VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO: W42/2013

CATCHWORDS

CO-OWNERSHIP – Costs – s 109 and s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether costs order to be made in proceedings under Part IV of the *Property Law Act 1958* – relevant considerations in determining whether one party obtained a judgment more favourable than offer made – where form of offer differs from form of determination – whether the comparison between the form of the offer and the form of the determination must be like with like.

APPLICANT	Mark Anthony Sherwood
RESPONDENT	Gayle Marion Sherwood
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Costs Hearing
DATE OF HEARING	28 July 2014
DATE OF ORDER	21 August 2014
CITATION	Sherwood v Sherwood (No3) (Costs Hearing) (Building and Property) [2014] VCAT 1037

ORDER

1. The Applicant's application for costs is dismissed.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr R Hay of counsel
For the Respondent	Mr T Schlicht of counsel

REASONS

INTRODUCTION

1. On 2 October 2013, I published *Reasons* in this proceeding, which set out my findings concerning a co-ownership dispute between siblings who jointly owned a residential property in Boronia as joint tenants. I found that the parties' legal interests should be adjusted such that the Applicant held a beneficial interest of 54.33% and the Respondent held a beneficial interest of 45.67%. In addition, I found that the Applicant was entitled to compensation from the Respondent in the amount of $78,004.67, given his contribution to the payment of the mortgage loan and other outgoings associated with the parties' ownership of the property.

2. On 8 November 2013, a further hearing was convened to determine whether interest was payable on the contribution amount. On 28 November 2013, I determined that interest in the amount of $5,372.69 was payable on that amount. At that stage, final orders had not been pronounced. Therefore, the parties were given liberty to file minutes of consent orders dealing with the sale or transfer of the property, having regard to my *Reasons*.

3. On 17 December 2013, the proceeding was returned to hear submissions as to the final form of orders to be made. On that day, orders were made by consent (**'the Consent Orders'**). The Consent Orders provided that the property was to be sold and set out how the net proceeds of sale were to be calculated and distributed. In addition, liberty was given to the parties to be heard on the question of costs. Pursuant to that liberty, the Applicant now seeks an order that his costs of the proceeding be paid by the Respondent. In support of his application for costs, the Respondent has filed an affidavit dated 6 May 2014.

THE APPLICANT'S CLAIM FOR COSTS

4. The Applicant seeks an order that his costs be paid by the Respondent:

   (a) on a party and party basis up to 4 June 2013 pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**); and

   (b) on an indemnity basis after 4 June 2013 pursuant to s 112 of the Act.

5. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of the Act. Section 109 of the Act states:

   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.

…

6. Mr Hay, counsel for the Applicant, submitted that it was fair to order that the Respondent pay the costs incurred by the Applicant up to 4 June 2013 pursuant to s 109(3) (a) to (c) of the Act. As to the period following 4 June 2013, Mr Hay argued that costs should be ordered on a full indemnity basis because the Applicant had made a settlement offer pursuant to s 112 of the Act, which he submitted was more favourable to the Respondent than the Consent Orders.

COSTS PRIOR 4 JUNE 2013

7. In *Vero Insurance Ltd v The Gombac Group Ltd*,[1] Gillard J stated:

> [20] In approaching the question of any application for costs pursuant to s.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.

[1] [2007] VSC 117.

(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.

8. Mr Hay submitted that it was fair to order that the Respondent pay the costs incurred by the Applicant up to 4 June 2013 pursuant to s 109(3)(a) to (c) of the Act because:

(a) The Respondent had vexatiously conducted the proceeding;

(b) The Respondent was responsible for prolonging unreasonably the time taken to complete the proceeding; and/or

(c) The relative strengths of the claims made by each of the parties.

Vexatiously conducting the proceeding – s 109(3)(a)(vi)

9. Mr Hay argued that costs should be awarded because the Respondent made assertions about monies that she had contributed towards the purchase and ongoing costs associated with the property, which were largely unsubstantiated and ultimately unproven. He contended that the assertions caused the Applicant to undertake time-consuming analysis of bank and other records in circumstances where the Respondent chose not to produce any documentary evidence in support of her claims.

10. Therefore, Mr Hay submitted that the Respondent had conducted the proceeding in a vexatious manner. He referred me to the Tribunal's decision in *State of Victoria v Bradto*,[2] where Judge Bowman stated:

> [67] I am also of the view that, pursuant to the frequently cited test in *Oceanic Sun Line*, the proceeding is conducted in a vexatious manner if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging…

11. Mr Hay referred to the affidavit of the Applicant dated 6 May 2014, where the Applicant states:

> 24. Due to the unsubstantiated ambit claims made by the Respondent which included:
>
> (a) claims in relation to 2 other properties (other than the Property) …
>
> (b) claims in relation to unparticularised cash payments of approximately $400-$500 per week for utilities, pool

[2] [2006] VCAT 1813.

expenses, maintenance, cleaning, furniture and some clothing for me (see paragraph 27 of the Respondents witness statement); and

(c) the statement that the respondent had had the opportunity reviewing the accounts and statements I had provided and that the Respondent had been able to identify some $100,000.00 of cash deposits into my account which indicated my receipt of cash (see paragraph 29 of the Respondents Witness Statement); and

required me and CGS, on my behalf, to:

(i) locate and undertake forensic analysis of the following of my banking and other records for eighteen years:

(A) my taxation return for the 2005 to 2012 tax years (see paragraphs 4, 13, 21, 54 and Attachment A to my affidavit in these Proceedings dated 19 August 2013 (My Primary Affidavit);

(B) the MAS Classic Account …

(C) the loan account for the Kaola Street Property …

(D) the Essex Court Loan …

(E) the Home Loan …

(F) my Visa credit card statements …

(G) cheque books for the MAS Classic Account …

(ii) verify every deposit into the MAS Classic Account for ten years from 2003 to establish the extent of the Respondent's deposits into that Account;

(ii) relate every cash payment to its source to counter any possible argument from the Respondent that the cash payments were made by her; and

(iv) recover computer files (which involved …

(v) locate and analyse the water, electricity, gas, phone and Internet, insurance and rates invoices in relation to the Property;

(vi) locate and analyse gardening and pool maintenance expenses in relation to the Property; and

(vii) as the Respondent had raised the issue of payments of household items (such as food and clothing) locate and analyse food and clothing receipts for a ten year period.

12. I accept that the forensic analysis undertaken by the Applicant in preparation for the Proceeding was extensive. In particular, comprehensive affidavits filed by the Applicant set out numerous tables listing expenditure, entries into bank accounts and other relevant matters concerning each party's contribution to the purchase price and ongoing

costs associated with the property. In addition, voluminous documents were exhibited to those affidavits to verify the entries made in those tables. Ultimately, I largely accepted the Applicant's evidence as to his contribution and expenditure. This was, by no small measure, because of the meticulous method in which he presented his case.

13. I also accept that the Respondent did very little to substantiate her general statements concerning her contribution to the purchase price of the property or contribution in meeting loan payments and other expenditure concerning the property. However, the question arises whether the Respondent's failure to prove her case makes it fair to order that she pay the Applicant's costs.

14. Mr Schlicht of counsel, who appeared on behalf of the Respondent, submitted that the Respondent's conduct, or alleged lack of conduct, did not contribute to the Applicant having expended enormous resources in preparing his claim. In particular, Mr Schlicht pointed to the extract of the Applicant's affidavit referred to above, wherein he states that he had to undertake his *forensic analysis* because of the claims made by the Respondent in her witness statements. Mr Schlicht contended, correctly in my view, that the general statements made by the Respondent in her witness statements could not have been the impetus or cause of the Applicant having undertaken his *forensic analysis* because those witness statements were prepared well after the Applicant had already filed and served his *forensic analysis* documentation. Mr Schlicht further submitted that the information contained in the affidavit setting out the Applicant's *forensic analysis* was already largely set out in the various annexures attached to his *Points of Claim* dated 7 June 2013.

15. In reply, Mr Hay submitted that it was not to the point that the *forensic analysis* documents may have been prepared prior to the filing and serving of the Respondent's witness statements because once the Respondent had joined issue with the information contained in the Applicant's *Points of Claim*, the Applicant was required to recheck his calculations.

16. I do not accept that the extensive and meticulous *forensic analysis* undertaken by the Applicant was caused or prompted by the general statements made by the Respondent in her witness statement. It is clear from the documents filed in the Tribunal, that his analysis took place well before those statements were made. Moreover, I do not accept that the failure on the part of the Respondent to produce documents corroborating the allegations she made concerning her contributions unnecessarily disadvantaged the Applicant. In fact, I consider the reverse to be the case. The fact that the Respondent failed to produce documents to substantiate her claims effectively made it easier for the Applicant to prove his claims. Further, the meticulous preparation of the Applicant's claim assisted in reducing the hearing time required to prove his claim.

17. Therefore, I do not consider that the Respondent's failure to prove her claims, of itself, is a factor which would justify or make it fair to order costs against her in favour of the Applicant.

Prolonging the time taken to complete the proceeding – s 109(3)(b)

18. As indicated above, the Applicant also relies upon s 109(3)(b) of the Act as a basis upon which to order costs against the Respondent. However, Mr Hay has not pointed to any facts which demonstrate that the Respondent has been *responsible for prolonging unreasonably the time taken to complete the proceeding*. In my view, merely forcing a party to prove its claim does not, of itself, constitute *prolonging unreasonably the time taken to complete the proceeding*.

Relative strength of the claims – s 109(3)(c)

19. The third basis upon which the Applicant contends that costs should be awarded against the Respondent is under s 109(3)(c) of the Act. In the absence of there being a more favourable offer of settlement, I am of the view that co-ownership disputes are sometimes difficult to measure in terms of who was the 'winning party'. This is especially the case in circumstances where both parties do not resist the sale of the property but simply require the Tribunal to assist in formulating appropriate orders and in determining beneficial interests. In the present case, the relief sought by the Applicant in his *Prayer for Relief* was for the Respondent to pay him compensation and for her to transfer her interest in the property to him. On that point, the Applicant contended that he had a 92.4% beneficial interest in the property.

20. In my view, it would not be fair to order costs on the basis of the relative strength of the Applicants claim or on the ground that the Respondent's claim had no tenable basis in fact or law. The Respondent asserted that her beneficial interest was commensurate with her legal interest. Ultimately, her beneficial interest was held to be 45.67%, which is marginally less than the interest she claimed but substantially higher than the 7.6% interest contended by the Applicant. That being the case, I do not consider that the Respondent's claim had no tenable basis in fact or law or that the Applicant's claim was so strong so as to justify an order for costs in his favour.

21. Therefore, I am not satisfied that it would be fair to order costs for the period up to 4 June 2013. In my view, none of the factors set out under s 109(3) of the Act are enlivened so as to justify the making of an order under that section. There will be no order for costs for the period up to 4 June 2013.

COSTS AFTER 4 JUNE 2013

22. As indicated above, Mr Hay submitted that costs should be awarded in favour of the Applicant against the Respondent for the period after 4

June 2013 because the Applicant made a settlement offer pursuant to s 112 of the Act, which was more favourable to the Respondent than the orders made in the proceeding.[3]

23. Section 112 of the Act states:

> **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
>
> (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 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.
>
> (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;
>
> …

24. The settlement offer is constituted by correspondence from the Applicant's solicitors dated 4 June 2013 (**'the Offer'**), which states:

> **WITHOUT PREJUDICE**
>
> **SETTLEMENT OFFER MADE IN ACCORDANCE WITH SECTIONS 112-114 OF THE *VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998***
>
> The Applicant offers to settle the proceeding on the following basis:
>
> (a) the Applicant paying the Respondent the sum of $30,000, which sum the Applicant will pay to the Respondent within 14 days of acceptance of the offer by the Respondent;
>
> (b) the Respondent signing all documents necessary to transfer to the applicant all her right, title and interest to the property known as … being the property described in Certificate of Title Volume … (the "Property") within 14 days of the Applicant providing the respondent with the documents necessary to effect the transfer.

[3] A further offer of settlement dated 12 February 2013 was also served on the Respondent. However, Mr Hay indicated that the Applicant no longer relied upon that offer.

(c) the Respondent vacating the Property and removing all her goods within 30 days of acceptance of the offer by the Respondent; and

(d) each party bearing his or her own costs.

The "Offer").

The Offer is open for acceptance until the expiry of 14 days after the Respondent's solicitors are served with the Offer.

25. According to Applicant's affidavit dated 6 May 2014, the property was offered for sale by public auction on 22 February 2014. The reserve price was $550,000. However, there were no bids. Following the auction, the reserve price was dropped to $510,000. On 28 February 2014, the Respondent purchased the property for $535,000.

26. Following the regime prescribed by the Consent Orders, the net amount received by the Respondent was $26,755.10. The calculation of that figure included factors such as ongoing mortgage repayments, interest, repairs and other matters which were set out in the Consent Orders dated 17 December 2013. A detailed calculation of that figure is set out in the Applicant's affidavit filed in support of his costs application.[4] According to Mr Hay, the Respondent has not raised any objection to the calculation of that amount.

27. Mr Hay submitted, correctly in my view, that the *benefit* bestowed by the Offer must be assessed as at the day the Offer was made, which in this case is 4 June 2013. Therefore, in order to assess the *benefit*, it is to be assumed that the Consent Orders were made on 4 June 2013. According to the Applicant, the value of the property as at 4 June 2013 was $500,000, which reflects a sworn valuation expressed in a valuation report prepared by Aaron Campbell of *Valuations Vic* dated 4 April 2014.[5] Mr Hay submitted that the *benefit* received by the Respondent had the property been sold pursuant to the 'assumed' Consent Orders, if made on 4 June 2013, would be $16,914.65. Again, the calculation of this amount is set out in the Applicant's affidavit. The following table describes how that amount is derived, by reference to the orders comprising the Consent Orders:

[4] Exhibit MS 8 to the affidavit of Mark Sherwood sworn on 6 May 2014.
[5] The valuation report of *Valuations Vic* dated 4 April 2014 is Exhibit MS 7 to the affidavit of Mark Sherwood sworn on 6 May 2014.

Item	Order No	Amount
Respondent's entitlement to the proceeds of sale before deductions		**$109,134.93**
Less sums authorised in order 11		
$78,004.47 [Contribution payment]	11(b)(v)Bi.	($78,004.47)
Interest between 3 March and 4 June 2013	11(b)(v)B.ii.	($1,752.43)
-	11(b)(v)B.iii.	-
Home Loan Payments	11(b)(v)B.iv.	($979.00)
Water Charges (Service Charges)	11(b)(v)B.v.	($162.62)
Water Charges (Utility Charges)	11(b)(v)B.v.i	($168.31)
Total of Order 11 Deductions		**($81,067.83)**
House styling costs, Rubbish Removal and Painting	2	($2,428.82)
Marketing Costs	3 and Sch	($1,582.00)
Loan Repayments	14	($2,314.87)
Expenses relating to the Property (other than loan repayments) being utilities and insurance	14	($0.00)
Costs of Emergency Repairs	15	($2,442.23)
Cleaning, Gardening and Pool Maintenance	18	($1,847.18)
Total of Orders Deduction (other than those under Order 11)		**($10,615.10)**
Imputed Costs of Garden and Pool Maintenance		$537.35
Total of Deductions		**$92,220.28**
Net Benefit to the Respondent		**$16,914.65**

28. Given the net *benefit* of $16,914.65 compared with the $30,000 offered, Mr Hay submitted that the orders made by the Tribunal were not more favourable to the Respondent than the Offer.

29. In order to arrive at a monetary *benefit* amount of $16,914.65 (or $26,755.10), the Applicant has taken into consideration the sale price, expenses incurred after sale as well as certain imputed costs. This was done to quantify the Respondent's *benefit* to enable the determination of

the Tribunal, reflected in the Consent Orders, to be compared to the Offer on a like for like basis.

Should the comparison be like with like?

30. In many cases, the comparator for determining whether an offer is more favourable than the final determination of the Tribunal is easy to identify. For example, it may be a monetary sum, in which case, the comparison is like with like. However, difficulties arise where the terms of the offer differ from the type of relief granted, such as in the present case.

31. Here, apart from the amount awarded by way of contribution and interest, there is no monetary determination. The Consent Orders provide for the sale of the property by way of public auction. However, the Offer does not contemplate that the Property be sold. It requires that the property be transferred to the Applicant in consideration that the Applicant pays the Respondent $30,000. In order to compare like with like, the Applicant has, valiantly, sought to re-characterise the Consent Orders in terms of the monetary benefit effected through the sale of the property and based on a sale price of $500,000.

32. The difficulty with *creating* a monetary comparator is that the analysis may not result in a comparison of like for like. The Offer contemplated that the Respondent divests herself of all her right, title and interest in the property. That never occurred, nor was that ordered. There may be many reasons why the Respondent chose not to accept the Offer and divest herself of her right, title and interest in the property. For example, she may have had an emotional attachment to the property. That emotional attachment may have resulted in her bidding at an auction far beyond the valuation price of 500,000. This example illustrates the danger in assuming a sale price, even if that assumption is based upon a sworn valuation.

33. In my view, the analysis undertaken by the Applicant would be more persuasive if the Offer had been expressed to mirror the Consent Orders; namely, that the property be sold by public auction, failing which by private treaty. In that scenario, the comparison is closer to like with like. Similarly, had the Offer been expressed in terms of the Respondent acquiring the Applicant's interest in the property (for a sum less than her net cost), then, again, the comparison is closer to like with like.

34. However, in the present case the Offer shut out any possibility of the Respondent being able to retain part or whole ownership in the property. That was never contemplated in the Tribunal's determination, as expressed in the Consent Orders. Moreover, the fact that the Respondent has now purchased the property demonstrates the contrast between what was offered and what was determined.

35. I am of the view that the Offer and the Consent Orders differ materially, such that I cannot be satisfied that the offer was more favourable than the orders made by the Tribunal. In particular, the Respondent successfully prevented an order being made that the property be transferred to the Applicant, which is what was contemplated under the Offer. In those circumstances, it is arguable that she fared better than had she accepted the Offer.

CONCLUSION

36. Section 112 of the Act creates a presumption that costs will be awarded to a party who makes an offer which ultimately proves to be more favourable than the determination of the Tribunal. The section does not, however, usurp the Tribunal's discretion to either order or not order costs. So much is clear by the express words in s 112(2):

> (2) If this section applies and unless the Tribunal orders otherwise, the party made an offer…. [Emphasis added]

37. The evident purpose of a s 112 offer; and offers of compromise generally, is to provide costs protection for the offeror and a punitive incentive for the offeree to settle the proceeding, rather than having the matter determined by the Tribunal. The possibility of having an adverse costs order made against the offeree encourages that party to focus on the issues, the risk of litigation and the costs of continuing with the litigation. That process is part of the evaluation that an offeree must undertake when considering whether to accept an offer or not.

38. However, difficulties arise when an offer of compromise is not expressed in a similar form to the relief granted. In those circumstances, it may not be appropriate to order costs pursuant to s 112 of the Act because a like with like comparison is either impossible or requires manipulation or re-characterisation of either the offer or the outcome in order to establish whether the offer of compromise was more favourable than the determination. In my view, an offer of compromise should be expressed clearly and reflect an outcome that is substantially in the same form as the relief sought in the claim. Otherwise, it becomes too difficult for an offeree to evaluate whether the offer should be accepted or not.

39. Having regard to my observations and findings concerning the difficulty in making a like with like comparison in the present case, I consider that it would be unfair to order costs in reliance upon the Offer and I decline to exercise my discretion to do so. For the same reason (in addition to my findings concerning the application for costs for the period to 4 June 2013), I do not consider that it would be fair to order costs under s 109 of the Act, as an alternative basis.

SENIOR MEMBER E. RIEGLER