VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D355/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Costs order in favour of successful party – s112 offer – outcome less favourable to the offeree – how costs should be assessed

APPLICANT	Mardel Constructions Pty Ltd (ACN 090 939 601)
FIRST RESPONDENT	Jogendra Sinha
SECOND RESPONDENT	Poonam Sinha
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing
DATE OF HEARING	7 July 2009
DATE OF ORDER	3 August 2009
CITATION	Mardel Constructions Pty Ltd v Sinha (Domestic Building) [2009] VCAT 1532

ORDER

1. Order the Respondents to pay the Applicant's costs of this proceeding and the counterclaim, including reserved costs, up to be assessed by the Registrar if not agreed on a party/party basis in accordance with Scale "D" of the County Court Rules up to and including 16 September 2008 and thereafter on an indemnity basis.

2. The application for an order for the payment of interest is refused.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr R. Andrew of Counsel
For the Respondents	Mr D. Noble, Solicitor

REASONS

Background

1 On 19 May 2009 I handed down my decision in this matter awarding the Applicant the sum of $187,870.90 and striking out the Respondents' counterclaim. Costs were reserved. The Applicant now applies for an order for those costs on an indemnity basis. It also seeks an order for interest.

The application

2 The applications came before me on 7 July 2009. Mr Andrew of Counsel represented the Applicant and Mr Noble, Solicitor, represented the Respondents. After hearing submissions I reserved my decision in order to have the opportunity to read certain authorities to which I had been referred in argument. Having now considered the matter I order the Respondents to pay the Applicant's costs of this proceeding to be assessed if not agreed in accordance with Scale D of the County Court Scale up to and including 16 September 2008 and thereafter on an indemnity basis. I do not make any order for interest since I consider that I am *functus officio* in that regard. The reasons for this decision follow.

The principal proceeding

3 The application concerned a claim by the Applicant builder for a lock up payment and certain other sums. The Respondents counterclaimed for allegedly defective workmanship, the alleged cost of having the work completed by another builder and substantial damages for delay, including a very substantial claim that, due to delay by the Applicant the Respondents missed the real estate boom and the opportunity to sell the properties at a very high price.

4 In a lengthy decision I upheld the substantial majority of the Applicant's claims and dismissed the whole of the Respondents' claim save for some claims for credits, liquidated damages and defects which had not been the subject of any serious opposition on the part of the Applicant. I found that the Applicant was entitled to a total of $216,661.10 on its claim and the Respondents were entitled to a set off for the cost of remedying defective and incomplete work and a credit for a change of windows, all totalling $22,161.64, and also liquidated damages of $6,628.56. When the various amounts were set off there remained a credit balance in favour of the Applicant of $187,870.90.

5 The reasons for the decision were lengthy, extending to 31 pages. Significantly for the present application I determined that I did not accept much of the evidence of the Respondents' principal witness, Mr Sinha and indeed, found much of his evidence quite evasive and untruthful. I made a number of findings of fact that reflected adversely on Mr Sinha's credit. One of these was an attempt to mislead the bank as to the contract price in order to secure a larger loan. Another was altering a document sent by the

builder under the contract claiming extras and altering it in such a way as to disguise the fact that it had been altered. His evidence tended to shift and parts of his evidence conflicted with other parts. In the end I was not satisfied that he was a witness who attempted to give an honest account of what had occurred but rather, was attempting to say what he thought might advance the Respondents' case. His behaviour in the witness box under cross examination extended the length of the cross examination by at least a day.

6 A key element in the case was that an agreement was reached at a conciliation organised by Building Advice and Conciliation Victoria. Mr Sinha denied that any such agreement had been reached yet it was clear from his own correspondence that such was the case. Tbis dispute took a lot of hearing time. He also denied that he had agreed to a change of the window supplier from that specified in the contract even though he had clearly agreed to that. Again, this occupied much of the hearing time. He then sought to obtain a substantial collateral advantage from the Applicant by the stance that he took in regard to the windows which reflects poorly on his honesty as well as his credit.

7 Mr Noble, sensibly, did not suggest that this was not an appropriate case in which to order costs but opposed the making of any order other than party/party costs. Mr Andrew seeks indemnity costs.

The offers

8 On 16 September 2008 the Applicant made an offer to the Respondents to settle the proceeding upon terms whereby it would receive the sum of $135,000.00 in full and final satisfaction of the claim and counterclaim. The offer was made in accordance with s112 of the *Victorian Civil and Administrative Tribunal Act* 1998.

9 The offer was not accepted and the outcome of the proceeding was more favourable to the Applicant that this offer. This calls into play s. 112 of the *Victorian Civil and administrative Tribunal Act 1998*, which is relied upon by Mr Andrew and provides as follows:

> "112. Presumption of order for costs if settlement offer is rejected
>
> (1) This section applies if-
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> (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
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> (b) the other party does not accept the offer within the time the offer is open; and
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> (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."

10 The Applicant seeks indemnity costs as from the date of the offer.

How section 112 is to be applied

11 There is a divergence of opinion within the Tribunal as to how this section is to be applied. Mr Andrew referred me to a number of recent decisions of this tribunal namely, *Borg v Metricon Homes Pty Ltd* [2009] VCAT 507, *Geftine Pty Ltd v Dover Beach Pty Ltd* [2006] VCAT 2189 and *Gower v Vero Insurance Limited and Anor* [2005] VCAT 1447.

12 In *Borg* the Tribunal awarded indemnity costs after observing that, where a party chooses not to make an offer under s112 of the Act, orders for costs should be on a party/party basis unless there are exceptional circumstances. In that case an offer under s112 was made, which had a claim that was "weak, legally and factually" and was ordered to pay costs on an indemnity basis where the amount recovered was very modest and the trial had occupied 3 days.

13 In *Geftine Pty Ltd v Dover Beach Pty Ltd* the Tribunal awarded indemnity costs, considering that the term "or costs" in s112 was full indemnity costs.

14 Gower was not a s112 case but one where the Tribunal awarded indemnity costs in circumstances where the Respondents had conducted their case using witnesses who gave untruthful evidence and that if it had been properly advised it would have settled the matter before the hearing.

15 Another view adopted in the Tribunal is that the word "all" in s112 means "all reasonable costs" (see *Tsiavas v Transport Accident Commission* [2002] VCAT 1496).

16 In *Paleka v Suvak* [2000] VCAT 58, I said in regard to s112(2), after referring to the authorities:

"I think the conclusion to be drawn from all of the authorities cited and the various quotes to be found in the judgements is that costs, where they are awarded, are normally ordered to be taxed on a party-basis but that they may be awarded on some other basis in an appropriate case. It is in the unfettered discretion of the Tribunal to determine which basis should be adopted. In the exercise of this discretion the Tribunal will take into

account the purpose for which provisions such as s112 are enacted but more importantly, it will have regard to the circumstances of the particular case. It is well recognised that party-party costs are usually considerably less than the costs that the successful party has actually spent in prosecuting or defending the application. Even solicitor/client costs, although more generous, fall short of a complete indemnity. Indemnity costs purport to provide a full indemnity but may (according to the terms of the order) not include costs that are unreasonably incurred.

Generally, party/party costs should be awarded. Access to courts and tribunals is a fundamental right enjoyed by everyone in persons bona fide in pursuing that right and not acting improperly should not generally face orders more onerous than party/party costs if they are unsuccessful. Solicitor/client costs are ordered when the party in ……. when the order for costs is being made has somewhat acted improperly in the conduct of the litigation so as to cause the other party unnecessary expenses. Indemnity costs are ordered when the party's conduct is particularly blameworthy. That is, the circumstances, justify a harsh order that …….. solicitor/client costs.

I think the foregoing represents the general thrust of the various authorities referred to but it is not intended to express any hard and fast rule. In each case it is for the Tribunal in its unfettered discretion to decide what order is appropriate in the circumstances that fit that particular case".

17 In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No.651 Pty Ltd* [2005] VSCA 165 the Court of Appeal determined that the term "reasonable legal costs and expenses" in a policy of insurance was as apt to describe costs on a party/party basis as on any other basis. Indeed, in that case Nettle J A said (at paragraphs 91 and 92):

"I also agree with their Honours that where an order for costs is made in favour of the successful party in domestic building list proceedings, the costs should ordinarily be assessed on a party/party basis. If and to the extent that Reid v FAI suggests otherwise, I agree with all Ormiston JA and that it is wrong and should not be followed.

Of course there may be occasions where it is appropriate to award costs in favour of a successful claim in domestic building list proceedings on an indemnity basis. But those occasions will be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the Supreme Court (General Civil Procedures) Rules 1996".

I think the comments of the Court of Appeal indicate that in interpreting s112, the term "or costs" refers to the costs incurred, not the manner in which they are to be assessed on a taxation.

18 It seems to me that the thrust of the *Maclaw* decision is consistent with the view that I expressed in *Paleka*, although until binding authority determines just how s.112 is to be applied the question must remain in doubt.

19 These different interpretations of s.112 arise as a result of the lack of any explanation in the Act and will remain until such time as the Supreme Court finally determines what the section means. However, as the section itself confers upon the Tribunal the power to "otherwise order" the distinction between the various interpretations is perhaps more apparent than real in that, it is for the Tribunal in each case to determine whether it is appropriate in the circumstances of the case before it for the consequences contemplated by the section to be visited upon the unsuccessful party.

The present case

20 In the present case the conduct of the principal witness for the Respondents, namely, Mr Sinha, was such that an order other than party/party costs should be made. It seems to me that this litigation was provoked by the wholly unreasonable conduct of the respondents during the course of the construction of the Units which provoked the dispute and after the disputes first arose.

21 Further, the proceeding was considerably lengthened by the manner in which Mr Sinha gave evidence, in particular, by his insistence that he had not agreed to the change of window supplier when I found that he clearly had done so. I also found that the Respondents' case was untenable and it must have been known to them to be untenable.

22 This is an unusual case where the case of the Respondents' case was both untenable and based upon false evidence. To pursue such a case is not to exercise the normal right to have a bona fide case heard in a full hearing. Rather, it is to put the other party, possibly for tactical reasons, to wholly unjustified expense. If someone wishes to proceed in such a way he ought to do it at his own cost, not at the cost of an innocent party. The Respondents ought to have accepted the offer and they ought to have known that to continue was to put both themselves and the Applicant to unnecessary and unjustifiable expense.

23 In these circumstances I think it is appropriate to accede to the application for indemnity costs from the making of the offer. For the period up to and including the date upon which the offer of compromise was served costs will be in accordance with Scale D of the County Court Scale.

The application for interest

24 Mr Andrew asks also that I make an order awarding interest. Power is conferred upon the Tribunal in the Domestic Building List to award damages in the nature of interest pursuant to s53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995. In determining the matter I awarded interest in favour of the Applicant and I consider that I am now *functus officio* in that regard. The fact that interest may not accrue on the amount ordered until such time as it is filed with the appropriate court is unfortunate but demonstrates the need to file the Tribunal's order promptly. Thereafter, interest accrues by statute on the amount of the judgement.

Counsel's fees

25 Mr Andrew also asks that I certify for Counsel's fees and seeks a daily fee of $2,400.00. Since I am awarding indemnity costs I do not need to consider this application but for counsel of Mr Andrew's seniority and competence I consider that amount reasonable.

SENIOR MEMBER R. WALKER