

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP815/2016

**CATCHWORDS**

Application that the Applicant pay the costs of the Respondent of the proceeding; applicant was unsuccessful in its claim, and respondent was successful in its counterclaim; consideration of the factors under section 109 (3) (c),(d) and (e)

<b>APPLICANT</b>	Crawford Engineering Pty Ltd (ACN 160 818 968)
<b>RESPONDENT</b>	Newvision Holdings Pty Ltd (ACN 126 377 080)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	B Thomas Member
<b>HEARING TYPE</b>	In Chambers
<b>DATE OF ORDER</b>	18 July 2017
<b>CITATION</b>	Crawford Engineering Pty Ltd v Newvision Holdings Pty Ltd (Building and Property) [2017] VCAT 1062

**ORDER**

The Applicant is to pay the costs of the Respondent of this proceeding, on the standard basis, on the County Court Scale, such costs if not agreed, to be assessed by the Victorian Costs Court.

**MEMBER BW THOMAS**

## REASONS

### BACKGROUND

1. This proceeding concerned a claim by the Applicant for payment by the Respondent of outstanding invoices for \$15,202.09. The Respondent counterclaimed for \$2,305.61. I heard the proceeding on March 2017. I dismissed the Applicant's claim and ordered that the Applicant pay the Respondent the amount of its counterclaim. I also ordered that any submission as to costs must be filed by the 2 June 2017. The Respondent filed a Submission dated 21 June 2017, together with an Affidavit of Marvin Lyle Lee. The Applicant did not file any submission in reply.

### HISTORY OF THE PROCEEDING

2. The Applicant's application was filed on 17 June 2016. On 20 July 2016 the Respondent served an offer pursuant to section 112 of the *Victorian Civil and Administrative Act 1998* (the Act) to the effect that each party should walk away and bear its own costs. The offer was open until 3 August 2016. On 30 August 2016 the Respondent served a Calderbank offer, on the same basis as the section 112 offer. On 17 March 2017, the Respondent served a second Calderbank offer offering to pay the Applicant the sum of \$5000.00. None of the offers were accepted by the Applicant.

### THE TRIBUNAL'S DISCRETION AS TO COSTS

3. Power to award costs is conferred by section 109 of the Act. Where relevant, that section provides as follows:
  - (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 claim is 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. The Tribunal's discretion under section 109 is distinct from its power to award costs in favour of a party to the proceeding under section 112 of the Act if a settlement offer is rejected.
- 5. Section 112 provides as follows:
  - (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 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.
- 6. The Respondent submits that it is entitled to an order for costs in its favour under section 109, or alternatively under section 112.
- 7. I disagree that the Respondent can rely on s112. This is because in order to qualify for consideration under that section, the offer must comply with sections 113 and 114.
- 8. Section 114(1) requires that the offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute,

or until the expiry of a specified period after the offer is made, whichever is the shorter period.

9. The Respondent made three settlement offers to the Applicant in the course of the proceeding. The first offer dated 20 July 2016 was made in accordance with section 112 of the Act, on a 'walk away and bear own costs' basis. The second offer, dated 30 August 2016, was a Calderbank offer. A 'walk away' on an identical basis was again proposed. The third offer made on 17 March 2017, was a Calderbank offer that the Respondent pay the sum of \$5,000.00 to the Applicant within 7 days of acceptance.
10. In my view the efficacy of the s112 offer of 20 July 2016 was destroyed by the making of subsequent offer on 30 August 2016. If that view is wrong, the Calderbank offer made on 30 August 2016 was identical to the s112 offer, it was clearly superseded by the offer to pay \$5000 made on 17 March 2017. The Respondent cannot seek to obtain the benefit available under s112 of the Act, and at the same time in its application for costs point to a subsequent, and higher, offer and seek to obtain costs protection from the later offer.
11. On this basis I will put aside consideration of any application for costs under s112, and confine myself to a consideration of the Respondent's entitlement to an order for costs under s109.

#### **THE APPLICANT'S SUBMISSIONS IN RESPECT OF S109**

12. The Respondent submits that, by reason of the following factors, the Tribunal should award costs in its favour –

#### **Section 109(3) (c) - the relative strengths of the claim is made by each of the parties**

13. The Applicant's claim was weak as it included variations which did not comply with the Subcontractor Agreement between the parties. Furthermore, the Applicant did not challenge the expert evidence of Mr Jeffrey, and therefore had no basis to dispute the Respondent's counterclaim.
14. I found that the Applicant's variation claims were not made in accordance with the procedure required by the Subcontractor Agreement. Mr Barnett, a witness called by the Applicant, was not supportive of the Applicant in respect of these claims. The Applicant chose not to call any evidence in rebuttal to the evidence of Mr Jeffrey. I therefore accepted Mr Jeffrey's opinion that the Applicant had not completed the works in accordance with the Subcontractor Agreement and, as a consequence, was liable for the cost of rectification as detailed in the Jeffrey report.
15. I therefore find that the Applicant's claim was so weak that s109(3) (c) should be applied.

### **Section 109(3) (d) - the nature and complexity of the proceeding**

16. The Tribunal must assess what weight should be given to the nature and complexity of the case in determining whether or not to make an order for costs. I accept that the complexity of the claim and counterclaim justified the parties being legally represented. Determination of the proceeding required consideration of architectural and engineering drawings, contractual documentation, correspondence and emails passing between the parties, and an expert's report. There were a number of issues in dispute. There were a number of items in the clauses of the Subcontractor Agreement that required interpretation.
17. The Applicant's claim and the Respondent's counterclaim required consideration of the facts, documentation, expert evidence and the law. The Applicant was legally represented until the hearing; the Respondent was legally represented throughout the proceeding, and by counsel at the hearing.
18. I accept therefore that the proceeding was sufficiently complex to enliven s109(3) (d).

### **Section 109(3)(e)- any other matter the Tribunal considers relevant**

19. As noted, the Respondent made three settlement offers to the Applicant in the course of the proceeding. The third offer made on 17 March 2017, was a Calderbank offer that the Respondent pay the sum of \$5,000.00 to the Applicant within 7 days of acceptance. As the third offer was the only offer which I consider, as a matter of law, the Respondent can rely, I confine my consideration to the circumstances in which that offer was made.
20. The letter from the Respondent's solicitors to the Applicant containing the third offer stated –
  1. The nature and scope of works claimed to be variations should have been provided for within the original scope under the contract, and accordingly, your claims for variations are invalid;
  2. Your claim is further reduced by the cost to repair the defective works as per the expert report of Trevor Jeffrey dated 27 September 2016. Consequently, you are likely to be ordered to pay our client a sum of money in respect of these defective works; and
  3. As per the Subcontractor Agreement dated 14 April 2016, the site manager never had authority to execute any variations and your director was well aware of this.
21. Only a month after commencing the proceeding, the Applicant was made aware of the Respondent's allegations, but chose not to respond. The third offer was a payment by the Respondent to the Applicant of \$5000.00 within 7 days of the signing of Consent Orders. It referred to the included the Respondent's expert report, the Jeffrey report, which had been referred to in the second offer, and addressed the alleged defective works, variations and

the Subcontractor Agreement. The Applicant chose not to respond to the Jeffrey report.

22. The Applicant was clearly on notice very early in the proceeding of the Respondent's defence and counterclaim. It chose not to accept any of the Respondent's settlement offers, including the third. In the context of the outcome of the proceeding, I consider the third offer was generous.
23. Although the outcome of the proceeding was not any better than the three settlement offers made by the Respondent, I find that the third offer superseded the first and second offers and is the offer on which my determination under section 109(3) (e) is based. I consider that the disparity between the quantum of the Applicant's claim and the outcome of the proceeding is such that it was unreasonable on the part of the Applicant, in the knowledge of the Respondent's possession and counterclaim, not to accept the third offer.
24. Accordingly, I consider that each of sections 109 (3) (c), (d) and (e) has been enlivened and therefore the Tribunal's discretion to award costs accordingly comes into play.
25. Considering the Applicant's conduct of the proceeding discussed above, and finding that that conduct unnecessarily disadvantaged the Respondent, I am satisfied that it is fair for me to make an order under s109 (2) that the Applicant pay the Respondent's costs of the proceeding on the standard basis, such costs, if not agreed, to be assessed on the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court by the Costs Court.

**MEMBER: BW THOMAS**