VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D494/2013

CATCHWORDS

Domestic Building; interest; interest rate; costs under section 109 of the *Victorian Civil And Administrative Tribunal Act 1998* s109(3)(a), (b), (c) and (d); claim by each party for costs; settlement offers; pre-application letter to both respondents, offers to which s112 of the VCAT Act respond; offers to the respondents individually; offers to the respondents jointly; Tribunal's discretion; type and scale of costs; whether cost to be fixed by the Tribunal.

APPLICANT	Mr Keith Francis
FIRST RESPONDENT	Mr Kitchener Crespin
SECOND RESPONDENT	Mr Spencer Bitcon
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	23 November 2016
DATE OF ORDER	7 December 2016
CITATION	Francis v Crespin (Building and Property) [2016] VCAT 2046

ORDERS

1 The second respondent must pay the applicant $6,485.45 for interest.

2 The second respondent must pay the applicant's costs including reserved costs to be agreed, or failing agreement, costs, to be assessed by the Victorian Costs Court on a standard basis on the County Court scale from 27 May 2013, with the exception of the costs referred to in order 3.

3 The first respondent must pay each of the applicant's and the second respondent's costs, including any reserved costs, to be agreed for half of the hearing on 20, 23 and 25 May 2016, to be agreed or failing agreement, costs, to be assessed by the Victorian Costs Court on a standard basis on the County Court scale.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr R. Rozenberg of Counsel
For First Respondent	Mr K. Crespin in person
For Second Respondent	Mr A. Kirby of Counsel

REASONS

1 This costs hearing was arranged because the applicant wrote to the Tribunal on 26 September 2016 seeking interest and costs. The application was supported by an affidavit of the applicant, Mr Keith Francis affirmed on 26 September 2016.

2 On the same day, but after the applicant, the second respondent also made a written application for costs. The first respondent made no written application for costs, but made an oral application on the day of the costs hearing.

3 A written submission was handed up for the second respondent at the costs hearing. The summary of the second respondent's submissions were:

> 1.1 in the circumstances no costs orders should be made;
>
> 1.2 alternatively, if a costs order is made in favour of [the applicant] then it should be paid by the [first respondent] … or alternatively apportioned between [the first and second respondents] because of [the first respondent's] conduct during the proceeding; and
>
> 1.3 because of [the first respondent's] conduct and delays, as noted in paragraph 56 of the judgement including his unsuccessful attempts in the Tribunal and the Supreme Court to stay the application, he should pay a portion of [the second respondent's] costs as it should have been a one day hearing.

BACKGROUND

4 On 8 September 2016 I made an order that the second respondent pay the applicant the full amount of his claim of $23,255.25. As I said in the reasons, there was no suggestion that there was any defect in the applicant's work or that the amount claimed was excessive. The only question was whether the first respondent, the second respondent, or both were liable to pay him.

5 The applicant's plumbing work was undertaken in late 2012 and early 2013. One payment was made by the second respondent's stepfather but the amount the subject of this proceeding, for the applicant's first claim, was not made to the applicant at all.

6 The proceeding commenced on 22 April 2013 and was set down for a one-hour[1] small claim hearing. From then, this apparently simple claim, has taken on a life of its own because of association with the bitter dispute between the first and second respondents in related proceeding D700/2013.

7 Offers were made by the applicant to the respondents to settle the dispute before the proceeding commenced on 14 February 2013, to each of the respondents on 27 May 2013, and to both of the respondents on 22 April

[1] Mistakenly shown in the hearing notice as two hours, but as the hearing was to commence at noon the correct time was an allocation of one hour.

2016. The offers of 27 May 2013 and 22 April 2016 were expressed to be in accordance with s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act").

8 After a number of interlocutory hearings[2] and an attempt to settle both proceedings at a compulsory conference, this proceeding was detached from the other and set down for a one-day hearing on 20 May 2016.

9 The whole of the first morning was taken up with the first respondent's application for a stay pending criminal prosecution in the County Court, and it was not until the first day that the first respondent filed his points of defence. I refused the application which the first respondent sought leave to appeal to the Supreme Court.

10 Justice Jack Forrest of the Supreme Court returned the proceeding to me for the afternoon of 20 May 2016 to enable me to hear the applicant's evidence, as he lives outside Victoria. The parties returned to the Supreme Court on the morning of 23 May 2016. His Honour ruled at the conclusion of the hearing before him that leave to appeal was granted, but the appeal was dismissed. I resumed hearing the matter on the afternoon of 23 May 2016 and the whole of 25 May 2016. Surprisingly, counsel for the first respondent, Mr J Sutton, again sought a stay before me on 23 May 2016.

11 At the costs hearing Mr R Rozenberg of Counsel appeared for the applicant, Mr Crespin, the first respondent, appeared for himself and Mr A Kirby of Counsel appeared for the second respondent.

INTEREST

12 Section 53 of the *Domestic Building Contracts Act* 1996 ("DBC Act") provides in part:

> (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, the Tribunal may …
>
> (b) …order the payment of a sum of money-
>
> …
>
> (ii) by way of damages (including … damages in the nature of interest);
>
> …
>
> (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983 or on any lesser rate it thinks appropriate.

13 As I said in *Caldwell v Cheung* [2008] VCAT 1794:

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[2] Described in detail at paragraph **??**

> …it is a rule of economy that money now is worth more than the same amount of money paid at some time in the future. However the DBC Act does not provide that interest is always paid. It does not even provide, like section 60(1) of the *Supreme Court Act* 1986 that the Tribunal:
>
> > …must, unless good cause is shown to the contrary, give damages in the nature of interest…
>
> Parliament could have chosen to have the Tribunal assume that interest would be awarded where money is awarded, but it did not do so. The test for entitlement to interest is whether it is "fair", then the rate of interest is the PIR Act rate or any lesser rate I consider "appropriate".

Entitlement to interest

14 I am satisfied that in circumstances where the claim is for an account rendered for work and labour done it is fair that the second respondent pay the applicant interest from the date of commencement of this proceeding.

Rate

15 Mr Rozenberg submitted that I should award the rate allowed under the *Penalty Interest Rates Act* 1983 ("PIR Act"), which in the relevant period ranges between 11.5% and 9.5%. Mr Kirby submitted that these rates are far higher than the rates commonly applying to business and other loans. He submitted that the rate should be 5%, but without providing evidence as to why 5% was appropriate.

16 I accept Mr Kirby's submission that the rate set under PIR Act are significantly higher than those payable to banks. I also take into account that there was a genuine dispute between the respondents about who was liable to pay the applicant. In these circumstances I consider it is fair for the interest to be set at 75% of the amount that would be payable under the PIR Act.

17 I accept the calculations of the interest payable under the PIR Act undertaken for the applicant and appearing at "KF-2" to the applicant's affidavit of 26 September 2016 and totalling $8,090.25 to 8 September 2016, plus a further $6.04 per day from 9 September 2016 to the date of these orders and reasons. I accept that the daily amount is calculated on the current interest rate of 9.5% per annum.

18 The second respondent must pay the applicant interest of $6,067.69 to 8 September 2016 plus a daily rate of $4.53 from 9 September 2016, being $416.76 to 7 December 2016; a total of $6,485.45.

COSTS

19 Mr Kirby submitted that I should reserve the costs in this proceeding to be determined in D700/2013.

20 The issues in the two proceedings are different. I am not satisfied that there is any reason why the costs in this proceeding should be dependent upon the outcome of the other. Further, it is an unreasonable impost upon the member who hears the other proceeding to be required to make a determination regarding costs in a matter that they have not heard.

The Applicant's claim – s109

21 The applicant seeks costs from the second respondent, but as Mr Rozenberg said at the costs hearing, if Mr Kirby's submission regarding apportionment of costs were to be successful, the applicant would have no objection.

22 Section 109 of the *VCAT Act* provides in part:

> (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.

23 The applicant bases his claim on one or more of s.109(3)(a), (b), (c) and (d) of the VCAT Act.

24 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) (a) – Conducting the proceeding in a way that unnecessarily disadvantaged another party

25 The important word when interpreting this paragraph in this proceeding is "unnecessarily".

26 The history of adjournments in this proceeding is long and varied.

- The proceeding was set down for a one hour hearing to take place on 13 June 2013, but on 3 June 2013 it was adjourned by orders in chambers because of correspondence from the second respondent's solicitors. They wrote to say that they considered two[3] hours insufficient and that they believed a whole day would be necessary.
- On 21 June 2013 the hearing was again adjourned because of the applicant's prearranged travel.
- On 30 July 2013 the hearing was adjourned because applications had been made by the first and/or second respondents to strike out the proceeding against them.
- On 1 October 2013 the second respondent's strikeout application was adjourned and he was ordered to pay the applicant's costs thrown away.
- On 17 April 2014 this proceeding and D700/2013 were listed for a compulsory conference and the strikeout application was stayed.
- There was then an application for leave to appeal to the Supreme Court, made by the first respondent. This proceeding was stayed on 28 August 2014, 3 December 2014 and 25 March 2015, pending the outcome of the Supreme Court application.
- At a directions hearing on 6 November 2015 both proceedings were listed for a compulsory conference on 11 November 2015.
- Neither proceeding settled at the compulsory conference on 11 November 2015 and both proceedings were listed for a directions hearing before a judicial member which took place on 9 March 2016.

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[3] See footnote 1.

- On 9 March 2016 Judge Jenkins separated this proceeding from D700/2013 and set it down for a one-day hearing before me on 20 May 2016.
- On 7 April 2016 her Honour made orders in chambers concerning witness summonses issued by the first respondent which she discharged as they were "likely to result in adjournment of the hearing listed for 20 May 2016".
- The first respondent sought an adjournment by letter which was refused by orders in chambers of 18 May 2016.

27 The applicant has been extraordinarily unfortunate to be involved in this litigation, but I am not satisfied that I can attribute responsibility for delays to the second respondent for "unnecessarily" conducting the proceeding to the disadvantage of the applicant, with the exception of the adjournment of the strikeout application on 1 October 2013, for which the applicant already has an order for costs.

s 109(3)(b) – Prolonging Unreasonably the Time Taken to Complete the Proceeding

28 Mr Rozenberg drew my attention to comments by Forrest J at paragraph 29 of his judgement[4]:

> The proceeding had been on foot for years and related to events over three years ago. Moreover, Mr Francis had no involvement whatsoever in the dispute between Mr Bitcon and Mr Crespin. He was an innocent party in no man's land between two belligerents.

29 As described above under s 109(3)(a), it is hard to attribute responsibility for delay to the second respondent rather than the first respondent. I am not satisfied that the applicant is entitled costs under this paragraph.

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

30 The applicant's claim was very strong concerning everything except the identity of the person with whom he contracted. As I said at paragraph 55 of the reasons of 8 September 2016:

> Although I have found the contract was between Mr Francis and Mr Bitcon, it was by no means immediately obvious who the contracting parties were.

31 Because of difficulty with identity, the applicant's claim was no stronger than "on the balance of probabilities" and I am not satisfied that an award of costs is justified on this basis.

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

32 The applicant's claim was relatively simple but it was made complex by the dispute between the respondents. I am not satisfied that the applicant is

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4 *Crespin v Francis & Anor* [2016] VSC 277

entitled to an award of costs on the basis of the second respondent's contribution to making the proceeding complex.

The applicant's application for s 109 costs generally

33 Mr Kirby referred me to *Champion v Rohrt*[5] where the appellant appealed successfully from a decision that he should pay indemnity costs and the Court of Appeal ordered that there be no order for costs in circumstances where:

> … in our opinion the respondent has not made out a case for departing from the ordinary rule in the Tribunal that no costs orders should be made.

34 Mr Kirby's submission reinforced my view that there should be no order as to costs for the applicant against the second respondent under s109, but as discussed below, I have concluded that the applicant is entitled to costs under s 112 of the VCAT Act.

The First Respondent's claim – s109

35 As stated above, the first respondent made an oral application for his costs against both the applicant and the second respondent.

36 The first respondent was successful in defending the claim against him in this proceeding, although, as I said at paragraph 1 of the reasons of 8 September 2016, the only issue in that proceeding was with whom the applicant contracted. I did not need to, nor did I, consider the rights between the first and second respondents, which is the subject of D700/2013. Further, as I said at paragraphs 55 and 56 of the reasons of 8 September 2016, the first respondent contributed to the confusion which led to the necessity for the hearing and the steps leading to it.

37 The first respondent made some unsupported allegations regarding an alleged conspiracy between the applicant and the second respondent which I do not take into account.

38 I dismiss the first respondent's application for costs.

The Second Respondent's claim – s109

39 As mentioned above, the second respondent claims that the hearing should have occupied one day rather than two half days and another day and that the first respondent should therefore bear a portion of the second respondent's costs. Mr Kirby also submitted that the first respondent should pay part or all of the applicant's costs.

First Respondent's Response

40 Many of the first respondent's submissions concerned whether the primary decision is correct. I pointed out that the proper response to a decision

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5 [2016] VSCA 215

thought to be incorrect would be to take it on appeal and I asked the first respondent to limit himself to matters concerning costs.

41 The first respondent again raised the issue of whether the true respondent in D700/2013 should be Advaland Pty Ltd[6] rather than himself. I do not need to take this into account because it is the first respondent personally who is a party to this proceeding and it is the first respondent personally who has caused delay in completing the hearing.

Conclusion regarding the second respondent's submissions regarding the first respondent' contribution

42 I am satisfied that the actions of and on behalf of the first respondent approximately doubled the length of the hearing time and therefore I find that it is fair that he contribute to the cost payable to the applicant and also that he pay a proportion of the costs of the second respondent.

43 I will therefore order under s109(3)(b) that the first respondent pay half the costs of the hearing for each of the applicant and second respondent, to be agreed, or failing agreement to be fixed by the Costs Court on a standard basis including any reserved costs.

SETTLEMENT OFFERS

Offer of 14 February 2013

44 The first letter, dated 14 February 2013 was written to both respondents by the applicant's then solicitors before the proceeding commenced. It was headed "Without Prejudice Save As to Costs".

45 I refused to allow it to be part of the evidence in the substantive hearing because of its heading. It was properly introduced into the costs hearing and Mr Kirby drew my attention to paragraph 2 which states:

> As a result of entering into the … contract, [the second respondent] engaged our client to provide plumbing services at the property. Our client has instructed us that at all times, all instructions and directions in relation to the work that was performed was provided by [the second respondent].[Underlining added]

46 Mr Kirby submitted that the words underlined demonstrate the responsibility of the second respondent to pay the applicant under the contract. In circumstances where there has not been an appeal of my decision, the relevance of this submission is unclear, although I assume it might be that if the primary decision were wrong, it would be unfair to also impose an order for costs on the second respondent.

47 However, I note that on the second page of the letter, the third last paragraph demonstrates that the applicant was not necessarily asserting that there was a contract between himself and the second respondent. That paragraph and the next state:

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6 The company of which the first respondent was or is the director.

> We confirm that a debt in the amount of $23,255.25 is due and payable to our client by both parties or either party and our client has been patient while the dispute between you both has escalated. Our client is not a party to your dispute and should be paid forthwith. We provide you with the opportunity to resolve this matter and confirm that there is no allegation of defects with respect to the goods and services supplied by our client. [Underlining added]
>
> We advise that we have instructions to institute proceedings (naming both parties as defendants) to recover the outstanding amount without further notice unless the debt is paid within 7 days of the date of this letter. We will also produce this letter to the Tribunal on the issue of costs.

48 The letter was sent before the proceeding commenced so, not surprisingly, it did not make reference to sections 112, 113 and 114 of the VCAT Act. Such offers can be relevant to an order for costs under s 109(3)(e). However in this proceeding, the respondents were not acting in concert and not partners.

49 This offer was made to two disputing parties. I am not satisfied that it was a clear offer to either party and I do not take it into account.

Offers of 27 May 2013

50 As stated above, two independent but substantially identical offers were made to the respondents on 27 May 2013. The relevant one is the offer to the second respondent.

51 Excluding the formal parts, the offer was as follows:

> We refer to previous correspondence and confirm that our client has instituted proceedings in the Victorian Civil And Administrative Tribunal Act 1998 to recover the monies owing to him in the amount of $23,255.25 in relation to the works he undertook at … Glen Iris.
>
> Our client has agreed to make the following offer under section 112 of the Victorian Civil and Administrative Tribunal Act 1998 to settle this matter to avoid all parties incurring further expense. We note that this matter is listed for hearing on 13 June 2013.
>
> Our client will accept payment of $19,500 in full and final settlement. Please note that this offer is open for acceptance until 4 PM on Tuesday, 11 June 2013.
>
> In the event that we do not receive a signed notice of acceptance and payment by 4 PM on Tuesday, 11 June 2013, our client will seek to recover the full outstanding amount at the hearing on 13 June 2013.
>
> Please communicate with the writer should you have any queries.

52 Mr Kirby submitted that this offer was made in the context of the earlier offer of 14 February 2013 which asserted that the first respondent had engaged the applicant. Having regard to the third last and second last paragraphs of that letter I am not persuaded by this submission.

53 I am satisfied that this settlement offer is in accordance with the provisions of sections 112, 113 and 114 of the VCAT Act. S112 provides:

> **Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if
>
> (a) a party to a proceeding … 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.

54 Given that the total amount payable by the second respondent to the applicant is in excess of the amount offered I find that the orders made in the proceeding are not more favourable to the second respondent than the offer.

55 It is not necessary for me to consider, under s 112(3), "any costs that would have been ordered on the date the offer was made", as the offer was an "all in" offer, and did not make a separate provision for costs.

56 It is not necessary for me to consider the offer of 22 April 2016. In any event, it suffers from certain difficulties because the offer was made to both respondents which calls for the cooperation of both respondents. The offer was not made to the second respondent alone and was therefore not an unconditional offer to the second respondent to settle the proceeding.

Tribunal's Discretion, Type and Scale of Costs

57 S112(2) 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.

Discretion

58 Whereas s 109 starts with the presumption that parties will bear their own costs, s 112 starts with the presumption that a party who has received an offer where the orders are not more favourable will pay the costs of the offeror.

59 Mr Kirby's written submission for the second respondent was that at the stage of the proceeding where the offer of 27 May 2013 was made, this proceeding and D700/2013 were to be heard and determined together. Mr Kirby submitted that the second respondent was therefore not unreasonable in rejecting any offer made to him alone in May 2013, given the role of the first respondent in the controversy.

60 I am not satisfied that the possibility that the first, rather than second, respondent might be found liable for any sum payable to the applicant was a sufficent reason for him to fail to properly consider the applicant's offer. It is no more of a reason than circumstances where there are only two parties but there is contention about the amount one might have to pay the other, or even which party must pay the other.

61 With the exception of the costs I have ordered that the first respondent pay the applicant, I am not satisfied that there is any reason why I should exercise my discretion against the interests of the applicant. The offer was made to the second respondent and he could have chosen to pay and then claim that sum from the first respondent – this is the outcome of the substantive decision in this proceeding. Therefore, even if it is necessary to apply the common law principles in *Calderbank v Calderbank* (1975) 3 All ER 33 and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435, as discussed in *Hopkins v Hopkins* [2014] VSC 319 to this offer, I find that it was reasonable that the second respondent accept the applicant's offer.

62 For the sake of completeness, I add that if I had not awarded costs under s 112 arising out of this offer, I would have done so under s 109(3)(e).

63 I therefore find that the applicant is entitled to costs from the date of the offer being 27 May 2013.

Type and Scale

64 Mr Rozenberg urged me to award costs on an indemnity basis for the whole of the proceeding. Furthermore, he urged me to fix the costs in the sum of $24,813.87.

65 I have regard to the decision of the Court of Appeal in *Verlado v Andonov* (2010) 24 VR 240 where the Court said at paragraph 47:

> 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[7] basis – although the Tribunal would be empowered to allow costs on a more favourable basis.

66 I am not satisfied that this proceeding goes beyond the "ordinary". An otherwise simple case has been turned into a legal maelstrom and the applicant took the step of protecting himself by making an offer to the second respondent of the type contemplated by s 112, at an early stage.

67 While that consideration might be sufficient to take the proceeding by the applicant against the second respondent beyond the "ordinary", the fact that there were two respondents, each of whom could have been liable, restores it to the ordinary status.

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[7] Now described as standard.

68 I consider it appropriate that, with the exception of the costs payable by the first respondent, the second respondent must pay the applicant's costs from 27 May 2013 to be agreed, but failing agreement, that such costs be fixed by the Victorian Costs Court on the County Court scale, on a standard basis from 27 May 2013.

SENIOR MEMBER M LOTHIAN