VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP11/2016

CATCHWORDS

Costs application by respondent. Applicant largely unsuccessful in claims brought against the respondent in the substantive proceeding. Sections 109 to 115 of the *Victorian Civil and Administrative Tribunal Act* 1998. Offers of settlement, although not compliant with section 114 of the Act, relevant to consideration as to whether costs should be awarded. Costs not awarded as the Tribunal not satisfied it is fair to depart from the prima facie rule under section 109 of the Act that each party bear their own costs in a proceeding.

APPLICANT	Sylvia Jeric
RESPONDENT	A.J. Key Pty Ltd (ACN 078 922 915)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Costs Application
DATE OF HEARING	In Chambers
DATE OF ORDER	14 July 2017
CITATION	Jeric v A.J. Key Pty Ltd (Building and Property) [2017] VCAT 1028

ORDER

1. The respondent's application for costs is dismissed.

SENIOR MEMBER M. FARRELLY

REASONS

1 This proceeding was heard by me at Bairnsdale Magistrate's Court on 19 and 20 January 2017. The applicant, Mrs Jeric, brought a claim against the respondent builder seeking compensation in respect of numerous items of building work which she alleged were defective or not compliant with the requirements of the home building contract between her and the respondent. The applicant represented herself at the hearing. I granted leave to the respondent to be represented by a professional advocate at the hearing, and the respondent was represented by Mr Biviano of counsel.

2 On 14 February 2017, I handed down my decision with written reasons. Of the numerous items of alleged defective or non-compliant building works (approximately 56 items were raised in respect of which the applicant sought total compensation in the sum of $60,000), I found that only two minor items were substantiated, and I assessed the reasonable cost to rectify those two items as $250. I ordered the respondent to pay the applicant $250, and I reserved costs with liberty to apply by 30 March 2017.

3 On 29 March 2017, the Tribunal received the respondent's application seeking an order that the applicant pay the respondent's costs of the proceeding. The application included affidavit material exhibiting 2 offers of settlement made by the respondent to the applicant, each of which the applicant did not accept. The affidavit included a submission to the effect that, having regard to the offers of settlement, it was appropriate to make a cost order in favour of the respondent.

4 Having regard to the fact that the parties reside in or near Bairnsdale, on 4 May 2017 I made orders to the effect that I would determine the costs application in chambers after allowing the parties the opportunity to file and serve submissions. Written submissions were subsequently received from the respondent.

5 After the orders of 4 May 2017 were sent to the parties, the Tribunal also received correspondence from the applicant. That correspondence is comprised mostly of the applicant's commentary on what she perceives as the injustice of my decision handed down on 14 February 2017. In terms of submission on costs, I consider the applicant's correspondence amounts to a submission that, having regard to the nature of the case, it would not be fair to order that she pay any of the respondent's costs.

THE VCAT ACT

6 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("**the Act**") provides that each party is to bear its own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

(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.

7 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

1. The prima facie rule is that each party should bear their own costs of the proceeding;

2. 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;

3. In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s109(3) of the Act.

8 Section 112 of the Act makes special provision in respect of the making of a cost order in circumstances where a party has rejected a settlement offer made by another party:

112 Presumption of order for costs if settlement offer is rejected

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1 [2007] VSC 117 at [20]

(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...

9 Section 114 of the Act provides, amongst other things:

(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 period that can be specified is 14 days.

10 Where the Tribunal is minded to make an order for costs, the Tribunal will often identify the basis and scale upon which the sum of costs is to be assessed or "taxed" in the event the parties are unable to agree on the sum of costs.

11 As to the *scale* of costs, the Tribunal will usually identify a scale operative within the Magistrates Court, the County Court or the Supreme Court. If the Tribunal does not nominate any particular scale, the applicable scale will, by virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, be the County Court scale.

12 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis generally includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher "indemnity" basis generally includes all costs *actually* incurred save in so far as they are of an unreasonable amount or have been unreasonably incurred.

13 Although the respondent does not specify the basis and scale of costs sought, it appears that the respondent seeks an order for its actual or indemnity costs incurred after the rejection of one or other of the settlement offers. Alternatively, it seeks cost on whatever basis the Tribunal might be prepared to order.

THE SETTLEMENT OFFERS AND SECTION 112 OF THE ACT

14 By letter from the respondent's lawyer to the applicant dated 31 October 2016, the respondent offered to pay the applicant *"$1000 in full and final settlement of your claim"*. The offer stated that it was open for acceptance until 5 pm on 10 November 2016. The offer was not accepted.

15 The second offer was made by letter to the applicant from the respondent's lawyers dated 12 January 2017. The respondent offered to pay the applicant *"$5000 payable within 7 days of acceptance of this offer, in full and final settlement of your claim".* The letter stated that the offer remained open for acceptance until 5 pm on 18 January 2017. The letter of offer also stated:

> In the event that you do not accept this offer and this matter proceeds to hearing and our client is successful in defending your claim, then we reserve the right to tender this letter to VCAT on the question of costs pursuant to both sections 109 and 112 of the *Victorian Civil and Administrative Tribunal Act* 1998.
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> Further our client reserves its rights to tender this letter to VCAT in relation to the question of costs and alternatively seek costs on an indemnity basis or solicitor – client basis against you from the date of this letter in accordance with the principles set out in: Calderbank v Calderbank [1975] 3 All ER 333 [and other cases cited].

16 Neither of the offers of settlement attract the operation of section 112 of the Act because they do not meet the requirement of compliance with section 114 of the Act, namely that 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 minimum specified period of 14 days.

SECTION 109 OF THE ACT

17 As I have found that the offers of settlement do not attract the operation of section 112 of the Act, to make a costs order in favour of the respondent I must be satisfied that it would be fair, having regard to the matters set out in section 109 of the Act, to depart from the prima facie rule that each party bear their own costs. For the reason set out below, I am not satisfied that it would be fair to depart from that prime face rule.

18 Although the offers of settlement do not attract the operation of section 112 of the Act, they may nevertheless be relevant matters for consideration under section 109(3)(e) of the Act.

19 In my view the offers of settlement, particularly the second offer made a week prior to the commencement of the hearing, were prudent having

regard to the expert opinion evidence of Mr Furphy, set out in a report which had been served on the applicant well prior to the hearing, that there was little substance to most of the applicant's complaints in respect of the building works. The prudence of the offers is amplified in hindsight, having regard to my decision handed down on 14 February 2017.

20 However, I do not accept that the applicant's rejection of the offers of settlement is sufficient reason to depart from the prima facie rule under section 109 of the Act.

21 I do not doubt that the applicant, an elderly woman who lives on her own, was anxious and unsettled over what she perceived to be numerous faults in her home. Although I found that almost all of the applicant's complaints as to faulty works or non-compliance with the building contract were not substantiated, that does not mean that all of her complaints were baseless.

22 My determinations in respect of many of the items of alleged defective work were qualitative assessments following a view of the alleged defects. For examples, I listened to the heating system functioning to assess if it was unreasonably noisy, and I viewed carpet from several viewpoints to assess the carpet joins. In respect of many such items, it cannot be said that the applicant's complaint was baseless. What can be said is that items of work which the applicant considered to be of unacceptable quality, I found to be of acceptable quality.

23 Some allegations of non-compliance with the building contract, although not substantiated, were understandable. For example, as noted in my substantive decision the positioning of the light switch in the garage is not ideal, but it complies with the construction plans. As another example, the applicant's disappointment that her gas cook top does not have the safety feature of an automatic "flame failure" cut-off function is understandable, however the cook top installed is the cooktop specified in the detail of the contract works specifications.

24 As it has turned out, the applicant would have been better off accepting either of the offers of settlement. But in my view, having regard to the nature of the applicant's claims, that does not mean it would now be fair to depart from the prima facie rule under section 109 of the Act.

25 The respondent might ask what else could it have done to protect itself other than to make a prudent offer of settlement? The answer is that it could have made an offer of settlement that attracted the operation of section 112 of the Act.

26 The respondent submits that:

> The Applicant has vexatiously conducted the proceeding and also unreasonably prolonged the Hearing of the proceeding in that:
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> i. she continued to pursue a claim for each of the alleged defects, notwithstanding that the only Expert evidence adduced concluded that they had no reasonable prospect of success; and

ii. failed to produce any Expert evidence to support her claim of the alleged defects, or rebut the Expert evidence of the Respondent.[2]

27 I do not accept that the applicant conducted the proceeding in a vexatious manner. The fact that the applicant pursued her claims without supporting expert evidence does not constitute vexatious conduct of the proceeding. As noted above, a number of the applicant's claims were understandable even though I found they were not substantiated. The applicant has not pursued claims in the knowledge that she had no reasonable prospect of success.

28 And I do not accept that the applicant has unreasonably prolonged the proceeding because she has pursued claims which the respondent's expert considered to be unsubstantiated or lacking in merit.

29 As to relative strengths of the parties' claims, it is fair to say that the respondent's claims, that is the matters raised in defence of the claims brought against it, were stronger than the applicant's claims. But I do not consider this to be reason enough to depart from the prima facie rule under section 109 of the Act.

30 It cannot be said that the applicant's claims had no tenable basis in fact or law.

31 Although there were a large number of claim items raised by the applicant in the proceeding, there were no complex matters of fact or law. I granted leave to the respondent to be represented by counsel at the hearing, not because the complexity of the proceeding warranted the engagement of lawyers, but because the respondent had engaged lawyers and I saw no prejudice to the applicant, in the proceeding to be conducted by me, in allowing the respondent to be represented by a lawyer.

32 The respondent's decision to engage lawyers is understandable. And the preparation for the proceeding by the respondent's lawyers, including the preparation of a very helpful Tribunal book of documents, certainly assisted in the orderly conduct of the proceeding. But that does not mean that the nature of the proceeding, the issues involved, had complexity warranting the engagement of lawyers.

33 The prima facie rule in section 109 of the Act is not to be overturned simply because one party 'succeeds' and one party does not.

34 Having regard to the matters discussed above, I am not satisfied that it would be fair in this case to depart from the prima facie rule. Accordingly, I will dismiss the respondent's application for costs.

SENIOR MEMBER M. FARRELLY

[2] paragraph 9 in the respondent's submissions dated 29 May 2017