VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D816/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Settlement agreement – Respondent to pay Applicants' "costs" – offer made by Applicants – construction of offer – includes costs after date of offer – also includes reserved costs

FIRST APPLICANT	Brett Jacques
SECOND APPLICANT	Simone Jacques
RESPONDENT	BJ Builders Pty Ltd (ACN 063 780 272)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Consent order and Order as to costs
DATE OF HEARING	22 April 2008 (Hearing) – 22 April and 1 May (Written submissions as to costs) - 21May 2008 Minutes of agreed order
DATE OF ORDER	2 June 2008
CITATION	Jacques v BJ Builders Pty Ltd (Domestic Building) [2008] VCAT 975

ORDER

1. By consent, it is ordered as follows:
   (a) Order the Respondent to pay to the Applicants $150,000 by 19 May 2008, which the Tribunal notes is agreed by the parties to be in full and final settlement of the Applicants' claim and the Respondent's counterclaim.
   (b) Subject to paragraph 1(c), order the Respondent to pay the Applicants' costs, such costs if not agreed to be assessed by the Registrar in accordance with Scale D of the County Court Scale.
   (c) The parties shall bear their own costs of the application issued 19 May 2008.

2. Further order, but not by consent, that the costs to be assessed pursuant to paragraph 1(b) of this order shall include the whole costs of the proceeding, being both the claim and counterclaim and any reserved costs.

SENIOR MEMBER R. WALKER

APPEARANCES AT HEARING:

For the Applicants	Mr C. Harrison and Mr T. Pikusa of Counsel
For the Respondent	Mr B. Reid of Counsel

REASONS

Background

1 In this proceeding the Applicants ("the Owners") sought damages from the Respondent ("the Builder") with respect to allegedly defective and incomplete work. The Builder counterclaimed for monies said to be due under the contract.

2 By letter dated 3 April 2008, the Owners made an open offer to settle the proceeding. The letter was in the following terms:

> "My clients make the following offer to your client to settle this action. This offer is made pursuant to s112-115 of the *Victorian Civil and Administrative Tribunal Act* 1998:
>
> 1. My clients will accept the sum of $150,000.00 (sum) in full and final satisfaction of their claim in your client's counterclaim.
> 2. Your client will pay this sum within 28 days of the date of acceptance of this offer.
> 3. Your client will pay my clients' costs to be taxed if not agreed on County Court Scale "D".
>
> This offer is open for acceptance within 14 days from the date of this offer, that is, until 5.00 p.m. on Friday 18 April 2008. If your client wishes to accept this offer, your client must give me signed notice of his acceptance".

3 The letter then goes onto deal with the possible consequences of not accepting the offer and saying that it was also made as a "Calderbank" offer.

4 By letter from its solicitors dated 18 April 2008, the Builder accepted the offer.

5 The question has now arisen as to the extent of the costs that ought to be allowed consequent upon the acceptance of the offer. The Owners argue that the Builder has agreed to pay all of their costs of both the claim and the counterclaim and the Builder argues that it is contracted to pay the costs of the claim only. There is also a dispute as to whether reserved costs are included and whether the Builder is to pay the costs after the date of the offer. Submissions have been filed by both parties and it has been left for me to determine.

Submissions

6 Mr Pikusa for the Owners relies upon a passage in *Hudson's Building Contracts* 10th Ed. at p.869, where it is stated that:

> "Though there may be many issues, in legal pleading terms, of claim, setoff and counterclaim, the parties' eyes will always have been fixed on the final balance owing, one way or another. Whoever secures or avoids paying that balance in effect has won. Only in the case of wildly exaggerated claims, or separate and costly issues on which the successful party has failed and which it was wholly reasonable for him to raise, can there be, it is submitted, any justification that departing from the rule of the party ultimately successful on a final balance of claim and counterclaim should be paid his costs".

7 He pointed out that this passage has been referred to with approval by Crockett J in *Rival Nominees Pty Ltd v Craig Davis Constructions Pty Ltd* (Supreme Court of Victoria - 26 June 1981 – unreported); Pagone J in *DMD Major Projects Pty Ltd v Victorian Urban Development Authority (No 2)* [2007] VSC 441 and by Warren CJ in *Kane Constructions Pty Ltd v Sopov (No 2)* [2005] VSC 492. That may be so but I am dealing with the meaning of an agreement, not an application for costs in the usual sense.

8 Counsel for the Builder Mr Reid submits that the word "costs" should be interpreted to mean costs incurred by the Owners in prosecuting their claims but as not including reserved costs or costs incurred after the date of the offer namely, 3 April 2008. He said that it would have open to the Owners to have included words to broaden the term "costs", such as:

> "…of prosecuting its claims and defending your client's counterclaim, including any reserved costs, incurred up until the date of settlement of this offer".

It did not so. He says that the Owners are now seeking to have implied into the settlement of the agreement a term that is not there.

9 It does not seem to me that the Owners are trying to imply anything into the agreement; at least Mr Pikusa has not specifically invited me to do that. The question is what the terms of the settlement agreement mean. The words of the offer are clear. There is no basis I can see for implying anything into it that is not there.

10 The question is, whether the term "costs" includes the three types of costs which are in dispute, namely, reserved costs, the costs incurred by the Owners in defending the counterclaim and the costs incurred by them from the time the offer was made until the time it was accepted. Since the agreement arose as a result of the unqualified acceptance of the Owners' offer, I need to interpret what that offer should be taken to mean.

The costs incurred by the Owners in defending the counterclaim

11. It was offered that the settlement sum would be in full and final satisfaction of the claim and the counterclaim**.** Mr Reid submitted that, since the Owners' claimed an amount in excess of $700,000.00 for defective and incomplete work, the settlement sum represented a little over 16% of their total claim and that on that basis, one might say that the Owners had been unsuccessful in their claim. He said that the passage in *Hudson* and the authorities relied on by the Owners were inappropriate. I do not think that is of any significance. I agree that in the light of the amount ultimately agreed to be accepted by the Owners, a claim of over $600,000.00 would scarcely seem to have been justified but the Builder has nonetheless agreed to pay the Owners' costs and since the agreement was that this took into account both the claim and the counterclaim, the two have been treated as one and the setoff has been made.

12. The comments in the passage from *Hudson* referred to above, although not directly apposite, reflect the common sense position. The rights of the respective parties in the subject matter of both the claim and the counterclaim are offset and there is an agreed balance to be paid to the Owners, who have won the overall dispute because, whatever percentage of their original claim the settlement sum might be, it represents a substantial balance in their favour. The clear intention is that there will be only one award of costs and since the settlement is of both the claim and the counterclaim the intention must be that the costs to be paid are both of the claim and the counterclaim.

Does the offer include reserved costs?

13. As to whether the term "costs" includes reserved costs, the Builder relies upon comments made by the Tribunal in *Herniman Associates Pty Ltd v Meers* [2006] VCAT 800, but those comments relate to how an order should be interpreted, that is, an order that one party pay the other's costs. An order for costs is not automatically read as including reserved costs. Costs that are reserved have been the subject of a Tribunal order that they be reserved, that means that the Tribunal has ordered that liability to pay those costs shall be determined by it at a later time. It is therefore open to

either party to argue that they or it should be awarded such costs. However that is not what I am dealing with here. What I am doing here is interpreting an offer that has been made and accepted. I am not dealing with an application for reserved costs in the usual sense.

14. The Owners offered to settle the whole dispute upon the condition that their "costs" were paid. The settlement was of both the claim and the counterclaim and the costs that the Owners had incurred included costs which were the subject of orders reserving costs. Notwithstanding that the Tribunal had reserved those costs the agreement is that the Owners' costs are to be paid. By making an order for the payment of those costs I am simply giving effect to an agreed settlement. I am not determining that those reserved costs ought to be paid by the Builder; I am simply deciding whether the Builder has agreed to pay them and I think it has.

15. To offer to settle the proceeding by offering to pay the other party's "costs" without limitation would I think include reserved costs as well as unreserved costs.

The costs after the date of the offer

16. As to the last category, Mr Reid relied upon *Bilbarin Nominees Pty Ltd, Mistiglen Pty Ltd v Di Mella Constructions* [2004] VCAT 1816. In that case I found that, in the absence of some specific provision to the contrary, an offer made by a respondent which included "costs" should be interpreted to mean costs as at the date the offer was made. Costs thereafter were not therefore the subject of the agreement resulting from the acceptance of the offer, but they could be applied for by either side, provided that there was nothing in the settlement agreement to prevent such an application. Mr Reid submitted that I should adopt similar reasoning and hold that the offer only applies to the costs as at the date of the offer.

17. However, *Bilbarin* concerned an offer by the Respondent. There are different considerations where the offer is made by the Applicant who is to receive the money. In *Bilbarin* I referred to the comments of McGarvie J in ***Malliaros v Moralis*** [1991] 2 VR 501. In that case, an offer of compromise made by the Plaintiff was accepted by the Defendant on the thirteenth day after it had been made. The offer was to pay the Plaintiff the sum of $30,000 "together with the Plaintiff's taxed costs". As to the liability for costs, his Honour said (at p.505):

> *"It was argued for the Defendant that the rules disclosed an intention and that justice indicated, that they were entitled to delay acceptance up to the 14 days mentioned in the offer of compromise without being liable to be ordered to pay the Plaintiff's costs incurred in that time.*
>
> *In my opinion neither r26.03(7) nor any other provision by implication discloses that intention.*
>
> *It is difficult to see what considerations of justice tell in favour of leaving the defendants free of liability for the costs of the period being considered. The*

defendants in such a situation are ordinarily liable for costs up to the day of the offer: r26.03(7). According to normal practice they would also ordinarily be liable for costs incurred after acceptance of the offer such as costs incurred in arguing questions of costs of the trial. There is no apparent reason why the time between those periods should be dealt with in a different way. The absence of an apparent reason for differentiating on costs between these three periods would be the same even if a defendant could show a good justification for taking all the time it had taken in deciding to accept the offer.

It would operate against the policy of the rules, and make plaintiffs reluctant to make an offer of compromise during a trial, if, in the usual case, they faced the prospect of incurring trial costs for up to 14 days before acceptance of the offer, and ultimately having to bear all those costs themselves.

The reality of the situation is that in this case, for the plaintiff to recover the $30,000 it was necessary for her to proceed with the trial until the defendants accepted her offer of compromise."

18. Although much of his Honour's reasoning turned on the Rules referred to, the liability for the costs between the making of the offer and its acceptance is not dealt with by the rules. Liability for those costs was said to turn on "…the policy of the rules." I am not concerned with any rules here. Instead I must interpret an offer that the Owners have made. At the time the Owners made that offer they knew that they would have to proceed to prosecute the proceeding until the offer was accepted and I do not think a reasonable interpretation of the offer would be that it would include only the costs incurred up to the date of the offer regardless of what further costs should be incurred from then until acceptance. The time of acceptance was entirely within the control of the Builder. I think a reasonable interpretation is that it includes the costs up to the date of acceptance. It should also include the costs of these submissions and any assessment in accordance with what his Honour in *Malliaros* described as "normal practice". I am fortified in this view by the approach taken by the learned Judge.

Conclusion

19. The order will therefore be that the costs to be assessed include reserved costs and the costs on both the claim and the counterclaim. These are not limited to the date of the offer.

SENIOR MEMBER R. WALKER