

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D335/2008

CATCHWORDS

Domestic building, costs, s109(3)(d), nature and complexity, s112 “all costs”, party-party scale, certifying for Counsel

APPLICANTS	Kevin Newlands, Dianne Newlands
FIRST RESPONDENT	Ratcliffe Building Group Pty Ltd (ACN: 069 349 051 (formerly C.I. Carpentry Services Pty Ltd) trading as Ratcliffe Building Group
SECOND RESPONDENT	CBG Consulting Engineers Pty. Ltd.
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	9 June 2010
DATE OF ORDER	24 June 2010
CITATION	Newlands v Ratcliffe Building Group Pty Ltd & Anor (Domestic Building) [2010] VCAT 1115

ORDERS BY CONSENT

- 1 The Second Respondent must pay the Applicants \$400,000.00
- 2 The Applicants must pay the First Respondent \$80,132.71.

FURTHER ORDER

- 3 The Applicants must pay the First Respondent’s costs, including reserved costs. Costs are to be agreed, but failing agreement they are to be assessed by the Victorian Costs Court on County Court Scale D on a party-party basis. I certify for Counsel until 24 May 2010 at \$280 per hour inclusive of GST and at \$2,400 per day for the first day and at the refresher rate of \$2,000 thereafter. I certify for Counsel from 24 May 2010 at \$300 per hour and note that the hearing of 9 June 2010 was brief.

SENIOR MEMBER M LOTHIAN

APPEARANCES:

For the Applicants	Mr R. Squirrell of Counsel
For the First Respondent	Mr D. Pumpa of Counsel
For the Second Respondent	Mr D. Grahame of Counsel

REASONS

- 1 On 28 May 2010 I published reasons for decision in this proceeding. On 9 June 2010 the proceeding returned for further hearing:
 - ... to enable the parties to make further submissions regarding the effect of Part IVAA of the *Wrongs Act 1958* and regarding orders to give effect to the following reasons. Any application for costs and interest should also be made on the day.
- 2 Counsel for the Second Respondent Engineer and the Applicant Owners announced that there was settlement of the proceeding concerning their clients, whereby the Engineer would pay the Owners \$400,000.
- 3 Counsel for the Owners and the First Respondent Builder announced that subject to one issue, the Owners agreed the principal sum owing to the Builder. The issue concerned an amount I allowed the Owners for the garage door. I declined to revisit it as the application was not in the nature of a correction under s119 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”), but would have involved re-opening the case.
- 4 One aspect of my reasons of 9 June 2010 is corrected by consent - on page 24 at line 113 there is an arithmetic error - the sum of \$6,557 is substituted for \$5,557.
- 5 Counsel for the Owners and the Builder then announced that the nett agreed sum to be paid by the Owners to the Builder is \$80,132.71, which is \$56,247 plus interest of \$23,885.71.
- 6 The issue remaining in contention is costs.

COSTS

Background

- 7 The Builder seeks costs under s109(3)(d) of the VCAT Act from the commencement of the proceeding until 13 November 2009 on a party-party basis on County Court Scale D. On 13 November 2009 the Builder made an offer to which s112 of the VCAT Act responds to accept \$70,000 inclusive of interest and costs. The Builder and Owners agree that the orders of 9 June 2010 are not more favourable than the offer, and therefore the cost consequence is that the Builder is entitled to costs from that date.
- 8 The Builder seeks indemnity costs from the date of the s112 offer.
- 9 The Owners submit that each party should bear their own costs to the date of the s112 offer and that costs thereafter should be on a party-party basis.
- 10 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* provides in part:
 - (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.

11 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

- (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 s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

Costs to the date of the s112 offer

12 I consider that in accordance with s109(3)(d) the nature and complexity of the proceeding merits an award of costs. The nature of the proceeding includes the size of the claims and award, and the length of hearing. The Owners claimed either in excess of \$400,000 or in excess of \$700,000 and

the Builder counter-claimed \$120,000 plus interest. The amount awarded is substantial and the claim the Builder successfully defended is even more so. The hearing took six days with an additional directions hearing on 6 April 2010.

- 13 Mr Squirrell of Counsel for the Owners submitted, with respect to complexity, that the proceeding was a fairly common building case before the Tribunal, and should not be regarded as particularly complex. Although the proceeding is not the most complex that has come before the Tribunal, the hearing canvassed a number of matters; some routine and some legally complex.
- 14 I find that the proceeding is of a nature and complexity which justifies an order for costs in favour of the Builder, and that it is fair to do so.

Costs after the date of the s112 offer

- 15 S112(2) provides:

If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (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. [Emphasis added]

- 16 I have emphasised the words “all costs” because the parties’ submissions concerning the effect of s112 turn on them. There is no suggestion that there has been any conduct on the part of the Owners that would entitle the Builder to indemnity or solicitor-own client costs, other than the failure of the Owners to accept the Builder’s offer of 13 November 2009.
- 17 Mr Pumpa of Counsel for the Builder referred to my own decision in *Borg v Metricon Homes* [2009] VCAT 507 where I said “Recent decisions have tended to award indemnity costs as ‘all costs’ ” and went on to award indemnity costs. However, as I later said in a footnote to *Milankovic v Binyun Pty Ltd & Ors* [2010] VCAT 538:

Given the recent decision of the Victorian Court of Appeal in *Verlado & Anor v Andonov* [2010] VSCA 38, particularly at [47] there is now less support for the view that a party who makes a successful offer to which s112 of the VCAT Act applies is entitled to an order for indemnity costs.

- 18 At paragraph 47 of *Verlado* Ashley JA said:

Section 112(2) creates, on the one hand, a prima facie entitlement to payment of ‘all costs’ in favour of a successful offeror. Ordinarily, it appears, costs would be assessed in such a case on a party and party basis – although the Tribunal would be empowered to allow costs on a more favourable basis.

- 19 As Mr Pumpa correctly submitted, quoting Deputy President Aird¹, the Tribunal has an unfettered discretion and the basis of an order for costs is to be considered according to the circumstances of each case.
- 20 Nevertheless, I consider it valuable to aim for consistency and predictability. Decisions which are consistent with Court of Appeal pronouncements on this section are most likely to be those upon which lawyers can advise their clients when considering offers to be made and whether to contest applications for costs.
- 21 I have regard to another relevant pronouncement of the Court of Appeal, by Nettle JA in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd and Anor*². His Honour was considering an application for costs in a Domestic Building List proceeding claimed under s109, which he said would normally be ordered on a party-party basis, and added:
- Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in the Domestic Building List 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 Procedure) Rules 1996.
- 22 In *Scholl Nicholson Pty Ltd v Chapman (No 2)*³ Balmford J summarised the circumstances in which the Supreme Court will make an order for indemnity costs, one of which is an imprudent refusal of an offer of compromise. Nevertheless, costs usually follow the event in Supreme Court proceedings, and under s109(1) of the VCAT Act, usually do not at the Tribunal. It is also questionable whether the failure to accept an offer which was close to the result achieved, albeit better, can be considered “imprudent”.
- 23 Mr Pumpa submitted that if there is no cost consequence of making an offer to which s112 applies, the offering party is not rewarded for making such an offer and there is less motivation for doing so. There is logic in what he says. By starting with the assumption that a party making a successful s112 offer will get costs, a party who successfully offers to pay, or successfully offers anything up to receiving a modest payment, is likely to get a costs advantage that they would not otherwise receive at VCAT. In contrast, a party who, like the Builder, is involved in a fairly large and complex proceeding and who obtains an order for a substantial sum, probably does not receive any more than it would obtain under s109, unless it obtains an order for costs beyond party-party. The only advantage to such a party is a greater degree of certainty that costs will follow the event.

¹ *Body Corporate Strata Plan No 405967 No 1 v Brady Constructions Pty Ltd* [2008] VCAT 2305 at [77]

² [2005] VSCA 165

³ [2001] VSC 462

- 24 Notwithstanding, I follow the decision in *Verlado*. Apart from anything else, it has the advantage of simplicity. The Owners must pay the Builder's costs on a party-party basis after the offer to which s112 of the VCAT Act responds.
- 25 The order for costs is therefore in favour of the Builder on a party-party basis for the whole proceeding.

Certifying for Counsel

- 26 Mr Pumpa submitted that I should certify for Counsel as follows:
- i until 24 May 2010 at \$280 per hour, \$2,400 per day and \$1,500 per half day; and
 - ii from 24 May 2010 at \$300 per hour and \$2,600 per day,
 - iii all inclusive of GST.
- 27 I accept the submissions of Mr Squirrell that it is appropriate to certify for counsel until 24 May 2010 at \$280 per hour inclusive of GST and at \$2,400 per day for the first day and at the refresher rate of \$2,000 thereafter. I certify for counsel from 24 May 2010 at \$300 per hour and note that the hearing of 9 June 2010 was brief.

SENIOR MEMBER M LOTHIAN