VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP992/2016

CATCHWORDS

Costs hearing. Section 109 Victorian Civil and Administrative Tribunal Act 1998. Calderbank offer considered. Tribunal not satisfied that it would be fair to depart from the prima facie rule that each party bear their own costs.

FIRST APPLICANT	Mr Bishoy Nashed
SECOND APPLICANT	Ms Mariam Rezkallah
RESPONDENT	AMT Design and Construction Pty Ltd (ACN 167 990 034)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Costs Hearing
DATE OF HEARING	7 February 2018
DATE OF ORDER	13 February 2018
CITATION	Nashed v AMT Design and Construction Pty Ltd (Building and Property) [2018] VCAT 208

ORDERS

1. The applicants' application for costs is dismissed.

2. The respondent's application for costs is dismissed.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicants:	Mr T Fitner, solicitor
For the Respondent	Mr N Cozens of Counsel

REASONS

1 The hearing in this proceeding was conducted before me over 4 days in September 2017. It concerned a domestic building dispute in respect of the construction of a new home by the respondent builder for the applicants. At the hearing, the applicants represented themselves and the respondent was represented by its solicitor.

2 The applicants took possession of the home before the building works were completed. They then commenced this proceeding, bringing a claim for damages of approximately $24,000, made up of $17,000 as the estimated cost to rectify defects in, and to complete, the building works, and $7000 as liquidated damages for delay.

3 The respondent brought a counterclaim for damages of approximately $33,000.

4 On 11 October 2007 I handed down my decision with detailed written reasons. I found that the applicants, by taking possession of the home, had repudiated the contract, and the respondent was entitled to accept the repudiation and bring the contract to an end and sue for damages, as the respondent did. I assessed damages at $5308.90. That sum was reached after:

- assessing numerous variations to the works, both additions to the contract works and deletions from the contract works, most of which were not confirmed in written notices and many of which were the subject of dispute between the parties;
- assessing numerous items of alleged defective and incomplete works, and the reasonable cost the respondent would have incurred, had the building contract been fully performed, in attending to works which I determined were defective or incomplete;
- allowing, in favour of the applicants, $6070 as liquidated damages for delay pursuant to the terms of the building contract;

5 After allowing interest on the assessed sum of damages, I ordered that the applicants pay the respondent $6202.80, and I reserved costs.

6 Both parties bring an application for costs of the proceeding.

COSTS UNDER THE VCAT ACT

7 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") provides that each party is to bear its own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (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 subsection (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.

8 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

i. The prima facie rule is that each party should bear their own costs of the proceeding;

ii. The Tribunal should 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).

9 Section 112 of the Act makes special provision in respect of the making of a cost order in circumstances where a party has rejected a settlement offer made by another party:

112 Presumption of order for costs if settlement offer is rejected

(1) This section applies if—

[1] [2007] VSC 117 at [20]

(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.

Level of costs

10 Where the Tribunal is minded to make an order for costs, the Tribunal will often identify the basis and scale upon which the sum of costs is to be assessed or "taxed" in the event the parties are unable to agree on the sum of costs.

11 As to the *scale* of costs, the Tribunal will usually identify a scale operative within the Magistrates Court, the County Court or the Supreme Court. If the Tribunal does not nominate any particular scale, the applicable scale will, by virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, be the County Court scale.

12 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis generally includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher "indemnity" basis generally includes all costs *actually* incurred save in so far as they are of an unreasonable amount or have been unreasonably incurred.

13 As I have noted in the past[2], in my view indemnity costs may be ordered only in exceptional or extreme cases such as where the conduct of a party is vexatious or particularly obstructive or where a party's case is hopeless or fanciful and with no real prospect of success or where a claim is brought for an ulterior purpose.

[2] Taylor v Trentwood Homes Pty Ltd [2012] VCAT 1125 at para 34

CALDERBANK OFFER

14 On 3 July 2017, the applicants made an offer of settlement. The offer was prepared by the applicants' (then) lawyers and sent to the respondent's lawyers. The offer was as follows:

> "Without prejudice save as to costs"
>
> Re: Nashed & Rezkallah and AMT Design and Construction Pty Ltd
>
> We refer to our various correspondence in the above matter.
>
> We have been instructed by our clients to put an updated offer of settlement to your client.
>
> Our clients make this offer in good faith. They instruct us that they wish to move on from the dispute as they find it exhausting and stressful, and they do not wish to cause the parties further wasted time, costs and stress.
>
> Our clients' offer is as follows:
>
> they pay your client a lump sum of $7000 in full and final settlement of the matter;
>
> they will not claim any further rectification works on the outstanding defective items to be undertaken by your client on the property; and
>
> they will not disparage your client or his business in any manner.
>
> Our clients request that when considering acceptance of the above offer, that you bear in mind the matter has caused much stress and financial strain for them, that they are a young family with a toddler, and that their financial resources are not extensive. They do not wish to bear the ongoing burden of pursuing the dispute, including the works required to prepare for the hearing of the matter in September 2017.
>
> This offer will remain open until 4.00pm on Monday, 10 July 2017.
>
> If our client's offer is not accepted, and our client obtains a judgement more favourable than the offer above, then this letter will be produced to the Tribunal on the question of costs. An application will then be made against your client for costs on a Solicitor/Client basis, from the date of this letter, in accordance with the principles enunciated in *Calderbank v Calderbank* [1976] Fam 93 and adopted in the Supreme Court of Victoria in *Mutual Community Ltd v Lorden Holdings Pty Ltd & Ors* (28 April 1993, unreported), and *John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd & Anor* (1 November 1996, unreported).
>
> We look forward to hearing from you.

15 The respondent did not accept the offer.

THE RESPONDENT'S APPLICATION FOR COSTS

16 The respondent seeks an order that the applicants pay the respondent's costs of the proceeding on a standard basis pursuant to the County Court scale.

Alternatively, the respondent seeks an order for costs on any basis as determined by the Tribunal. The respondent raises a number of matters which it says make it fair to depart from the prima facie rule that each party bear their own costs.

Relative strengths of claims – section 109(3)(c) of the Act

17 The respondent says that its case was, relative to the applicants' case, significantly stronger and that this is evident from the result.

18 I do not agree.

19 As noted above, the outcome in the case was reached following detailed assessment of many matters. Some of those matters were determined in favour of the applicants and some were determined in favour of the respondent. In the end the builder came out "in front" to the tune of $6202.80. It was not a substantial or resounding success. It was, in a sense, the "mathematical" outcome to an equation involving numerous competing and legitimate interests.

20 In my view, the relative strengths of the parties' claims in this case is not a factor of significance in assessing whether it would be fair to depart from the prima facie rule as to costs.

Complexity – section 109(3)(b) of the Act

21 The respondent says that the proceeding and the hearing was relatively complex, as evidenced by the fact that the hearing required four days and my written decision extended to 40 pages.

22 The respondent says also that the complexity and length of the hearing was in part due to the unsatisfactory nature of the applicants' evidence. In this regard the respondent refers to commentary in my decision that I found much of the evidence of the first applicant to be confusing, reactive and often self-serving, and I generally preferred the evidence of the respondent's director who I found to be a more helpful witness[3].

23 I accept that the hearing had some complexity, primarily factual, and I attribute much of that complexity to the failure of the parties, during the course of the building works, to follow the contractual procedure and properly document the numerous variations to the contract works. Had the parties properly documented the numerous variations to works, the proceeding would have been significantly less complex and the hearing would have been significantly shorter. In this regard, I consider that the respondent bears significant responsibility, particularly as I expect experienced builders, more than inexperienced owners, to possess knowledge and awareness of standard contractual terms as prescribed by the *Domestic Building Contracts Act* 1995.

[3] see paragraphs 20 – 22 in my written reasons 11 October 2017

24 The respondent says that its role in terms of the factual complexity does not detract from the fact that the hearing was relatively complex. That may be so, however, under section **109(3)(e) of the Act** I may have regard to any other matter I consider relevant. In my view, the respondent's share of responsibility for the complexity of the proceeding is, in this case, relevant.

25 I am not satisfied that it would be fair, having regard to the complexity of the proceeding, to depart from the prima facie rule as to costs.

Unreasonable prolongation of the proceeding – section 109(3)(a) and (d) of the Act

26 Each party points to the conduct of the other as the primary cause for the length of the hearing. While I found the evidence of the first applicant to be frequently unhelpful, the length of the hearing was, in my view, primarily the product of the number of issues to be assessed and the paucity of documentary evidence. In this regard, the parties share responsibility.

27 The respondent refers also to delays caused by the applicants in the interlocutory stages of the proceeding.

28 The respondent says that the applicants were responsible for compliance directions hearings, on one occasion for failing to file pleadings and expert reports on time, and on another occasion for failing to file Tribunal books on time.

29 It is not unusual in building disputes for interlocutory timetables to be amended by reason of delay in obtaining expert reports. Often compliance hearings can be avoided by sensible agreement between the parties to amend the interlocutory timetable.

30 It is also not unusual that compliance directions hearings, called for a particular reason, become useful for a host of other reasons. I note in this case, for example, that the compliance directions hearing on 18 May 2017, called because the applicants failed to file Points of Defence to Counterclaim by the due date, resulted in agreement to refer the dispute to a compulsory conference.

31 I note also that at the compliance directions hearings, no order for costs as against the applicants were made. Instead, costs were "reserved".

32 Having reviewed the Tribunal's file, including interlocutory orders made, and bearing in mind that the applicants were not always represented by lawyers, I am not satisfied that it would be fair to make an order for costs in respect of delays associated with the applicants' failure to comply with the ordered timetable of events.

33 The respondent says also that the compulsory conference conducted on 6 September 2017 was, in effect, a waste of time because the applicants reneged on a promise to attend the compulsory conference with legal representation and an expert witness.

34 I note that there is nothing in the orders made 18 May 2017, whereby the proceeding was referred to the compulsory conference, requiring the applicants to have legal representation and their expert witness attend the compulsory conference. I note also that there is nothing in the orders made at the conclusion of the compulsory conference on 27 June 2017 to suggest that the conference was a waste of time by reason of the applicants' failure to have legal representation or an expert witness present, or for any other matter. The simple fact is that the parties were unable to reach settlement at the compulsory conference.

Conclusion, respondent's application for costs

35 For the reasons set out above, I am not satisfied that it would be fair to depart from the prima facie rule and make an order for costs as against the applicants.

THE APPLICANTS' APPLICATION FOR COSTS

Costs prior to the Calderbank Offer

36 In respect of costs incurred by the applicants prior to the Calderbank offer of 3 July 2017, the applicants seek costs on a standard basis pursuant to the County Court scale.

37 I am unable to think of any sound reason as to why such an order should be made in circumstances where it was the respondent, and not the applicants, who might be said to have succeeded in the proceeding. The applicants' lawyer, making the application for such an order on the instructions of the applicants, was unable to submit any sound reason.

38 To the extent it might be said that such an order should be made having regard to the matters set out in section 109 of the Act, I reiterate the matters discussed above in assessing the respondent's application for costs. In my view, there is no sound reason why it could be said to be fair, having regard to the matters in section 109 of the Act, to depart from the prima facie rule and make an order for costs in favour of the applicant in respect of costs incurred prior to the Calderbank offer.

Costs after the Calderbank offer

39 The applicants' primary application is that the respondent should pay their costs, on an *indemnity* basis, incurred after the Calderbank offer of 3 July 2017.

40 The applicants' lawyer concedes that the Calderbank offer does not enliven the provisions of section 112 of the Act. This is because the offer was, by its express terms, open for acceptance for a period of only 7 days. The offer was made approximately two months prior to the commencement of the hearing. As such, for the offer to attract the operation of section 112 of the Act, it must, pursuant to section 114 of the Act, have been open for acceptance for a minimum period of 14 days.

41 That does not mean, however, that the Calderbank offer has no relevance. Pursuant to section 109(3)(e) of the Act, it falls within "any other matter the Tribunal considers relevant" in determining whether it would be fair to depart from the prima rule that each party bear their own costs.

42 The applicants' submission is straightforward. They say the offer was genuine and fair, as demonstrated by the fact that the sum of the offer was greater than the sum of damages ordered in favour of the respondent. They say that, in line with the generally accepted principle, it is fair that the respondent pay the applicants' costs of the proceeding after the date of the offer.

43 The respondent says that the settlement offer, when analysed in accordance with well-known authority[4], does not justify a costs order against the respondent for a number of reasons including the following:

- having regard to the well advanced stage of the proceeding at that time the offer was made, the offer was not reasonable, and it was not unreasonable on the part of the respondent to reject it;
- the time allowed to consider the offer, 7 days, was not reasonable;
- the offer lacked adequate clarity and adequate specifity, particularly having regard to the large number of matters in dispute between the parties;
- the offer lacked clarity in one critical respect, namely, it expressed no date by which the payment of the lump sum offered would be made.

44 In my view, the offer was not unreasonable by reason of the sum offered, the date the offer was made having regard to the stage of the proceeding or the time the offer was open for acceptance.

45 However, I find that the offer lacked clarity and certainty to such a degree that it would be unreasonable and unfair to expect the respondent to have accepted it.

46 As noted, the offer provided no date by which the sum offered was to have been paid after acceptance of the offer. In my view there are further critical matters going to the lack of clarity and certainty of the offer.

47 The offer refers to "*the dispute*" and "*the matter*", but not "*the proceeding*". It is not clear whether all matters in the proceeding in the Tribunal fall within "the dispute" or "the matter". It is simply not clear whether the applicants are offering to settle all disputes *in the proceeding*, inclusive of costs.

48 One of the express terms of the offer was that the applicants:

> "will not claim any further rectification works on the outstanding defective items to be undertaken by your client on their property"

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[4] *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298

49 The term raises significant problems.

50 If the term was meant to convey that the builder would not be required to carry out any rectification works, then that is not what it says. In my view the term could be interpreted as saying that, *other than* currently outstanding defective items *to be undertaken* by the respondent, the applicants will not make *further* claims in respect of any rectification works.

51 Alternatively the term might mean that the applicants would make no further claim in respect *only* of outstanding defective items. That is, they would be free to make further claims in respect of works and matters *other than* outstanding defective items. As was apparent at the hearing, the parties were in serious disagreement as to what constituted "outstanding defective items" of work. As such, the term, when interpreted in this manner, does not offer clear resolution but, rather, the likelihood of ongoing disputation.

52 Alternatively, if the term was interpreted as providing that the owners would make no further claims at all for rectification of defective works, the term would offend section 10 of the *Domestic Building Contracts Act* 1995 which prohibits a provision in an agreement which purports to restrict or remove the right of a person to take proceedings for a breach of statutory warranties other than breaches which are known, or ought reasonably be known, at the time the agreement is executed.

53 It may well be that the uncertainty in the term is simply the result of sloppy drafting. It does not matter. In my view, the uncertainty goes to the core of the offer. Upon acceptance of the offer, the respondent's obligations in respect of existing, potential, agreed or disagreed items of alleged defective building work would remain unclear. As such, I consider that it was not unreasonable on the part of the respondent to reject the offer. For the same reason, I am not satisfied that it would be fair, having regard to the offer of settlement, to depart from the prima facie rule as to costs.

Conclusion, applicants' application for costs

54 For the reasons set out above, I am not satisfied that it would be fair to depart from the prima facie rule and make an order for costs as against the respondent.

REIMBURSEMENT OF FEES

55 Division 8A under Part 4 of the Act provides for circumstances in which the Tribunal may order that fees paid by a party in a proceeding, "fees" meaning application fees and hearing fees, be reimbursed by another party.

56 Application for reimbursement of fees pursuant to this division of the Act was not raised by either party, however, for completeness I will deal with it.

57 Under section 115C of the Act provides that in certain proceedings (this being one such proceeding as it was a proceeding under the *Domestic Building Contracts Act* 1995) an order for the reimbursement of fees will be

made where a party has *substantially succeeded* against another party, although the Tribunal may decline to make such order having regard to the nature of the proceeding and the issues involved in it and the conduct of the parties.

58 It might be said that the respondent "succeeded" in the proceeding because the respondent obtained an order in its favour. However, for the reasons discussed above, I do not consider the respondent's success to be "substantial". As such, I am satisfied that the respondent is not entitled to a reimbursement of fees pursuant to section 115C of the Act.

59 To the extent I might otherwise make an order for the reimbursement of fees under section 115B of the Act, I decline to do so having regard to the parties' shared responsibility for the dispute, as discussed above.

CONCLUSION

60 For the reasons set out above, I will dismiss both parties' applications for costs.

SENIOR MEMBER M. FARRELLY