VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D374/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building dispute – application for costs – offer of compromise made without prejudice not accepted by offeree – outcome of case less favourable to offeree – privilege attaching to offer mutual - offer not able to be relied on – whether order for costs should be made – relevant matters

FIRST APPLICANT	John Charles Leonard
SECOND APPLICANT	Maryann Leonard
RESPONDENT	Matthew John Noy
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing
DATE OF HEARING	4 August 200
DATE OF ORDER	25 August 2008
CITATION	Leonard v Noy (No 2) (Domestic Building) [2008] VCAT 2085

ORDER

1. The application for costs is dismissed.

2. No order as to the costs of these proceedings.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A. Ritchie of Counsel
For the Respondent	Mr A. Beck-Godoy of Counsel

REASONS

The proceeding

1 In this matter the Applicants ("the Owners") sought to recover $25,731.30 from the Respondent ("the Builder") with respect to allegedly defective work and also sought unspecified general damages. The Builder counterclaimed for $9,453.70, being the amount of its final invoice.

2 After a defended hearing I found that the Owners were entitled to damages in the sum of $4,521.40 from the Builder with respect to defective and incomplete work and ordered that he pay that sum to the Owners. On the counterclaim I ordered the Owners to pay to the Builder the sum of $9,388.70, that being the total of the items that I found to be established.

3 An order was also made permitting the Builder to remove bricks from the site. Costs were reserved.

Application for costs

4 An application is now made by the Builder for the costs of the proceeding. The prima facie position in regard to costs in this Tribunal is that each party bears his own costs. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides (where relevant) as follows:

> (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—
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> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
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> (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);
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> (iv) causing an adjournment;
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> (v) attempting to deceive another party or the Tribunal;
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> (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 Before making any order for costs in favour of the Builder I would need to be satisfied that it was "fair" to do so having regard in particular to the matters referred to in sub-section 3.

The offer

6 Mr Beck-Godoy sought to rely upon an affidavit sworn by the Builder's solicitor that, on 2 July 2008 (that is, less than a week before the hearing) he made a without prejudice offer on behalf of the Builder to settle the proceeding and counterclaim upon terms considerably more favourable to the Owners than the order that I made. The solicitor says in his affidavit that he received no response to this offer. Mr Beck-Godoy argued that I should treat the letter as a "Calderbank" type offer and make an order for all the Builder's costs at least after the making of the offer.

7 Mr Ritchie for the Owners objected to the opening of the affidavit and submitted that I could not have any regard to the settlement offer sought to be relied upon by the Builder because it was a without prejudice communication and it is clear law that this makes it privileged. Because the privilege is mutual it cannot be waived by one party (see *White v Director of Housing* [2003] VSC 124, particularly paragraph 23). That is certainly the law and so I accept Mr Ritchie's submission that I cannot have regard to this offer.

Other considerations

8 There can be no criticism of the manner in which the case was conducted. Reliance is sought to be placed on the outcome of the case compared with the claims made on both sides which would suggest that the Builder was substantially successful. Mr Beck-Godoy submitted that, of the $25,731.30 claimed, the Owners recovered a little under 20%. He also pointed out that the Builder had largely succeeded on his counterclaim.

9 That is so, but these amounts do not reflect the reality of the dispute. The major item in the Owners' claim related to the ceiling of the extension, which was slightly lower than the plans required. There was a dispute between the parties as to whether it was agreed to depart from the plans in this respect but I found it unnecessary to resolve that because I found that, even if there was a breach there was no loss because the difference in ceiling height is imperceptible and nothing needs to be done.

10 That finding was made despite evidence from Mr Arends, an architect and a highly respect expert witness who frequently gives evidence before this Tribunal. He gave evidence on behalf of the Owners that the ceiling should be reconstructed at considerable cost. In view of the obvious departure from the plans and this advice from a respected expert it was not unreasonable for the Owners to proceed with that part of the claim. In regard to the

counterclaim, the Builder left the site when the work was clearly unfinished and demanded final payment.

11 The relatively small allowance made to the Owners in reduction of the counterclaim reflected the comparatively minor cost of attending to the matters the Builder left undone but since the work was incomplete he ought not to have claimed the balance of the contract price. Orders are made in favour of Builders in the determination of building disputes because a just financial outcome has to be arrived at between the parties and this cannot be done if credit is not given to the Builder for the value of what he has done, assuming that there is substantial performance as there usually is. Hence I made the order for a sum equivalent to nearly all the Builder's final invoice notwithstanding that, since the work was incomplete, he should not have submitted it.

Conclusion

12 This was a comparatively small claim in which both parties have partially succeeded. I am not persuaded it is appropriate for me to depart from the prima facie position that the parties pay their own costs.

SENIOR MEMBER R. WALKER