VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST VCAT REFERENCE NO.D576/2007

CATCHWORDS

Costs – s109 *Victorian Civil and Administrative Tribunal Act* 1998 – relevant considerations - whether costs order premature – '*Calderbank*' offer

APPLICANT	Krongold Constructions (Australia) Pty Ltd
FIRST RESPONDENT	Brian Worsfold
SECOND RESPONDENT	Helena Worsfold
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	10 July 2008
DATE OF ORDER	23 July 2008
CITATION	Krongold Constructions (Australia) Pty Ltd v Worsfold (Domestic Building) [2008] VCAT 1480

ORDER

1. The respondents shall pay the applicant's costs of and incidental to its application, including the costs of and incidental to the hearing held on 11 October 2007, but not its costs of the compulsory conference held on 18 December 2007 which shall remain reserved. In default of agreement such costs are to be assessed by the principal registrar on a party/party basis on County Court Scale 'D'.

2. The respondents shall pay to the applicant interest fixed in the sum of $4,850.16.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Ms E. Porter of Counsel
For Respondents	Mr M. Whitten of Counsel

REASONS

1 By contract dated 12 October 2005 the respondent owners entered into a contract for the construction of a new home. By application dated 24 August 2007 the applicant sought payment of the final certified payment due under the contract, interest and costs. On 14 September 2007 the applicant filed an 'application for orders' seeking the following orders:

> 1. There be Judgement for the Applicant in the sum of $56,406.53 [the certified sum].
>
> 2. The Respondents pay the Applicant's party/party costs, to be taxed on scale D of the County Court Scale of Costs.

On 3 October 2007 the applicant filed an 'amended application for orders' (dated 14 September 2007, but date stamped as having been received by the Ground Floor Counter on 3 October 2007) seeking in addition to the above orders:

> 1A In the alternative to order 1, that the Respondents pay the sum of $56,406.53 into the Domestic Builders Fund.

2 On 11 October 2007 the Tribunal found that the builder, *'whichever entity that properly is'*, was entitled to payment of the final certified sum of $56,406.53 and ordered payment of that amount into the Domestic Builders' Fund pending determination of the identity of the builder. On 16 November 2007 the respondents filed a counterclaim seeking damages for the costs of rectification and/or completion works. Following an unsuccessful compulsory conference on 18 December 2007, the proceeding including the counterclaim, was set down for hearing to commence on 5 May 2008 with an estimated hearing time of 5 days. Shortly prior to the hearing the parties agreed that the applicant's claim for payment of the certified sum should be determined prior to the hearing of the respondent's counterclaim.

3 Following a two day hearing in May this year, after ruling on the first day of the hearing: '*that there is a degree of ambiguity and/or uncertainty as to the identity of the builder and that I should hear the extrinsic evidence'*[1]. I found the applicant was the builder entitled to payment of the certified sum[2]. Orders were made for payment of the monies held in the Domestic Builders' Fund to the applicant. The applicant now seeks payment of its costs of and incidental to:

i its application for summary judgement dated 14 September 2007 – on an indemnity basis; and

ii The application dated 24 August 2007 including the costs of the compulsory conference held on 18 December 2007, on a party/party basis on County Court Scale 'D'.

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[1] *Krongold Constructions (Australia) Pty Ltd v Worsfold* [2008] VCAT 837 at [9]
[2] *Krongold Constructions (Australia) Pty Ltd v Worsfold* [2008] VCAT 1003

The applicant also seeks certification of counsel's fees and interest.

4 Mr Whitten of counsel appeared on behalf of the respondents and submitted that it is premature to determine the applicant's application for costs until the respondents' counterclaim has been heard and determined. He sought to rely on my earlier decision in *Age Old Builders v Swintons Pty Ltd* [2006] VCAT 870. However, that decision concerned the costs of a preliminary hearing relating to a number of discrete legal issues. In this proceeding the hearing of the claim and counterclaim were 'split' at the request of the parties. The hearing of the applicant's claim was not a preliminary hearing, although had the respondents been successful in persuading me that the applicant was not the builder, the future conduct of the proceeding would have been different. The Tribunal (differently constituted) found, in October 2007, that the builder was entitled to payment of the certified sum, and ordered payment of that sum into the Domestic Builders' Fund pending determination of the identity of the builder. Having determined that the applicant was the builder entitled to payment of the certified sum, the substantive issues in relation to the applicant's claim have been finalised.

5 Section 109 of the *Victorian Civil and Administrative Tribunal Act* provides that each party should bear its own costs of a proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) viz:

> (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;
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> (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;
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> (vi) vexatiously conducting the proceeding;
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> (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.

6 Ms Porter of Counsel appeared on behalf of the applicant and submitted that the overriding consideration, in deciding whether to exercise the tribunal's discretion under s109(2), is one of fairness. The applicant relies on s109(3)(b), (c), (d) and (e) and I will consider each of these in turn. However, it must be appreciated that I am concerned with the parties' conduct *of the proceeding* not their conduct *prior to* the commencement of the proceeding.

Section 109(3)(b) - whether the respondent has been responsible for unnecessarily prolonging the proceeding

7 I cannot be satisfied that the respondents have been responsible for unnecessarily prolonging the proceeding. They have complied with all directions – any amendments to the timetable were by consent, and preserved the hearing date.

Section 109(3)(c) - the relative strengths of the parties' claims

8 Whilst it was clear that the builder was entitled to payment of the certified sum there was some uncertainty as to the identity of the builder, and the entitlement of the applicant to payment. The Tribunal was unable to determine this question when the application for summary judgement was heard on 11 October 2007. Ultimately I determined that the applicant was the builder under the contract, but only after considering and discounting, for the reasons set out in my earlier decision, the extrinsic evidence which was voluminous.

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

9 There is no question that determining the identity of the builder was a difficult and complex task. Although the parties agreed that the witness statements would simply be tendered and that there would be no cross examination of the witnesses, legal argument extended over two days. Counsel for both parties prepared very careful, detailed submissions covering a number of issues in relation to the extrinsic evidence. An additional folder of documents was provided to me at the hearing which required close consideration. It was appropriate that the parties be legally represented.

10 I cannot agree with the curious submission by counsel for the respondents that complexity should militate against the making of an order for costs. When considering complexity in terms of the overriding consideration of fairness it is hard to agree that the more simplistic an argument the fairer it would be to order costs. In a complex case, primarily concerned with legal questions and interpretation, it is entirely appropriate that parties be represented by those qualified to argue to the legal points. Complexity is but one of the matters to be considered in exercising the discretion to order costs.

Section 109(3)(e) – any other matter the tribunal considers relevant

11 It may be said that the uncertainty about the identity of the builder came about because of the conduct of the Krongold Group in seemingly using the names of various companies within the group interchangeably. After a careful consideration of the extrinsic evidence I determined '*that the naming of KCA in the contract is the best available evidence in determining the identity of the contracting* party' [32] and further, that the Respondents were estopped from denying the applicant was entitled to payment of the certified sum. Although not a matter influencing my earlier decision, I note that the respondents rather than simply allowing the applicant's application to proceed to hearing lodged a counterclaim seeking damages for rectification and completion costs from the applicant. And, as I observed in my earlier Reasons *'It seems it was not until the parties fell into dispute towards the end of the project that this issue was formally raised'* [39].

Conclusion

12 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:

> 1. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> 2. 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 having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

13 Having considered the relevant provisions of s109(3) I am satisfied it is fair to exercise the Tribunal's discretion under s109(2) and order the respondents to pay the applicant's costs of its application.

Costs of the hearing of 11 October 2007

14 The applicant seeks its costs of the hearing on 11 October 2007 on an indemnity basis and relies on what it calls a *Calderbank* letter dated 2 October 2007 (the day prior to the filing the 'amended application for orders' wherein it proposed that the certified sum be paid into the Domestic Builders' Fund). The orders made following the hearing on 11 October orders are silent as to costs. Although some 8 days after this costs hearing, and after transcript of the 11 October hearing had been obtained by the applicant, the respondent consented to applicant's application (made later on the day of the costs hearing) that the orders of 11 October be amended under s119 of the *VCAT* Act (the slip rule) to include the order 'Costs reserved' it is appropriate that I consider the submissions made at the costs hearing.

15 Two affidavits by the applicant's solicitor, and one by the respondents' solicitors as to whether there were orders were made reserving costs of the hearing on 11 October as alleged by the applicant, were filed. The affidavit

by the applicant's solicitor exhibits a copy of his file note, and a file note made by counsel containing the note 'costs reserved'. The respondents' solicitor deposes in his affidavit to being unable to recollect what, if any, orders were made as to costs on that day.

16 Although there was no express reservation of costs, this does not mean that the issue of costs has been determined. Section 109(2) enables the Tribunal to make an order for costs '*at any time*'. The uncorrected orders of 11 October 2007 made no mention of costs and had they not been recently amended, I would nevertheless have been satisfied that the costs of that hearing had not been determined.

17 The applicant takes issue with the submission by the respondents that the application for summary judgement was dismissed on 11 October 2007. Although it is true that orders were not made dismissing the application, it cannot be said to have been successful. The Tribunal did not order that the certified sum be paid to the applicant, rather, having determined that the builder was entitled to payment, it ordered the certified sum be paid into the Domestic Builders' Fund pending determination of the identity of the builder. The substantive issues to be determined were the identity of the builder, and the entity entitled to payment of the certified sum.

18 The applicant submits that I should have regard to the letter dated 2 October 2007 written the day after the directions hearing held on 1 October 2007 (and the day before the filing of the 'amended application for orders') when the respondents' defence based on the identity of the builder was apparently raised. In this so- called *Calderbank* letter the applicant sought the respondents' consent to payment of the certified sum into the Domestic Builders' Fund. There appears to have been no response until the day the 'offer' expired when they made a counter offer seeking the applicant's consent to an order that both parties pay an amount equivalent to the certified sum into the Domestic Builders' Fund. This cannot, in my view, be regarded as a genuine offer in circumstances where, as already noted many times, the respondents had an absolute obligation under the contract to pay the certified sum to the builder. Upon receipt of the counter offer the applicant extended the time for acceptance of its offer. Ultimately, the Tribunal ordered that the certified sum be paid into the Domestic Builders' Fund pending determination of the substantive issue.

19 However, it is questionable whether the letter of 1 October 2008 can properly be regarded as a *Calderbank* letter as, in my view, it does not contain an offer of compromise. The relevant principles were summarised in *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* [2006] NSWSC 790 by Bergin J at [9]:

> In *Leichhardt Municipal Council v Green* [2004] NSWCA 341, Santow JA, with whom Bryson JA and Stein AJA concurred, observed that *Calderbank* offers are allowed because they facilitate the public policy objective of providing an incentive for parties to end their

litigation as soon as possible (at [14]). The principles gleaned from this decision relevant to this application are as follows:

- the cost consequences attendant under the general law upon an offer of compromise made in a *Calderbank* letter are in the Court's discretion, to be exercised having regard to all of the relevant circumstances of the case [19];
- there is not a prima facie presumption in favour of an award for indemnity costs if the *Calderbank* offer is not accepted and is not bettered [19];
- a *Calderbank* offer that has no real element of compromise in it, which is designed merely to trigger costs sanctions, will not be treated as a genuine offer of compromise [23]-[24];
- there is no rule that an optimistic offer is not a genuine offer. Whether or not it was reasonable to reject an offer is a question that may figure in the discretionary balance, but it is not a question which affects the genuineness of the offer [40];
- an applicant for an order for indemnity costs consequent upon an unaccepted *Calderbank* offer must show that the rejection of the offer was unreasonable [46].

20 The so-called *Calderbank* letter does not, in my view, contain any real element of compromise. It effectively sought security for payment of the certified sum and consent orders to that effect. It was made prior to the filing of the 'amended' application for orders in which it sought the alternative order that the certified sum be paid into the Domestic Builders Fund. There was no offer to compromise the applicant's claim.

21 Whilst the applicant did not succeed in its application for summary judgement, it did obtain the alternative order sought in the 'amended application for orders' consistent with those set out in the letter of 2 October. Not only did the respondents not accept that offer but they made a counter offer which as noted above cannot be regarded as having been a genuine offer.

22 The letter of 2 October was written the day before the amended application for summary judgement was filed. Whilst I accept that a *Calderbank* letter can properly be taken into account under s109(3)(e) I am not persuaded that, even if the letter of 2 October can properly be regarded as a *Calderbank* letter, I should order the respondents to pay the applicant's costs of the hearing on 11 October 2008 on an indemnity basis. The hearing was not simply concerned with an application for payment of the certified sum into the Domestic Builders' Fund– the applicant sought summary judgement of its application for payment of the certified sum to it, and in the alternative an order that the sum be paid into the Fund. I have since determined that the applicant was entitled to payment, and I consider the costs of the application and the hearing on 11 October 2007 to be costs in relation to the applicant's substantive application. I am satisfied it is fair

that the respondent pay the applicant's costs of that hearing on a party/party basis on County Court Scale 'D'.

Certification of Counsel's costs

23 The applicant has also requested that I certify counsel's fees. I am not prepared to do so. I am not persuaded there is any reason for certification of counsels' fees over and above those allowed by County Court Scale 'D'. Whilst senior counsel was apparently instructed to prepare the amended Points of Claim in April 2004 I note there is no indication on them, as filed, that they were settled by counsel or senior counsel. Further, I note that many of the allegations contained in the amended Points of Claim were not pursued at the hearing.

Costs of the Compulsory Conference held on 18 December 2007

24 The applicant seeks its costs of the compulsory conference held on 18 December 2007 because it contends resolution was impossible because of the issues about the identity of the builder. Costs were reserved at the conclusion of the compulsory conference. I did not preside at the compulsory conference and as evidence of anything said and done during a compulsory conference is inadmissible unless all parties agree (s85 of the *VCAT Act*) it is inappropriate for me to speculate as to the reasons a resolution was not reached. As discussed above, the discretion under s109(2) to order costs can only be exercised having regard to the matters set out in s109(3) if I am satisfied it is *'fair to do so'*. I cannot be so satisfied in relation to the costs of the compulsory conference and there will be no change to the orders made on 18 December 2007.

Interest

25 The applicant seeks an order for interest in the sum of $4,850.16 calculated at the contractual rate of 10% from 21 August 2007. In their Points of Defence, the respondents admit that term of the contract. The respondents did not challenge the applicant's entitlement to interest, or its calculation, and accordingly I will make the appropriate orders.

DEPUTY PRESIDENT C. AIRD