VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D414/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

DOMESTIC BUILDING DISPUTE - Costs; s 109 *Victorian Civil and Administrative Tribunal Act 1998*; factors considered; indemnity costs; factors considered; ss 112-114; offer made by Respondent in compliance; orders made by Tribunal not more favourable than the offer; factors considered.

FIRST APPLICANT	Fotios Gondopoulos
SECOND APPLICANT	Anastasios Stamenos
RESPONDENT	Metricon Homes Pty Ltd (ACN 005 108 752)
WHERE HELD	Melbourne
BEFORE	B Thomas Member
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2016
DATE OF ORDER	8 June 2016
DATE OF REASONS	8 June 2016
CITATION	Gondopoulos v Metricon Homes Pty Ltd (Builidng and Property) [2016] 904

ORDER

The Applicants must pay the Respondent's costs of the proceeding, including any reserved costs, from 12 March 2015, such sum to be agreed between the parties, failing which they are to be assessed by the Victorian Costs Court on a party and party basis on the *County Court Scale* to 5 October 2014 and thereafter on a standard basis on the *County Court Costs Scale* as defined in clause 1.13 of Chapter 1 of the Rules of the County Court.

MEMBER B THOMAS

APPEARANCES:

For the Applicants	Mr J Sumskas, solicitor
For the Respondent	Mr Stavris of Counsel

REASONS

Background

1 The Applicants commenced this proceeding on 2 May 2014 claiming the sum of $13,311.60 from the Respondent. The Respondent required this sum to be paid before handing over possession of two units constructed by the Respondent for the Applicants. The Applicants were unsuccessful in their claim.

2 Relying on s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'), the Respondent seeks its costs of the proceeding:

(a) On a standard basis, until 5 March 2015, and thereafter on an indemnity basis; alternatively

(b) On a standard basis, until 12 March 2015, and thereafter on an indemnity basis; alternatively

(c) On a standard basis.

3 The Respondent's Application was heard on 1 March 2016. Both parties filed written Submissions.

Brief History of the Proceeding

1 May 2014	Application filed.
16 May 2014	Proceeding listed for hearing on 5 August 2014.
5 August 2014	Applicants failed to attend hearing and Proceeding struck out.
20 January 2015	Proceeding reinstated and listed for hearing on 10 March 2015.
12 February 2015	Respondent's open offer to Applicants of $2,000.00. Offer refused.
18 February 2015	Respondent filed all documents on which it intended to rely.
3 March 2015	Applicants' counsel advised Respondent that the Applicants would rely on documents filed by Respondent.
4 March 2015	Offer rejected by a counter offer of $13,000 in full settlement.
5 March 2015	Respondent's without prejudice save as to costs offer to Applicants of $2,000.00, expressed as a 'Calderbank' offer. No response received.
10 March 2015	Proceeding adjourned part-heard to allow parties to file and serve Points of Claim and Defence.

12 March 2015	Respondent's offer pursuant to ss 112-115 of the *Victorian Civil and Administrative Act 1998* (the Act) to Applicants of $2,000.00 plus costs on the applicable County Court scale. No response received.
31 March 2015	Applicants' Points of Claim filed and served.
7 April 2015	Respondent invited Applicants to agree on cause of sewer blockage and served Request for Particulars of Points of Claim. Applicants refused to agree on cause of blockage and failed to provide particulars.
19 May 2015	Hearing completed.
1 October 2015	Orders and Reasons published.

The Tribunal's Discretion as to Costs

4 **Section 109** of the Act (Power to award costs) provides:

> (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.

5. **Section 112** (Presumption of order for costs if settlement offer is rejected) provides:

> (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. **Section 113** (Provisions regarding settlement offers) provides:

> (1) An offer may be made—
>
> (a) with prejudice, meaning that any party may refer to the offer, or to any terms of the offer, at any time during the proceeding; or
>
> (b) without prejudice, meaning that the Tribunal is not able to be told of the making of the offer until after it has made its orders in respect of the matters in dispute in the proceeding (other than orders in respect of costs).
>
> (2) If an offer does not specify whether it is made with or without prejudice, it is to be treated as if it had been made without prejudice.
>
> (3) A party may serve more than one offer.
>
> (4) If an offer provides for the payment of money, the offer must specify when that money is to be paid.

7. **Section 114** (Provisions concerning the acceptance of settlement offer) provides:

> (1) An 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.

(2) The minimum that can be specified is 14 days.

The Respondent's Submissions

8. The Respondent submitted that:

(a) it was unreasonable for the Applicants not to accept the 5 March 2015 offer of $2,000.00 plus costs. In view of the principles as stated in *Calderbank v Calderbank* and *Cutts v Head,* approved in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2),* the Tribunal should award the Respondent its costs on an indemnity basis from that date;

(b) alternatively, as the Tribunal's orders of 1 October 2015 were more favourable to the Respondent than its offer to the Applicants of 12 March 2015, pursuant to s 112 of the Act, the Tribunal should award the Respondent costs on an indemnity basis from that date;

(c) if the Tribunal is not prepared to award the Respondent costs on an indemnity basis, in view of the following criteria in s 109(3) being met, it should award costs on a standard basis:

(i) the Applicants failed to attend the first hearing on 5 August 2014;

(ii) at the second hearing on 10 March 2015, the Applicants' opening submission was contrary to facts alleged in their Application and evidence was led on matters of which the Respondent had not previously been put on notice. This necessitated the Tribunal ordering the parties to file and serve Points of Claim and Defence and an adjournment of the hearing;

(iii) the Applicants' –

- failure to attend the first hearing on 5 August 2014;
- conduct at the second hearing on 10 March 2015;
- refusal to concede factual matters; and
- failure to provide further and better particulars

unreasonably prolonged the time taken to complete the hearing;

(iv) the Applicants' claims included –

- a vague and inadequately particularised allegation of negligence;
- an allegation that the Respondent provided warranties under s 8 of the *Domestic Building Contracts Act 1995* for works it was not contracted to perform; and

- an allegation that the Applicants were not bound by the Special Conditions in the Contracts.

The Tribunal dismissed the Applicants' claim in full.

The Applicants' Submissions

9. The Applicants submitted that:

   (a) on 3 March 2015, counsel for the Applicants forwarded a proposed statement of facts to the Respondent. The purpose was to narrow the issues in dispute and therefore limit the hearing time. The Respondent refused to agree on any facts or issues or any changes to the proposed statement;

   (b) whilst it is conceded that the Applicants did not file and serve any documents prior to the hearing on 10 March 2015, all relevant documents had been discovered by the Respondent;

   (c) the disclosure of the conversation between Mr Simon Cassar, the Respondent's site manager, and Mr Gondopoulos on 5 October 2011 occurred when, in evidence in chief, Mr Gondopoulos was asked about notes supplied by the Respondent, taken at the building site. Mr Gondopoulos having named Mr Cassar, the Respondent was not in a position to cross-examine Mr Gondopoulos and an adjournment was therefore necessary. Despite the adjournment, Mr Cassar was not called at the resumed hearing which concluded in less than the allocated time.

IS THE RESPONDENT ENTITLED TO COSTS?

Section 109

10. Section 109(1) of the Act makes it clear that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding. By s 109(2) of the Act, the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in s 109(3).

11. In *Vero Insurance Ltd v Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the steps to be taken when considering an application for costs under s 109 of the Act:

> In approaching the question of any application to costs pursuant to section 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.

12. Therefore, parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. In exercising its discretion to make such an order, the Tribunal will have regard to the matters set out in s 109(3), although that is by no means an exhaustive list of the things to be considered (see *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54 at 28).

13. There is no presumption that a substantially successful party in the Tribunal's Building and Property List should have a reasonable expectation that an award of costs will be made in its favour. *Australian Country Homes v Vassiliou* (VCAT) 5 May 1999, unreported and *Pacific Indemnity Underwriting Agency v Maclaw* [2005] VSCA 165.

14. In each case, however, the question is whether it is fair in the circumstances of the particular case that a party be ordered to pay the costs of another party. Other than where an offer pursuant to s 112 of the Act falls to be considered, the onus of establishing that is on the party seeking the order for costs. Since every case is different, reference to what occurred in other cases is of limited assistance.

15. The Respondent relies upon the criteria set out in s 109(3)(a)(i) and (iv), (b) and (d) of the Act in support of its application for costs of the proceeding.

Section 109(3)(a)(i) – failing to comply with an order or direction of the Tribunal without reasonable excuse

16. I do not accept that the Applicants' failure to attend the hearing on 5 August 2014 unreasonably prolonged the proceeding. The Applicants' explanation was accepted by the Member hearing the Application for Review.

Section 109(3)(a)(iv) – causing an adjournment

17. I also do not accept that the Applicants solely caused the adjournment of the second hearing on 10 March 2015. Their Application was apparently drawn without legal assistance and they were not legally represented until the second hearing. It is understandable that the issues were not apparent to the Applicants when they drafted their Application. Furthermore, the Respondent was not legally represented until 12 March 2015. It was therefore appropriate to adjourn the further hearing with directions that Points of Claim and Defence be filed and served by both parties.

Section 109(3)(b) – whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding

18. I accept the Applicants' submission that the Respondent, despite being the controller of the site, did not produce any evidence as to the cause of the sewer backfilling. Therefore it was not unreasonable for the Applicants to refuse to concede the cause of the damage without any evidence.

Section 109(3)(d) – the nature and complexity of the proceeding

19. Finally, the mere fact that having heard the evidence the Tribunal dismissed the Applicants' claim, it does not follow that the claim was vague and inadequately particularised, or at best no more than a hopeful allegation.

20. Therefore I do not consider it is appropriate to depart from the general rule that each party should bear their own costs.

Indemnity costs

21. On 12 March 2015, the Respondent made an offer to pay the Applicants the sum of $2,000.00 plus costs on the applicable County Court scale. I find that this offer complied with ss 113 and 114 of the Act. I also find that the Orders made by the Tribunal on 1 October 2015 were not more favourable to the Applicants than the offer.

22. The Respondent seeks an order that the Applicants pay its costs of the proceeding on a standard basis until 12 March 2015, and thereafter on an indemnity basis.

23. In the 5th Edition of Pizer's Annotated VCAT Act at pages 680 and 681, the authors note that the following observations have been made about awarding indemnity costs in VCAT:

- it is a most unusual award made only in exceptional circumstances;
- it will only be made where a party has engaged in contumelious or high handed conduct;
- it will not be awarded unless the conduct of the culpable party has been vexatious or bloody minded;
- it should rarely be exercised;
- it should be awarded only in the rarest of circumstances;
- it is not commonly awarded by VCAT;
- there should exist special circumstances which lift the case out of the ordinary; and
- would be made even more sparingly in VCAT than in court.

In light of these observations, I do not consider that either the conduct of the Applicants or the facts of this proceeding warrant an award of indemnity costs against the Applicants.

The Respondent's Calderbank Offer

24. The Respondent's Calderbank offer was for $2,000.00. I find that the Tribunal's order of 1 October 2015 was not more favourable to the Applicants.

The Respondent's s 112 Offer

25. Section 112(2) provides that a party to whom s 112(1)(a) applies 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. In *Velardo v Andonov* [2010] VSCA 38 the Court of Appeal considered the meaning of the expression 'all costs' and said:

> [47] Section 112(2) creates …. a prima facie entitlement to payment of "all costs" in favour of the 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.

26. Each case must be assessed according to its facts and the relevant authority. In *Peet v Richmond (No 2)* [2009] VSC 585 Hollingworth J said:

> [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, justify an award other than on a party-party basis.

27. As Member Kincaid said in *Owners Corporation No 1 PS 611 203E v Furman Constructions (Vic) Pty Ltd (Costs)* [2015] VCAT 1159:

> [36] An imprudent refusal of an offer of compromise is a matter which a Court may have regard when considering whether an enhanced costs order should be made. The critical question is whether the rejection of an offer was reasonable in the circumstances. Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2) [2005] VSCA 298.

28. In *Hazeldene's Case* the Court of Appeal considered the circumstances that might lead a court to determine whether the rejection of an offer was unreasonable and said it should have regard to at least 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 at the date of the offer;

    (e) the clarity with which the terms of the offer were expressed; and

    (f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it. [25]-[29]

29. The Respondent's offer of $2,000.00 plus party/party costs on the County Court Scale was made on 12 March 2015, two days after the parties were ordered to file and serve Points of Claim and Defence. It was open for acceptance for a period of 14 days from 12 March 2015. It was preceded by an open offer of $2,000.00 made on 12 February 2015 and a without prejudice offer save as to costs for the same amount made on 5 March 2015. The terms of the offer were clearly expressed.

30. The Respondent's solicitor's letter of 5 March 2015 summarised the allegations of the Applicants and the Respondent's denial of those allegations. In particular, it said that on a reasonable construction of the contracts, the contractual risk of disconnecting and sealing the sewer lines had been allocated to the Applicants. Therefore, seven days before the Respondent's s 112 offer was served, the Applicants were appraised of the Respondent's position. They did not respond to the letter of 5 March 2015 and on 31 March 2015 filed and served their Points of Claim. By a letter to the Applicants' barrister dated 7 April 2015, the Respondent's solicitors pointed to inconsistencies between the allegations as to the cause of the blocked sewer pipe in the Application and the Points of Claim. The Applicants were invited to confirm that their position on this point at the forthcoming hearing would be that as stated in their Application. No reply was received to that letter.

31. I consider therefore that the Applicants had ample opportunity to assess their position and that of the Respondent before the expiration of the offer.

32. I find that the orders made by the Tribunal were not more favourable to the Applicants than the offer of the Respondent.

33. I will order that the Applicants pay the costs of the Respondent in the proceeding as set out the attached orders.

MEMBER B THOMAS