VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D349/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building, costs, *Calderbank* offer not in accordance with ss112 – 115 of the *Victorian Civil and Administrative Tribunal Act* 1998, s109(3)(e)

APPLICANT	Bogdan Konko
RESPONDENTS	Phillip Kamay, Julia Kamay
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	17 May 2007
DATE OF ORDER	5 June 2007
CITATION	Konko v Kamay (Domestic Building) [2007] VCAT 966

ORDER

1 The Applicant must pay the Respondents $200.00 forthwith being the cost of undertaking the work described in order 1 of 21 March 2007.

2 The Applicant must pay the Respondents' costs, including any reserved costs, from and including 24 November 2006 to be agreed, but failing agreement to be assessed by the Principal Registrar pursuant to s111 of the VCAT Act on a party-party basis on County Court Scale C

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr B. Konko in person
For the Respondents	Mr A. Beck-Godoy of Counsel

REASONS

1 On 21 March 2007 I made orders including that the Respondent Owners pay the Applicant Builder $1,138.71, reserved costs and interest and gave liberty to apply. I also ordered that the Applicant arrange for his electrician to return to site to leave the ceiling space in a condition that complies with the electrician's obligations when issuing a certificate of electrical compliance. On 2 April 2007 I amended the amount to be paid by including interest under the contract of $106.62; a total of $1,245.33.

2 Both parties agree this work has not been undertaken. The Respondents seek $200.00, which is awarded.

3 The Respondents have applied for their costs on the basis that they made an offer in writing on 23 November 2006 to settle the dispute in accordance with the principles of *Calderbank v Calderbank* [1976] Fam 93. The offer was expressed to be open until close of business on 24 November 2006, but was rejected later the same day.

4 The offer of 23 November 2007was at least the second that had been made by Messrs Gadens on behalf of the Respondents during that week. On 20 November 2006 Messrs Gadens sent a letter to Messrs Wainwright Ryan Eid, Lawyers, which offered $13,000.00 all in and the opportunity to collect windows which had been rejected by the Respondents as not in compliance with the contract. That offer had been open for acceptance until close of business on 23 November 2006. It was rejected on 22 November 2006.

5 On 23 November 2006 the Respondents' solicitors sent the Applicant's solicitors the offer referred to in the application for costs. It stated in part:

> At the trial of this matter the Respondents will produce expert evidence that shows clearly that your client's claims cannot succeed, or in the alternative are overvalued.

6 The letter set out the reasons why the Respondents asserted that the claim was overvalued and concluded that the amount awarded was likely to be no more than $2,800.00 and continued:

> Nevertheless we are instructed to offer your client:
>
> A The sum of $5,000.00;
>
> B Costs on the Magistrate's Court Scale; and
>
> C The opportunity to collect the rejected windows currently stored at the site (replacement windows costing $10,000.00);
>
> as full and final settlement inclusive of costs and interest (Offer). However, our client expressly reserves his right in respect of any future defects which may arise. The Offer will remain open for acceptance until close of business on 24 November 2006.
>
> The Offer is made according to the principles set out in *Calderbank v Calderbank* [1976] Fam 93 and we put you on notice that should your

client reject this Offer and proceed to hearing and obtain a less favourable result or have the proceeding dismissed, this letter will be produced to the Tribunal on any question of costs and in support of an Application that your client pay our client's costs on an indemnity or solicitor/client basis from the date of expiry of this Offer.

Please obtain your client's instructions on the Offer.

7 Mr Beck-Godoy estimate that reasonable costs to the date of the offer of 23 November 2006 on County Court Scale C were approximately $7,500.00 therefore the total value of the offer not including the windows was worth approximately $12,500.00.

8 At the costs hearing, Mr Beck-Godoy of Counsel submitted that the Respondents were forced to defend themselves against an unrealistic inter-parties dispute and said that they were seeking their costs on a party-party basis to 23 November 2006 and on a solicitor-client basis from them.

9 He submitted it was fair to order costs, taking into account the relative strengths of the claims of the parties. He said the Applicant made baseless claims resulting in prolongation of the proceeding and also wilfully disregarded known facts. He gave three examples. He said that the specification for the kitchen called for Baltic pine which the Applicant insisted that he had installed, whereas it was obvious that the Applicant had used radiata pine. Second, the windows were required by the specification to "match existing" but were found not to match the existing windows and third, there were thirty or so defective or incomplete items.

10 My response at the hearing was that the mismatch of timber in the kitchen appeared to come as a surprise to the Applicant's own expert, and with respect to the windows, it was not a straight-forward matter to decide whether they matched the existing windows in the Respondents' home. The Respondents substantially succeeded on the items alleged by them to be defective or incomplete, but the amounts awarded were less than the amounts sought by them.

11 Mr Beck-Godoy also submitted that the Applicant made claims that were untenable at law. He said the nature and complexity of the proceeding justified an award of costs. The hearing was five days including two days with expert witnesses in conclave.

12 Finally, Mr Beck-Godoy submitted that although the offers were not offers to which ss112 to 115 of the *Victorian Civil and Administrative Tribunal Act* 1998 would apply, they should be taken into account with s109(3)(e) "any other matter the Tribunal considers relevant". Neither offer had been open for 14 days or until immediately before the Tribunal made its orders in accordance with s114(1)

THE LAW

13 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 says 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 sub-section (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.

14 As recently emphasised by the Supreme Court in the matter of *Vero Insurance Limited v The Gombac Group* [2007] VSC 117, 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 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 s109(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.

DISCUSSION

The relative strengths of the claims made by the parties

15 The result of the substantive hearing was a small victory to the Applicant. In the circumstances, I do not consider it fair that either party should have an order for costs up to and including 23 November 2006.

Nature and complexity

16 The hearing was for five days and did involve significant expert evidence. Nevertheless, it was in the nature of a standard building dispute and the Respondents have failed to discharged their obligation of convincing me that there are factors which justify an order for costs to 23 November 2006.

Calderbank offer

17 The Respondents demonstrated commercial good sense in making realistic offers to attempt to settle the proceeding. It is noted that the offers of 20 November and 23 November were open for very short periods, however in both cases the offers were rejected by the Applicant rather than simply lapsing. The offers were also made in the context of the intense activity that occurs immediately before a hearing. The hearing of the substantive matter commenced on 27 November 2006.

18 Mr Beck-Godoy directed my attention to *Colgate-Palmolive v Cussons Pty Ltd* (1993) FCR 225 where proceedings were continued in wilful disregard of legal principles. I commented at the hearing that in the Federal Court costs followed the event and therefore this authority has limited application in the Tribunal where the first assumption is that parties will bear their own costs. He also referred me to the decision of Member Young, as he then was, in *Australian Country Homes v Vasiliou* - unreported (5 May 1999). To repeat the words of Bowman J in *Sabroni Pty Ltd v Catalano* [2005] VCAT 374 where he said:

> Despite the observations of Member Young in *Australian Country Homes v Vasiliou* … I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs order will be made in its favour.

19 The Applicant's former solicitors filed notice of ceasing to act on 26 March 2007 and he appeared for himself at the costs hearing. The submissions he made were, in the main, relevant to the substantive application rather than to the Respondents' application for costs. His submissions did not assist me. However, I have considered the effect of the *Calderbank* offer of 23 November 2006.

20 In the matter of *Fasham Johnson Pty Ltd v Ware and Saunders* [2004] VCAT 1708, Senior Member Cremean considered an offer which purported to comply with s112 of the VCAT Act but also included a statement that it

was made in accordance with *Calderbank* principles. He rejected the submission that it complied with s112 and added:

> "In light of the regime fixed by ss112, 113, 114 and 115 of the Act, I would be in doubt that there is any room for a *Calderbank v Calderbank* offer to be made in proceedings in the Tribunal. I would think that an Offer of Compromise that does not comply with that regime cannot operate as an offer of compromise at all. The existence of that regime, moreover, seems to me that *Calderbank* offers are unnecessary.
>
> …
>
> A *Calderbank* offer (if this was one) cannot fetter my discretion on costs under s109. That discretion rests with me and I cannot be compelled to exercise it one way or the other providing I proceed "judicially" as that expression is understood and I am satisfied there are discretionary considerations pointing away from an order of costs to the Applicant.

21 I draw the conclusion from *Fasham* that a *Calderbank* offer is not of the same force and effect as an offer to which s112 of the VCAT Act applies, and that there can be discretionary factors which will prevent it from having any effect at all.

22 I am guided by the decisions of Gillard J in two proceedings. The first is *NTA Associates Pty Ltd v Aqua-Max Pty Ltd and Anor (No. 3)* [2000] VSC 163 where he said at paragraph 65:

> "In my opinion if the offer could be made in accordance with the rules it should be. The rules [about offers of compromise] are there to be followed. In addition the rules set out in detail the procedure to be followed and the consequences which flow from the happening of a particular event.
>
> But if the offer is not made in accordance with the rules when it could have, it is still a relevant matter to take into account on the question of costs.
>
> Any offer made in litigation should be carefully considered and a party and his solicitor ignores or rejects the offer at his peril.

23 In the second, *Patsios and Anor v Glavinic and Anor* [2006] VSC 92, he based his decision regarding costs on the fact that a party "faced up to the realities and behaved in a more than reasonable fashion in trying to resolve the matter …"

24 I find the Respondents' offers reasonable and that the Applicant acted unreasonably in failing to accept the offer of 23 November 2006; the offer upon which the Respondents relied. I therefore find it reasonable that the Respondents be awarded their costs from 24 November 2006.

25 Had the offer been made in accordance with s112 to 115 of the VCAT Act, it is possible that an order other than costs on a party-party basis would have been made. However, in circumstances where these costs are awarded

pursuant to s109(3)(e), I order that the Applicant pay the Respondents' costs from and including 24 November 2006 to be agreed, but failing agreement to be assessed by the Principal Registrar pursuant to s111 of the VCAT Act on a party-party basis on County Court Scale C.

SENIOR MEMBER M. LOTHIAN