VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D437/2008

CATCHWORDS

Domestic building, costs, representation denied under s62 of the *Victorian Civil and Administrative Tribunal Act* 1998, offer under s112 of the VCAT Act.

APPLICANT	Faris Matti
FIRST RESPONDENT	Richard Girstun
SECOND RESPONDENT	Tamara Mecmejerski
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 September and 5 October 2009
DATE OF ORDER	10 November 2009
CITATION	Matti v Girstun & Anor (Domestic Building) [2009] VCAT 2338

ORDER

The Applicant must pay the First Respondent's costs of the claim and counter-claim (previously D490/2008, now consolidated into this proceeding) from 8 October 2008 to be agreed on a party-party basis, but failing agreement, to be assessed by the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on Scale "B". Such costs include Mr Rewell's costs of appearance as a witness on 5 October 2009 but exclude all other costs of appearance.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr F. Matti and Mr R. Ring, Agent in person
For Respondents	Mr R. Girstun in person

REASONS

1 This decision concerns Mr Girstun's application for costs in a claim and counter-claim where neither party was successful. The proceedings have already been the subject of reasons of 4 March 2009, which I briefly restate.

2 Mr Girstun, the applicant in D490/2008 and the respondent in this proceeding, was the "builder" for his daughter's home in Berwick. Mr Matti was one of the sub-contractors and applied exterior render. On 19 December 2008 I decided that both parties had failed to prove their claims and dismissed both.

3 After I pronounced the substantive decision, Mr Girstun sought his costs. He did so on the basis of an offer to which s112 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") responds. The offer was that each party abandon their claims and bear their own costs.

4 I explained the operation of s112 to Mr Matti's agent, Mr Ring, who was present in Mr Matti's absence. I arranged for copies of the offer and of s112 to be provided to Mr Ring and suggested Mr Matti should obtain some advice about its effect.

5 It was not possible to arrange a time for the hearing while the parties were present and because of a Tribunal error, the costs hearing was set for a date when Mr Matti was out of Australia and was not represented by Mr Ring. There was therefore no appearance on his behalf at the costs hearing on 20 January 2009, when I ordered that Mr Matti pay Mr Girstun costs of the claim and counter-claim from the deemed date of service of the offer, either to be agreed or to be assessed on County Court Scale B.

6 I became aware of the error in mid-February 2009 and on 4 March 2009 wrote the reasons referred to above and ordered the Principal Registrar to send Mr Matti copies of ss120 and 126 of the VCAT Act, concerning respectively re-opening proceedings when a party is absent and applications for extensions of time. I also ordered the Principal Registrar to send him a copy of the standard statutory declaration for completion by the parties seeking to re-open proceedings.

7 On 28 April 2009 the application for review came before Senior Member Levine who adjourned it to 15 May 2009 to enable Mr Matti to provide evidence in support of his application. On 15 May 2009 Senior Member Walker extended time for bringing the application, dismissed Mr Matti's application to set aside the substantive order of 19 December 2008 and set aside the costs order of 20 January 2009.

8 The effect of re-opening an order is that the subject matter of the order (in this case costs) is heard again, as if the first hearing had not taken place.

9 To give context to this costs dispute, Mr Matti's application was for $12,325.00, Mr Girstun's was for $20,000.00 and on 28 October 2008 I refused leave for Mr Girstun to be legally represented.

HEARING OF 8 SEPTEMBER 2009

10 At the costs hearing before me of 8 September 2009 Mr Ring appeared as agent for Mr Matti who was also present. Mr Ring again attempted to re-open the substantive decision, which I declined to permit as Mr Walker had dismissed the application to re-open that order and therefore I am "functus officio" concerning the substantive dispute – I no longer have the power to re-open it. If Mr Matti thought I had erred in law, his avenue of appeal would be to the Supreme Court.

11 Mr Girstun again relied on the offer served on Mr Matti, by his solicitors, dated 3 October 2008 which offered to settle both the claim and the counterclaim. He sought either indemnity costs or costs on a party-party basis on County Court Scale B.

12 Mr Ring read a submission, some of which concerned his attempt to re-agitate the substantive dispute. Of costs, he said that Mr Matti was not legally represented because of the cost and that "an offer to walk away is not a real offer".

13 In answer to my question about when Mr Matti received the offer, Mr Ring and Mr Matti both gave sworn evidence. Mr Ring said he had forgotten when the offer was received but that he had spoken to Mr Girstun's solicitors on behalf of Mr Matti. Mr Matti first said he did not know when he had first seen the offer, then said "today is the first time I saw the offer". Mr Ring could not be sure that he had discussed the offer with Mr Matti and therefore could not say for certain that the offer had been in Mr Matti's possession while it was open for acceptance.

LETTER OF 9 SEPTEMBER 2009

14 On 9 September Mr Girstun's solicitors, who had not been present on 8 September 2009, sent a facsimile which included an affidavit of that day of David Rewell, the solicitor responsible for sending Mr Matti the offer. In consequence, I ordered:

> In circumstances where evidence was given for the first time on 8 September 2009 that [Mr Matti] did not receive the offer of 3 October 2008 and the Respondents' solicitor may wish to give further evidence on this point the Tribunal orders:
>
> 1. The proceeding is listed for further hearing before Senior Member Lothian on 5 October ...
>
> 2. The Respondents' solicitor may appear to give evidence.

HEARING OF 5 OCTOBER 2009

15 Mr Matti appeared in person with Mr Ring and Mr Girstun appeared in person. Mr Rewell was present to give evidence and as he was the person with knowledge of what had occurred in the conversation with Mr Ring, I permitted him to cross-examine Mr Ring.

16 I accept Mr Rewell's evidence that Mr Ring telephoned him on 8 October 2008. It therefore follows that Mr Matti did receive the offer on or before that date because I also accept Mr Rewell's evidence that he caused the offer and the notice of solicitor commencing to act to be sent to Mr Matti in the same envelope. The only way that Mr Ring could have obtained Mr Rewell's contact details was from the notice of solicitor commencing to act. I therefore find the offer was properly served on Mr Matti.

DISCUSSION

S109

17 Obtaining an order for costs at VCAT is by no means automatic. In the absence of an offer to which s112 responds, s109 of the VCAT Act governs costs in Domestic Building cases among others. S109(1) starts with the assumption that there will be no order for costs. S109(2) provides that there are exceptions to that rule and s109(3) lists exceptions, including the discretionary s109(3)(e) "any other matter the Tribunal considers relevant".

18 I make no order for costs under s109. The claim and counter-claim were not of a nature or complexity that justified an order for costs and the relative strengths of the claims were evenly matched – both were unsuccessful.

19 But the application was under s112.

S112

20 S112 of the VCAT Act provides:

> **Presumption of order for costs if settlement offer is rejected**
>
> (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.

"orders ... not more favourable ...that the offer"

21 I am satisfied that the orders I made on 19 December 2008 are the same as Mr Girstun's offer dated 3 October 2008 and therefore in accordance with s112(1)(d), in my opinion they are not more favourable to Mr Matti than the offer.

Tribunal's discretion

22 S112 is the reverse of s109. There is a presumption against an order for costs under s109 and in favour of a costs order under s112. Nevertheless, s112(2) commences: "If this section applies and unless the Tribunal orders otherwise a party who made an offer ... is entitled to an order that the party who did not accept the offer pay all costs incurred after the offer was made."

23 The Tribunal found in *Deak v Transport Accident Commission* [2002] that if the Tribunal was satisfied that its orders are not more favourable than the offer, it is bound to order costs and the discretion is as to amount. This decision was criticised by the learned author Pizer[1], with whom I agree.

24 Offers under ss113 and 114 assist parties who are keen to settle, even when the other party appears to believe that regardless of reason or logic, they will eventually prevail. In order for an offer to "bite" it must be at least as advantageous for the party receiving it as the orders, so it imposes discipline on the party making the offer to be realistic. These sections also impose discipline on the party receiving the offer to consider whether they should accept during the time it is open for acceptance. To ignore such an offer is dangerous, because it is common for such offer to be the most advantageous ever made by the offering party. It is the promise of finality or costs which elicits such offers and I am disinclined to make a decision which diminishes that promise.

Parties not represented

25 As Mr Ring said, and I have no reason to doubt him, Mr Matti chose not to be represented because he could not afford representation. Moreover, I did not allow Mr Girstun and his daughter, the second respondent, to be represented by a professional advocate under s62 of the VCAT Act. I remark in passing that Mr Ring is not a professional advocate and appeared only as Mr Matti's agent. His assistance was not always helpful to Mr Matti's cause.

[1] *Annotated VCAT Act, 3rd Edition, para 4099*

26 Nevertheless, in this instance, Mr Ring's point is has some merit. S62(1) permits parties to appear personally. S62(2) gives certain classes of parties the automatic right to representation – Mr Girstun does not fall into these classes. Interestingly, the desire of the legislators to prevent professional advocates appearing goes to the extent in s62(3) of providing that a body corporate may be represented by a director, secretary or officer, except if that person is a professional advocate.

27 Although I did not permit Mr Girstun and his daughter to be represented, as found by the then President of VCAT, Justice Kellam, and Deputy President Galvin in *Coyle v Transport Accident Commission* (Unreported - 20 April 2001) "representation" means appearance before the Tribunal, not acting as a solicitor or adviser.

28 In this case I find that it is reasonable that Mr Matti bear Mr Girstun's costs. The first application was by Mr Matti to which Mr Girstun responded, and although the amount of Mr Matti's claim was not very great, it is reasonable that he sought legal advice and took steps to settle the dispute at an early stage. Mr Matti must pay Mr Girstun's costs, not including costs of and associated with appearance at the Tribunal. Mr Matti must pay the reasonable cost of Mr Rewell's attendance as a witness on 5 October 2009.

"Offer to walk not a real offer"

29 Offers under ss113 and 114 come in many varieties. Monetary offers can be offers to pay money, offers to be paid money and offers that each party walk away from the proceeding and bear their own costs. The offer was a real offer.

"all costs incurred"

30 The expression "all costs incurred" has been interpreted variously to mean indemnity costs, solicitor-own client costs and party-party costs. In this case, having regard to the discretion conferred in s112(2), Mr Matti must pay Mr Girstun's costs of the claim and counter-claim from 8 October 2008 to be agreed on a party-party basis, but failing agreement, to be assessed by the Principal Registrar under s111 of the VCAT Act on County Court Scale "B". As mentioned above, such costs include Mr Rewell's witness costs on 5 October 2009 but exclude costs of appearance on any date.

SENIOR MEMBER M. LOTHIAN