VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO D1266/2012

BUILDING AND PROPERTY LIST

CATCHWORDS

COSTS–DOMESTIC BUILDING–Section 109 *Victorian Civil and Administrative Tribunal Act 1998*–costs ordered in favour of Applicant–factors considered.

Offer made by Applicant in compliance with ss 113 and 114 *Victorian Civil and Administrative Tribunal Act 1998*–orders made by the Tribunal not more favourable to the offeree than the offer–whether an enhanced or special costs order should be made under s 112 in favour of offeror from the date of the offer–found that the facts and circumstances existing at time the offer was refused did not justify an order other than on the usual basis

APPLICANT	Owners Corporation No 1 PS611203E
RESPONDENT	Furman Constructions (Vic) Pty Ltd (ACN 084 601 329)
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Costs Application
DATE OF HEARING	2 April 2015
DATE OF ORDER	3 August 2015
CITATION	Owners Corporation No 1 PS611203E v Furman Constructions (Vic) Pty Ltd (Costs) (Building and Property) [2015] VCAT 1159

ORDERS

1 The Respondent must pay to the Applicant the Applicant's costs in the proceeding, including any reserved costs, such sum to be agreed between the parties, failing which they are to be assessed by the Victorian Costs Court on a party and party basis on the *County Court Scale* to 5 October 2014, and thereafter on a standard basis on the *County Court Costs Scale* as defined in clause 1.13 of Chapter 1 of the Rules of the County Court.

2 By consent, Counsel's fees are certified at the rate of $360 plus GST per hour and $3,300 plus GST per day.

3 Pursuant to section 115B of the *Victorian Civil and Administrative Tribunal Act 1998,* and by consent, the Respondent must reimburse and pay the Applicant total fees in the sum of $7,717.38 comprising:

(i) the filing fee paid by the Applicant in the sum of $38.80; and

(ii) the daily hearing fees of $1,462.50 per day paid by the Applicant on 13 May 2015, 14 May 2015, 15 May 2015, 5th August 2015 and 8 August 2015 in the total sum of $7,678.58.

MEMBER A KINCAID

APPEARANCES:

For the Applicant	Mr A Whitelaw, Solicitor
For the Respondent	Mr A Ritchie, Counsel

REASONS

Background

1. The Applicant owns the common property of a residential development of 19 townhouses at Manikato Avenue, Mordialloc, Victoria (the "**development**").
2. The Respondent built the development under a contract dated 19 March 2007.
3. By application filed in the Tribunal in about August 2012, the Applicant brought a claim for damages against the Respondent in respect of:
   (a) an allegedly defective driveway on common property (which comprised over 80% of the amount claimed);
   (b) an allegedly defective concrete path;
   (c) an allegedly defective timber paling fence on the western boundary of the development; and
   (d) alleged defective rendered brick piers at the eastern and southern edges of the development.

4 I heard the proceeding over 5 days on 12 May 2015-15 May 2015, and 5 August 2015. Final submissions were made on 8 August 2014.

5 By order dated 13 October 2014, and subsequently amended due to a clerical error on 10 December 2014, I ordered the Respondent to pay the Applicant the sum of $170,110 with costs and interest reserved.

6 The Applicant makes a claim for costs pursuant to sections 109 and 112 *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**")

The Law

7 Sections 109(1), (2) and (3) of the Act provide as follows:

> 109. **Power to award costs**
>
> (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:
>
> (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 It is apparent from the terms of section 109(1) of the Act, that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding. By section 109(2) of the Act, the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3).

9 In *Vero Insurance Ltd v Gombac Group Pty Ltd,*[1] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

> In approaching the question of any application to costs pursuant to section 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows-
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may 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 paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

[1] [2007] VSC 117

10 In summary, parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. In exercising its discretion to make such an order, the Tribunal will have regard to the matters set out in section 109(3), although that is by no means an exhaustive list of the things to be considered (see *Martin v. Fasham Johnson Pty Ltd*[2]).

11 There is no presumption that a substantially successful party in the Tribunal's Building and Property List should have a reasonable expectation that an award of costs will be made in his favour.[3]

12 A domestic building proceeding can be expensive. Experts' reports are usually required. The discovery process in even a modest building dispute is usually arduous and costly, involving a large number of documents on both sides. Witness statements are usually ordered, and they are commonly drawn or settled by counsel. There are generally many factual issues involved as well as legal issues, often requiring complex legal argument. The hearing will usually occupy several days. For these reasons, the "nature and complexity of the proceeding" is often submitted as the reason for making a costs order in favour of the successful party.

13 In each case, however, the question is whether it is fair in the circumstances of the particular case that a party be ordered to pay the costs of another party. Other than where an offer pursuant to section 112 of the Act falls to be considered, the onus of establishing that is on the party seeking the order for costs. Since every case is different, reference to what occurred in other cases is of limited assistance.

Applicant's Claim for Costs of the Proceeding

14 The Applicant relies upon the criteria set out in sections 109(3)(c) and (d) of the Act, in support of its application for costs of the proceeding.

15 The Applicant's damages claim for rectification costs was for $204,915. This was subsequently reduced, during the course of evidence, to a little over $170,000)[4].

16 By its Points of Defence dated 11 February 2014, the Respondent denied liability in respect of the claim. It estimated the costs of rectifying cracks to the driveway to be only $8,000 plus GST.

17 In respect of section 109(3)(c) of the Act, I accept the Applicant's submission that it was successful on all issues before the Tribunal. This demonstrates that the Applicant made strong claims in the proceeding, relative to what was raised in defence against them. I am also of the view,

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2 [2007] VSC 54 at [28].

3 *Australian Country Homes v Vassiliou* (VCAT) 5 May 1999, unreported, and *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw* [2005] VSCA 165.

4 Schedule C.

given my findings, that the Respondent made claims in its Defence that were shown to have had no tenable basis in fact.

18 In respect of section 103(d) of the Act, the Applicant submitted that there were complex questions of fact and law raised in the proceeding, including whether the Respondent:

(a) failed to comply with the plans and specifications in respect of the construction of a 70 metre long driveway;

(b) was in breach of the implied warranties set out in section 8 of the Act; and

(c) had discharged its onus of proof that the total replacement of the driveway was not a reasonable course to adopt within the meaning of the principle in *Bellgrove v Eldridge.*[5]

19 The Applicant also submitted that the case required engineering opinion from a number of experts on complex construction and engineering issues in respect of its claim that the Respondent:

(a) failed to provide a sub-base for the concrete driveway;

(b) failed to provide the correct depth of concrete for the driveway;

(c) failed to install appropriate reinforcement mesh;

(d) failed to provide the expansion joints required; and

(e) failed to provide a slab surface of exposed aggregate.

20 In my view, this is borne out by the facts. The Applicant served Points of Claim dated 28 October 2013. Attached to the Points of Claim was a Schedule of Defects[6], expert Reports of a Mr Tom Casamento, consulting structural engineer, dated 26 April 2013 (attaching a detailed geotechnical report of Mr Alkamede, Geotechnical Engineer), 30 July 2013,[7] and 5 June 2013.

21 The expert engaged by the Respondent, Mr Kevin Campbell, chartered professional engineer, visited the site on 3 June 2013, and produced a report dated June 2013. Mr Campbell, in effect, ascribed the alleged damage as shrinkage cracking which may have been exacerbated by reinforcement below the half depth of the slab. Mr Campbell then indicated that the cost to repair the cracks by epoxy, using a gravity technique, was about $8,000 plus GST.

22 Mr Casamento responded to Mr Campbell's report by a further report dated 14 November 2013. Mr Casamento reiterated his opinion that, in essence, the cause of the cracking in the slab was differential movement caused by an uncompacted rubble fill sub-grade, the absence of a sub-

5 (1954) 90 CLR 613
6 Schedule A
7 Schedule B.

base, variations in slab thickness, incorrect location of reinforcement and incorrectly spaced contraction joints.

23 The Respondent filed its Defence dated 11 February 2014, appending a copy of Mr Campbell's June 2013 report.

24 The Respondent subsequently received two further reports of Mr Campbell, one dated "March 2014" being a response to Mr Casamento's 14 November 2013 report, and a further report dated 21 March 2013 concluding that a survey of the surface of the concrete on that date confirmed his view that there had been no differential settlement of the concrete slab.

25 I consider that there is merit in the Applicant's argument that section 109(3)(d) is enlivened. The need for expert opinion on the engineering issues, and the challenges made by each party to the other's expert opinion, contributed greatly to the need for over 5 days of hearing. Numerous experts reports were relied upon. The evidence at the hearing covered many complex technical issues, requiring experienced counsel to advance each party's case. The nature of the proceeding required a transcript of the hearing to be made. I am in no doubt that the nature and complexity of this proceeding distinguished it from many other civil disputes heard in the Civil Division of the Tribunal.

26 Having regard to these considerations, I find that it is fair to order that the Respondent pay the Applicant's costs of the proceeding.

Costs incurred after settlement offer-Should an enhanced costs order be made?

27 On 6 March 2014, the Applicant made an offer to accept payment from the Respondent in "the sum of $167,000…plus payment of the Applicant's party and party costs on the County Court Scale, including any reserved costs...in full and final settlement of the Applicant's claim, costs, interest and the proceedings" ("**Offer 1**").

28 I find that Offer 1 complied with the formal requirements of sections 113 and 114 of the Act.

29 Section 112 of the Act provides as follows:

> 112. **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
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> (c) the offer complies with sections 113and 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 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.

30 I find that the orders made by the Tribunal were not more favourable to the Respondent than the offer.

31 The Applicant submits that it is entitled to an order that it is entitled to an order under section 112(2) of the Act that the Respondent pay "all costs" incurred by the Applicant after the date that Offer 1 was made.

32 The Applicant seeks costs after the date of service of Offer 1 on a solicitor-client basis until 5 October 2014.

33 Although section 112 uses the expression "all costs", the Court of Appeal in *Velardo v Andonov*[8] has considered the meaning of that expression as follows:

> The offer foreshadowed an application for solicitor and own client costs. Such an order is the frequent, but no means the inevitable, concomitant of a successful *Calderbank* offer. Section 112(2) creates ...a prima facie entitlement to payments 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.[9]

34 I do not regard the decision of *Velardo* as limiting the Tribunal's discretion to make an enhanced costs order, in circumstances such as this, where an offer made pursuant to section 112 of the Act is less favourable than the determination made by the Tribunal in favour of the offeror. Each case must, however, be assessed according to its own facts, informed by the relevant case law. In *Peet v Richmond (No.2)* [10] Hollingworth J stated:

> [121] As a matter of principle, if one party has drawn the futility of the case to the attention of the losing litigant, and the losing litigant has wilfully ignored that, those may be circumstances supporting a special costs order. But it does not follow that a special costs order can only be made if the successful party has drawn the futility to the other side's attention.

35 Later, in her judgment, her Honour stated:

> [170] However, an imprudent refusal of an offer of compromise may be sufficient to justify an award of costs on a special

8 [2010] VSCA 38.
9 ibid at [47].
10 [2009] VSC 585.

basis. The question must always be whether the particular facts and circumstances of the case, as they existed at the time the offer was refused, justify an award other than on a party-party basis.

36 An imprudent refusal of an offer of compromise is a matter to which a Court may have regard when considering whether an enhanced costs order should be made.[11] The critical question is whether the rejection of an offer was unreasonable in the circumstances.[12] In *Hazeldene's* case, Warren CJ, Maxwell P and Harper AJA, in their joint judgment, discussed the circumstances that might lead a court to determine whether the rejection of an offer was unreasonable:

> The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. At the same time, a Court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard to at least the following matters:
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> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed at the date of the offer;
>
> (e)` the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.[13]

37 The Respondent submits that Offer 1 did not really offer a compromise. It says that, in effect, it was asking the Respondent to "give up", and that it was not unreasonable for the Respondent in these circumstances to reject the offer, given that it had a competent body of expert opinion in opposition to the expert opinion then obtained by the Applicant.

38 In my view, the failure by the Respondent to accept Offer 1 does not warrant a departure from the ordinary rule as to costs. I accept that the Respondent was guided by expert opinion, which unequivocally opined that the alleged damage was shrinkage cracking, which may have been exacerbated by reinforcement below the half depth of the slab. Mr Campbell had also indicated in his June 2013 report that the cost to repair the cracks by epoxy, using a gravity technique, was about $8,000 excluding GST. The fact that the Respondent was also in possession of reports from the Applicant's consulting engineer, which proffered a different view to that of Mr Campbell, is beside the point. This is not a

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11 *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298.
12 ibid at paras [17]-[20].
13 ibid at paras [25]-[29].

situation where the expert opinion was overwhelmingly one-sided when, for example, a party in the position of an offeree could reasonably assess its prospects of success. The Respondent in this case was entitled to rely on the opinion of its consulting engineer, despite the risk that the Tribunal may not ultimately share the same view. The opinions expressed by the experts engaged by the parties needed to be tested and in these circumstances it cannot be said, in my view, that the Respondent's rejection of Offer 1was unreasonable.

40. During submissions it was suggested on behalf of the Applicant that there is little utility in serving an offer of compromise under section 112 of the Act unless an offeree's failure to accept an offer, where the offeree does not obtain orders more favourable than the offer, does not attract an enhanced costs order. I do not agree. It is always in a party's interest to make an offer of compromise pursuant to the provisions of the Act. This is because, if the final orders obtained by the offeree in the proceeding are not more favourable than the offer, and unless the tribunal orders otherwise, the offeror becomes *prima facie* entitled to an order for the costs incurred by the offeror after such an offer was made. This avoids the need for the party claiming costs to persuade the Tribunal, in the exercise its discretion, of the application of one of the required factors described in section 109(3) of the Act. Rather, the offeree must persuade the Tribunal that, in all the circumstances of the case, including those applying at the time the offer was made, the Tribunal should "otherwise order".

39 I am not persuaded that the particular facts and circumstances of the case, as they existed at the time Offer 1 was refused, justify an award other than on a party and party basis.

Further Offers

40 On 6 March 2014 the Applicant made a further offer to accept payment from the Respondent in "the sum of $199,000 inclusive of the amount claimed and costs…in full and final settlement of the Applicant's claim, costs, interest and the proceedings".

41 On 6 May 2014 the Applicant served a *Calderbank* offer on the Respondent. The Applicant offered to accept "the sum of $110,000 plus payment of the [Applicant's] party and party costs of the proceeding on the County Court scale, including any reserved costs in full and final settlement of the [Applicant's] claim, costs, interest and the proceeding."

42 On 6 May 2014 the Applicant served a further *Calderbank* offer on the Respondent. The Applicant offered to accept "the sum of $150,000…inclusive of costs and interest in full and final settlement of the [Applicant's] claim, costs, and interest and the proceeding."

43 The Applicant does not rely on these further offers as the basis for seeking an enhanced costs order.

44 In the event, to the extent that any of them fall to be considered on the basis that the order made in the proceeding is not more favourable than the relevant unaccepted offer, I would see little basis for making such an order. Again, there would be no basis for concluding that, in all the circumstances, and particularly for the reasons I have discussed, the Respondent unreasonably refused to accept any of them.

45 I make the orders attached.

MEMBER A KINCAID