal, the Supreme Court found that the Builder had infringed s 13 of *Domestic Building Contracts 1995*. This meant that the original assessment of the Builder's claim, which had been based on its entitlement under the relevant building contract, was no longer maintainable; and that any further claim which the Builder wished to prosecute had to be assessed under s 13(3)(b) of the *Domestic Building Contracts 1995 on the basis of the cost of carrying out the work plus a reasonable profit.* This prompted the Builder to file its *Application for Directions/Orders* dated 27 March 2014, in which it sought to have its claim re-assessed on that different footing.

16. Mr Smith submitted that in or about 23 October 2013, an offer of settlement was made by the Builder to the Owner in the Supreme Court appeal proceeding. The offer required the Owner to pay the Builder $200,000 in full and final settlement of that Supreme Court appeal. According to Mr Smith, acceptance of that offer of settlement would have

[3] *Charterarm Investments Pty Ltd v Roberts* [2013] VCAT 205

settled the dispute between the parties and would have eradicated the need for any further legal costs incurred by the Builder in both the Supreme Court appeal and any remitted hearing. Therefore, he argued that the offer was relevant in the exercise of the Tribunal's discretion to award costs under s 109 of the VCAT Act.

17. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[4] Gillard J set out the steps to be taken when considering an application for costs under s 109 of the VCAT Act:

> [20] In approaching the question of any application for costs pursuant to s 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows -
>
> (i) The prima facie rule is that each party should bear their 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, 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 paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

18. Section 109(3) of the VCAT Act sets out a number of factors to be considered by the Tribunal in the exercise of its discretion, which include:

(a) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding; or

(b) any other matter the Tribunal considers relevant.

19. Mr Smith submitted that the refusal to accept the offer made in the Supreme Court appeal proceeding enlivened both of those factors.

20. In my view, the offer made on 23 October 2013 should not be taken into consideration in the exercise of my discretion under s 109 of the VCAT Act. It was made at a time when the Owner was legitimately exercising his rights of appeal. At that time, there were no extant matters before the Tribunal. The orders made by the Supreme Court, overturning the Tribunal's earlier determination of the Builder's claim and giving the Builder a right to have its claim remitted for re-assessment, were only made on 12 February 2014. Prior to that time, the remitted proceeding had not yet crystallised.

21. Therefore, I do not consider that it would be fair to order costs in favour of the Builder in reliance upon that offer. Its purpose was to settle the

[4] [2007] VSC 117.

Supreme Court appeal only. At the time when the offer was made, there was no way of knowing whether the appeal would be successful and even if it was, to what extent. In my view, the offer is only relevant to the question of costs associated with the appeal and not to the costs of the remitted proceeding, as those costs are too remote to the offer.

22. That being the case, I am not persuaded that any of the other factors set out under s 109(3) of the VCAT Act are enlivened to such an extent so as to justify an award of costs. Consequently, I decline to exercise my discretion and award costs under s 109 of the VCAT Act.

Costs after 17 July 2015

23. The Builder further relies upon a subsequent offer of compromise dated 17 July 2014 (**'the Second Offer'**), which stated:

> TAKE NOTICE that the Applicant makes this offer pursuant to Sections 112, 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* to settle proceeding numbered D776/2009 ('the proceeding') on the following terms ('the Offer'):
>
> 1. The Respondent pays the Applicant the sum of $185,000.00 ('the settlement sum'). The sum includes interest and costs, and is in full and final settlement of the outstanding amount owing to the Applicant.
> 2. This offer does not include or relate to the costs of the Supreme Court Appeal No:SCI 01644/2013.
> 3. The Offer is open for acceptance for a period of (14) days after service of the Offer.
> 4. This offer is made on a "without prejudice" basis, save as to costs.
> 5. The Offer may only be accepted by notice in writing, sent to the Applicant's solicitor. If accepted, the parties will enter into terms of settlement.
> 6. The settlement sum is to be paid to the Applicant within 14 days of the date of acceptance of the Offer in writing.
> 7. The Offer if accepted is conditional and subject to the approval of the creditors of the Respondent as required by section 477 (2A) of the *Corporations Act 2001*.
> 8. Further, the Offer herein is made under reservation of the Applicant's rights to rely upon the Offer on the question of costs if in all the circumstances it is appropriate to do so, and is made in accordance with the principles contained in *Calderbank v Calderbank* (1995) 3 All ER 333 and *Cutts v Heads* (1994) 1 All ER 597.

24. Mr Smith submitted that the Second Offer complied with the requirements of ss 112-114 of the VCAT Act. Mr Murray, solicitor for the Owner, did not contend otherwise. Consequently, Mr Smith submitted, that as the

offer was more favourable than the determination of the Tribunal, costs should be awarded in favour of the Builder on an indemnity basis.

25. Section 112 of the Act states:

> **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.

26. Although I find that the Second Offer was more favourable than the determination of the Tribunal, I do not accept that it necessarily follows that costs are to be awarded on an indemnity basis. The meaning of s 112 of the VCAT Act, and in particular the expression 'all costs', has been considered by the Court of Appeal in *Velardo v Andonov* as follows:

> The offer foreshadowed an application for solicitor and own client costs. Such an order is the frequent, but no means the inevitable, concomitant of a successful *Calderbank* offer. Section 112(2) creates … a prima facie entitlement to payments of "all costs" in favour of a successful offeror. Ordinarily, it appears, costs would be assessed in such a case on a party and party basis - although the Tribunal would be empowered to allow costs on a more favourable basis.[5]

27. As highlighted by Ashley JA in the above extract of *Velardo*, the question as to whether an enhanced costs order is to be made is discretionary and will ultimately depend on the particular circumstances under

[5] (2010) 24 VR 240 at [47].

consideration. Each case must be assessed according to its own facts, informed by the relevant case law. In *Peet v Richmond (No.2)*,[6] Hollingworth J stated:

> [121] As a matter of principle, if one party has drawn the futility of the case to the attention of the losing litigant, and the losing litigant has wilfully ignored that, those may be circumstances supporting a special costs order. But it does not follow that a special costs order can only be made if the successful party has drawn the futility to the other side's attention.

28. Later in her Honour's judgment, she expressed the following:

> [170] However, an imprudent refusal of an offer of compromise may be sufficient to justify an award of costs on a special basis. The question must always be whether the particular facts and circumstances of the case, as they existed at the time the offer was refused, justify an award other than on a party-party basis.

29. In the present case, I do not consider that it would be fair to order costs on an indemnity basis. In my view, something more than simply 'beating an offer of compromise' is required in order to justify an enhanced costs order. Apart from obtaining a determination more favourable than the Second Offer, Mr Smith did not point to any other factors which would justify the making of an enhanced costs order.

30. Therefore, I will order the Builder's costs from 27 March 2014 be paid by the Owner on a standard basis in accordance with the *County Court Scale of Costs*.

Interest

31. Mr Smith submitted that interest on the judgment debt should also be awarded in favour of the Builder. I have previously ruled on the question of interest in my *Reasons* dated 23 May 2013.[7] In those *Reasons*, I stated:

> [17] The Tribunal has discretion to order interest, be it pursuant to the *Penalty Interest Rates Act 1983* or on some other basis. However, one cannot assume that interest will be ordered as a right. A number of factors will be considered by the Tribunal in the exercise of its discretion. For example, in *Asham v Carroll*[8] the Tribunal refused to order interest because there was no provision for the payment of interest in the contract between the parties. In *Bellcon Developments Pty Ltd (in liquidation) v Dardha*[9] the Tribunal refused to order interest because the owners had fair reason to challenge the builder's claim and that challenge was partly successful.

[6] [2009] VSC 585.
[7] *Charterarm Investments Pty Ltd v Roberts* [2013] VCAT 821.
[8] [2007] VCAT 661.
[9] [2013] VCAT 641 at [3-10].

> [18] In the present case, the written contract between the parties did not stipulate that interest was payable on a late payment of a progress claim. The relevant part of the contract that allowed the parties to insert an amount of interest payable on the late payment of progress claims had been engrossed with a dash, which I interpret to mean that no amount had been agreed upon. In those circumstances, an award of interest on the late payment of progress claims calculated prior to the issuing of this proceeding would be tantamount to re-writing the contract between the parties. Moreover, the Applicant was partly successful in challenging the Builder's claim. Therefore, and in the absence of any argument substantiating an order for interest, I find that it would not be fair to order interest in the present case. Consequently, it is inappropriate to take into consideration a *presumed* component of interest when ascertaining whether the net determination of the Tribunal is more or less favourable than the offer made.

32. Nothing was advanced by Mr Smith in argument to dissuade me of the views I expressed in the extract of my *Reasons* cited above. Accordingly, I reiterate those views and decline to order that interest be awarded on the assessed sum.

SENIOR MEMBER E, RIEGLER