

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D538/2008

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – ss 112 to 114 – settlement offers – offer open for acceptance at the relevant time – permission of the Tribunal to withdraw the offer s 114(3) – no agreement between the parties – s 115(a) application dismissed.

APPLICANTS	Agostino Velardo and Anna Velardo
RESPONDENT	Ilija Andonov
WHERE HELD	Melbourne
BEFORE	Vice President Judge I J K Ross
HEARING TYPE	Hearing
DATE OF HEARING	4 September 2009
DATE OF ORDER	16 September 2009
CITATION	Velardo v Andonov (Domestic Building) [2009] VCAT 1922

ORDER

- 1 Pursuant to s 114(3) the Tribunal gives permission, *nunc pro tunc*, for the Respondent's offer of 29 April 2009 to be withdrawn, prior to its purported acceptance by the Applicants.
- 2 Pursuant to s 124 of the *Victorian Civil & Administrative Tribunal Act 1998*, the Tribunal declares that there is no concluded agreement between the parties for the settlement of the proceeding.
- 3 The Applicant's application for an order giving effect to the terms of the Respondent's offer of 29 April 2009 pursuant to s 115(a) of the *Victorian Civil & Administrative Tribunal Act 1998*, is dismissed.

Judge I J K Ross
Vice President

APPEARANCES:

For Applicant	Mr C R Hanson of counsel
For Respondent	Mr P W Lithgow of counsel

REASONS

Introduction

- 1 On 5 August 2008 Agostino and Anna Velardo filed an application in the Tribunal's Domestic Building List seeking damages of \$122,745.65 from Ilija Andanov. The damages sought are said to flow from various breaches of agreements between the parties relating to the construction of a dwelling in Keilor, Victoria.
- 2 The matter went to mediation on 20 November 2008 but was not resolved. At a directions hearing on 29 January 2009 the application was set down for hearing, with an estimated hearing time of 10 days.
- 3 By letter dated 29 April 2009 Andonov made an offer to settle the proceeding (the 'Offer'). The Velardos made a counter offer on 13 May 2009.
- 4 Neither the Offer nor the counter offer were accepted prior to a compulsory conference held at VCAT on 16 June 2009.
- 5 It is common ground that immediately before the commencement of the compulsory conference counsel for Andonov informed counsel for the Velardos that all previous offers were withdrawn.
- 6 The compulsory conference then proceeded. At some point during or immediately after the conference the Velardos purported to accept the Offer. They did so in writing.
- 7 The central issue in these proceedings is whether the 'Offer' was open for acceptance at the time it was purportedly accepted by the Velardos.
- 8 Absent the operation of any statutory provisions the answer to this question would be straightforward. No. This follows from the fact that prior to the purported acceptance the Offer was withdrawn. At common law that would be the end of the matter – as the offer was withdrawn, there was nothing to accept. Both parties agree that this is so.
- 9 But the issue here is whether the offer ought properly be characterised as settlement offer within the meaning of ss 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act).
- 10 I now turn to those provisions.

113. Provisions regarding settlement offers

- (1) An offer may be made—
 - (a) with prejudice, meaning that any party may refer to the offer, or to any terms of the offer, at any time during the proceeding; or
 - (b) without prejudice, meaning that the Tribunal is not able to be told of the making of the offer until after it has made its orders in respect of the matters in dispute in the proceeding (other than orders in respect of costs).

- (2) If an offer does not specify whether it is made with or without prejudice, it is to be treated as if it had been made without prejudice.
- (3) A party may serve more than one offer.
- (4) If an offer provides for the payment of money, the offer must specify when that money is to be paid.

114. Provisions concerning the acceptance of settlement offers

- (1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.
- (2) The minimum period that can be specified is 14 days.
- (3) An offer cannot be withdrawn while it is open for acceptance without the permission of the Tribunal.
- (4) In deciding whether to give permission, the Tribunal may examine the offer, even if it was made without prejudice.
- (5) If the offer was made without prejudice, a member of the tribunal who examines it for the purposes of sub-section (4) can take no further part in the proceeding after determining whether or not to give permission.
- (6) A party can only accept an offer by giving the party who made it a signed notice of acceptance.
- (7) A party may accept an offer even though it has made a counter-offer.

115. Consequences if accepted offer is not complied with

If an offer is accepted, but the party who made the offer does not comply with its terms, the Tribunal, at the request of the party who accepted the offer, may—

- (a) make an order giving effect to the terms of the offer; or
- (b) if the party making the offer was the applicant—
 - (i) dismiss the proceeding; or
 - (ii) if the party who accepted the offer made a counterclaim before the offer was made, make an order awarding the party any or all of the things asked for in the counterclaim; or
- (c) if the party who accepted the offer is the applicant, make an order awarding the applicant any or all of the things asked for in the application.

- 11 These provisions form part of Division 8 of the VCAT Act. Division 8 deals with costs. Section 109 sets out the general rule, that each party bears their own costs.

12 Sections 112 – 115 set out the regime dealing with ‘settlement offers’. Cost consequences may flow from a refusal to accept a settlement offer. As a general proposition the person making the offer is entitled to an order that the party who did not accept the offer pay all costs incurred by the other party after the offer was made (s 112(2)). This presumption only applies in the circumstances set out in s 112(1), that is:

“(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.”

13 It follows from the terms of ss 112 – 114 that an offer will be a settlement offer for the purpose of the statutory regime if it has the following characteristics:

- it is given by a party to a proceeding (other than a review proceeding) to another party (s 112(1));
- it is an offer in writing to settle the proceeding (s 112(1));
- if the offer provides for the payment of money it must specify when that money is to be paid (s 113(4)); and
- it is open for acceptance until, either,
 - immediately before the Tribunal makes its orders on the matters in dispute; or
 - until the expiry of a specified period after the offer is made (the minimum period that can be specified is 14 days),whichever is the shorter period (s 114(1) and (2)).

14 Counsel for Andonov contends that the Offer is not a settlement offer within the meaning of the statutory regime, it is an offer on its own terms. Accordingly, the Offer was withdrawn prior to the commencement of the compulsory conference and the purported acceptance was of no effect and there is no agreement to settle the proceeding on the terms set out in the Offer. In the alternative it is submitted that if the Tribunal construes the Offer as a settlement offer within the meaning of ss 113 and 114 then Andonov seeks the Tribunal’s permission to withdraw the Offer, pursuant to s 114(3).

- 15 In dealing with this submission I note at the outset that the statutory scheme in respect of settlement offers is not an exclusive code as to the means whereby offers of compromise may be made in respect of a Tribunal proceeding.
- 16 Offers which do not comply with the terms of ss 112 – 114 are simply offers to settle on the terms contained in the offer itself. Depending upon their terms such offers may or may not be characterised as Calderbank offers.
- 17 There is some authority to the contrary. In *Toonlook Straights Pty Ltd v Maria Jeuken-Sims* Judge Bowman said:
- ... Given the nature of the jurisdiction and the specific provisions of the sections relating to costs, it might be argued that s.112 represents a self-contained code in relation to settlement offers, and is a code which embraces the principles of Calderbank offers.¹ ...
- 18 However in *Toonlook* no argument was advanced in support of the proposition set out and His Honour statement was clearly obiter. It is also contrary to the weight of authority.²
- 19 While ss 112 – 114 are not a code, settlement offers which comply with the requirements of these provisions should be regarded as falling within the scope of the statutory regime. Such an approach promotes certainty and fairness, consistent with the Tribunal’s obligations under s 97. It enables all parties to proceed on the basis that the statutory regime applies. The issue before me turns on whether the Offer complies with ss 112 – 114 and hence falls within the scope of the statutory scheme.
- 20 In support of the proposition that the offer does not fall within the scope of the statutory regime counsel for Andonov points to the following features of the offer:
- it does not purport to invoke the VCAT Act or any particular sections of the Act and by contrast invokes the common law by reference to ‘the decisions of *Calderbank v Calderbank* [1975] 3 ALL ER 333 and *Cutts v Head* [1984] 1 ALL ER 597’, and
 - the offer does not prescribe a time limit for acceptance.
- 21 In my view neither of these features place the Offer outside the scope of the statutory regime.
- 22 As to the first, there is no requirement that an offer expressly invoke ss 112 – 114 of the *Victorian Civil & Administrative Tribunal Act 1998* in order to

¹ [2004] VCAT 127 at [36]

² See *Berton v Noya and anor*(1990) 101 FLR 18; *Hillbrick v TAC* [1999] VCAT 80 per Member Davis at [8]; *Haidar Elali t/as H F K Cement Rendering v Hilmi Mina* [2005] VCAT 551 per Senior Member Cremean at [8]; *Donaldson Homes Pty Ltd v Vero Insurance Limited* [2006] VCAT 179 per Deputy President Aird at [39]

fall within the terms of those provisions.³ This may be contrasted with the provision in the Supreme Court Rules dealing with offers of compromise.⁴

- 23 Nor does the failure to prescribe a time limit for acceptance put the Offer outside the statutory retime. Subsections 114(1) and (2) deal with the period during which an offer is to remain open:
- “(1) An offer must remain open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.
- (2) The minimum period that can be specified is 14 days.”
- 24 These provisions do not require that an offer include a specified period during which the offer remains open. Nor, in my view, do they require an offer to expressly provide that it remain open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute. Such a provision is to be implied, as a matter of commonsense, in circumstances where there is no specification as to the period during which the offer remains open.⁵ It would be absurd to conclude that an open offer could be accepted after the Tribunal had determined the proceeding.
- 25 The Offer has all of the characteristics required of ss 112 – 114 (see paragraph 13 above) it follows that it should be regarded as falling within the scope of the statutory retime. The fact that the Offer purports to invoke *Calderbank* does not alter this conclusion.
- 26 As the Offer is a settlement offer within the meaning of ss 113 and 114 it can only be withdrawn within the permission of the Tribunal (s 114(3)).
- 27 Counsel for the Velardos contends that s 114(3) does not empower the Tribunal to give permission to withdraw the offer in circumstances where it has already been accepted. In the alternative, if the Tribunal is so empowered then such a power should only be exercised in special circumstances.
- 28 As to the first proposition I am not persuaded that the power in s 114(3) is limited in the manner contended for by counsel for the Velardos. There is no binding authority in support of the contention (the Court of Appeal decision relied upon by the Velardos, *H W Wilson v Pittman*, did not decide this point) and there is persuasive authority to the contrary.⁶
- 29 The same position has been taken in the Tribunal.⁷

³ See *Amos v Moutidis* [2004] VCAT 364 per Member Lothian at [22].

⁴ See Order 26.02(3)(b).

⁵ *Ibid*

⁶ *Cumper v Potheany* [1941] 2 KB 58 at 70: ‘Having once put a valuation on the plaintiff’s case, the defendant ought not be allowed to alter it without good reason’; *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427 at 437 ‘... leave to withdraw an offer under the Rules (even after acceptance) could be granted for good reason, including mistake or other circumstance making it just that the offer be allowed to be withdrawn’.

⁷ *Lord v Austexx v Developments Pty Ltd* [2003] VCAT 773

- 30 It is also relevant to note that acceptance of the Velardos position would render s 114(3) nugatory. If the offeree opposed the withdraw of the offer then he or she could simply accept the offer (in accordance with s 114(6)) before the Tribunal had the opportunity to determine the application to withdraw the offer. Such acceptance would (on the submission of counsel for the Velardos) rob the Tribunal of power to permit the withdrawal of the offer. Such an outcome cannot have been intended.
- 31 As to the second proposition, I am not persuaded that permission to withdraw an offer after the offer has been accepted by the other party can only be given in 'special circumstances'. The Tribunal should permit the withdrawal of an offer where it is in the interests of justice to do so. As Palmer J said in *Scanrubby v Caltex Petroleum* in relation to a NSW Supreme Court rule in substantially the same terms as s 114(3):
- “In my view, the Rules of Court are to be applied so as to promote justice as between the parties, not to frustrate it.”⁸
- 32 Such an approach is also consistent with the Tribunal’s statutory obligation to act fairly (s 97).
- 33 The cases referred to by counsel for the Velardos are distinguishable from the circumstances presently before the Tribunal. In *Gordon v Berowra Holdings Pty Ltd*⁹ the offer stated that it would remain open for 28 days and leave to withdraw the offer was sought within that 28 period. The relevant rules provided that offers ‘may be expressed to be limited as to the time it is open to be accepted but the time expressed shall not be less than 28 days after it was made’. Similar circumstances pertained in *Hardy Bros v Hardy Bros*¹⁰ in both cases the court refused leave to withdraw the offers.
- 34 In the circumstances of this case fairness supports permitting Andonov to withdraw the Offer *nunc pro tunc* (now for then). Two points are particularly relevant in this regard.
- 35 The Offer was made on 29 April 2009 and so if permitted to be withdrawn as at the commencement of the compulsory conference on 16 June 2009 it will have been open for acceptance for a period of over six weeks, well in excess of the 14 day minimum period prescribed in s 114(2). It cannot be said that the Velardos did not have an adequate opportunity to consider the Offer, indeed they made a counter offer on 13 May 2009.
- 36 It is also relevant that before the purported acceptance counsel for Andonov had told counsel for the Velardos that all previous offers were withdrawn.
- 37 I will permit Andonov to withdraw the Offer, such withdrawal to take effect from the commencement of the compulsory conference on 16 June 2009 and prior to the purported acceptance of the offer by the Velardos.

⁸ [2001] NSWSC 411 at [12]

⁹ (2005) 62 NSWLR 427

¹⁰ [2008] NSWSC 1220

38 As a consequence there is no concluded agreement to settle the proceeding and the Velardo's application for an order giving effect to the terms of the Offer is dismissed.

Judge I J K Ross
Vice President