VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1110/2015

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Application for reinstatement of the proceeding by reason of the respondent's failure to complete an agreed scope of works; applicants awarded a sum for completion of the works substantially less than the sum claimed; respondent claimed its costs of defending the applicants' claim for reinstatement pursuant to ss112 and 109 of the *Victorian Civil and Administrative Act 1998*; respondent's settlement offer found to not comply with s112; respondent's claim for cost under s109(3) not made out.

FIRST APPLICANT	Mr Ya Ge Xu
SECOND APPLICANT	Ms Qing Xiao Chen
RESPONDENT	Hallbuild Pty Ltd (ACN: 155 388 604)
WHERE HELD	Melbourne
BEFORE	BW Thomas, Member
HEARING TYPE	In chambers
LAST DATE FOR FILING WRITTEN SUBMISSIONS	9 May 2018
DATE OF ORDER AND WRITTEN REASONS	14 June 2018
CITATION	Xu v Hallbuild Pty Ltd (Costs) (Building and Property) [2018] VCAT 893

ORDER

1 The respondent's application that the applicants pay its costs of defending their application for the reinstatement of the proceeding is dismissed.

BW Thomas
Member

APPEARANCES:

For Applicants	Mr Xu
For Respondent	Mr Fah, solicitor

REASONS

BACKGROUND

1 The applicants (the Owners) applied for this proceeding to be reinstated by reason of the failure of the respondent (the Builder) to complete rectification works the Builder had agreed to perform under Terms of Settlement signed by the parties on 23 August 2016 ("the Settlement Works").

2 The Owners claimed the sum of $67,210.00 as the cost of completion of the uncompleted Settlement Works. I allowed the application for reinstatement and on 9 March 2018, I ordered the Builder pay the Owners the sum of $5,170.00, and reserved the question of costs. I further ordered that any submission as to costs must be filed and served by 20 March 2018.

3 The Builder's Costs Submission was filed on 20 March 2018, but the Owner's Submission was not filed until 23 March 2018. On 1 May 2018 I ordered that the date by which the Owners must file their Costs Submission be extended to 24 March 2018, and that the Builder must file and serve any Submission in Reply by 9 May 2018. The Builder's Submission in Reply was filed on that date.

4 In summary, the Builder relies on an offer made on 8 March 2018, and on s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* (the Act), and submits that the Owners should pay its costs on an indemnity basis. In the alternative, the Builder submits that the Owners should pay its costs pursuant to s 109 of the Act. The Owners oppose the Builder's application for costs.

5 For the reasons set out below, the Builder's application is dismissed.

THE LAW

Sections 112 – 114 of the Act

6 Section 112 relevantly provides -

> **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 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.

Section 113 provides –

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.

Section 114 provides -

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 subsection (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.

Section 115 provides –

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.

THE SUBMISSIONS OF THE PARTIES

S112 -115 of the Act

The Builder's Primary Submissions

7 On 8 March 2017, Mr Xu sent an email to the Builder's solicitors foreshadowing an application for the proceeding to be reinstated, on the basis that there were still works to be completed and, since the Builder was not returning to the site to complete the works, the Owners were entitled to compensation of at least $67,210.00. The application was filed on 10 March 2017. On 8 March 2017, shortly after receiving Mr Xu's email, the Builder's solicitors sent a letter by email to Mr Xu advising that a cheque for $5,970.00 in settlement of the Owners' claim would be available for collection from the solicitors' office on 13 March 2017 (the First Offer).

8 At the hearing on 8 November 2017, the Builder made a further offer to the Owners of $10,000.00 which was acknowledged to the Tribunal (the Second Offer). The Owners made a counteroffer of $50,000.00, to which the Builder did not respond.

9 The Builder submits that the Tribunal's order of 9 March 2018, that the Owners pay the applicants $5,170.00, was almost 15% less than the Builder's First Offer, and almost 50% less than the Builder's Second Offer. The First Offer was never withdrawn and was open for acceptance by the Owners until the Tribunal's order of 9 March 2018 was made. The Tribunal's order of 9 March 2018 is less favourable to the Owners than the

First Offer, and therefore the Builder is entitled to all its costs from the date of the First Offer.

The Owners' Submissions

10 The Owners say the First Offer does not comply with ss 112 of the Act in that it:

(i) was made prior to the commencement of the filing and service of the application for reinstatement of the proceeding;

(ii) did not comply with s 114(1) in that it did not specify the period within which it may be accepted;

(iii) was linked to the terms of a second proposed settlement, which reached beyond a monetary offer in that it sought a release from the applicants of any future defect in relation to the respondent's prior rectification work;

Further –

(iv) the difference between the sum offered and the sum awarded is marginal;

(v) the First Offer was made by a represented party to an unrepresented party without reference to the relevant sections of the Act;

(vi) the "level of understanding of the process' by an unrepresented party is a significant factor when awarding costs;

(vii) the question whether a party's case had any tenable basis in fact or law must be considered prospectively rather than retrospectively, after the Tribunal has made its decision; and

(viii) the Tribunal must evaluate and assess the settlement offer at the time it was made, "not at some later time. Looking back at the offer with the benefit of hindsight".

The Builder's Submissions in Reply

(a) ss 112-115 of the Act do not constitute a "code", so that even if the First Offer does not comply with those sections, it is a relevant factor the Tribunal can consider in an assessment of costs under s 109 of the Act. If accepted, the First Offer would have resulted in the Owners receiving more than they ultimately received;

(b) The difference between the First Offer and the ultimate award is irrelevant because at no time did the Owners concede that the First Offer was an appropriate quantification of their losses. The ultimate award was less than 8% of the total sum claimed in the reinstatement application;

(c) The Owners were previously represented in the proceeding, but chose to continue unrepresented. It is disingenuous for the Owners to now seek to rely on their lack of legal representation in order to avoid a

costs order in circumstances where they elected to discharge their lawyers;

(d) The Builder never claimed the Settlement Works were completed; it has always maintained that Mr O'Bryan directed the Builder not to return to the site; and the Builder offered a sum of money in lieu of completing the work required by Annexure B. The Tribunal's task was to determine the appropriate sum to complete the outstanding items in Annexure B, and the Tribunal's award determined that the First Offer was appropriate; and

(e) The authority relied upon by the Owners for the proposition that the Tribunal must evaluate and assist a settlement offer at the time it was made, was not relevant because it concerned an offer that contained an uncertain term, such that there was doubt whether it was capable of being accepted at the time the offer was made. There is no suggestion that the First Offer contained any uncertainty.

DISCUSSION AND FINDINGS REGARDING PRIMARY SUBMISSIONS

11 The letter from Mills Oakley to the Owners dated 8 March 2017 was sent by email. Relevantly, it stated -

> We enclose a table setting out the total amount directed to be paid by Hallbuild pursuant to the above directions, including for the sum quoted for item 1. The total sum payable is $5,970.
>
> Our client will arrange for a check for the above some to be made available for collection by you from Mills Oakley lawyers from 13 March 2017. In order for the cheque to be made available to you, you must both first sign (with appropriate witness) and return the enclosed form to us. By signing the form, you confirm that following your receipt of the above funds, all obligations of the parties under the Terms of Settlement been completed.

12 The "enclosed form" was headed CONFIRMATION OF FINALISATION OF OBLIGATIONS PURSUANT TO TERMS OF SETTLEMENT DATED 23 AUGUST 2016. Clause 3 stated –

> By this document, the Applicants accept and confirm that on receipt by them of a check in the sum of $5,970 in respect of some is directed by the expert appointed pursuant to the Terms of Settlement to be paid by the Respondent to the Applicants, that the respondent has completed all of its payment and rectification obligations pursuant to the Terms of Settlement, including, but not limited to:
>
> (a) the rectification work contained in Annexure B to the Terms of Settlement; and
>
> (b) the rectification of any damage caused during the rectification work, in accordance with clause 1.8 of the Terms of Settlement.

13 As noted by the learned author in *Pizer's Annotated VCAT Act* (112.80), it has been held that an offer is not a "settlement offer" for the purposes of s 112 if it –

- was made prior to the commencement of the proceeding;
- did not specify the period within which it may be accepted;
- did not specify when the settlement sum was to be paid;
- was subject to a condition that a certain requirement be fulfilled.

14 The Owners' application for reinstatement of the proceeding was filed with the Tribunal on 12 March 2017; that is four days after receipt of Mills Oakley's letter 8 March 2017 containing the First Offer. At this point the proceeding was not on foot. I therefore find that the offer was made prior to the (re)commencement of the proceeding. The letter did not specify a period within which the offer could be accepted or if accepted, when the settlement would be paid. Finally, the offer was conditional upon the Owners acknowledging that the Builder had completed its obligations under the Terms of Settlement.

15 I therefore find that the First Offer was not a settlement offer pursuant to s112 of the Act.

The Builder's Alternative Submissions under s 109 of the Act

16 S 109 relevantly provides –

> **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 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.

17 It is open to the Tribunal to find that the Owners pursued the reinstatement application in order to make a windfall gain. The sum they sought was more than eleven times the sum estimated by Mr O'Bryan and offered by the Builder, and almost thirteen times the amount ordered by the Tribunal. It is open to the Tribunal to infer that the Owners' failure to satisfy themselves about the actual cost to complete the works was deliberate, and out of the fear that such evidence would be detrimental to their case.

18 The Owners frequently failed to comply with the Tribunal's Practice Note PNVCAT1, in particular, paragraph 12, which requires any correspondence to the Tribunal to be copied to all other parties.

19 Mr Xu unlawfully commenced to record the hearing before the Tribunal on 13 June 2017, and he only admitted doing so after it was raised by the Builder's solicitor. He was ordered by the presiding Member to cease recording the proceeding.

20 The Owners conducted the proceeding in a vexatious manner which has prolonged the proceeding. In particular, Mr Xu has –

(i) made accusations of fraud against the Builder, accusing it of issuing false plumbing certificates;

(ii) called Mr O'Bryan, a liar, biased, false, "*unprofessional, motivated, premeditated and deliberate*";

(iii) accused the Builder's, solicitor of being "*evil*" and "*'an expert at twisting facts*"; and

(iv) at the 8 November 2017 hearing was preoccupied with calling Mr O'Bryan's integrity into question and re-agitating in past matters, despite being told by the Tribunal on multiple occasions that those issues were not relevant.

21 Given the level of sustained personal vitriol expressed by Mr Xu towards Mr O'Bryan (Mr Xu's own nominee as the Expert in the Terms of Settlement) and Mr Hall, the Builder's director, it is open to the Tribunal to find that the Owners were pursuing these proceedings for an extraneous or ulterior motive.

22 The Owners failed to call any expert building or quantity surveying expertise, despite being invited by the Tribunal to do so, and that Builder's First Offer was significantly higher than the sum the Owners were awarded, the strength of their case was self-evidently weak.

23 The substantial affidavit sworn by Mr Xu dated 15 June 2017 was significantly incomplete. Despite the Builder's solicitors requesting Mr Xu to provide complete and legible copies of the exhibits to that affidavit, he failed to do so, necessitating a Directions Hearing held on 25 July 2017.

24 It was the Owners' decision to terminate their legal representation before commencing their reinstatement application, and thereafter their self-representation should not be a basis for denying the respondent its costs.

25 Based on the judgement of Shephard J in *Colgate – Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248, the Tribunal would be justified in finding that the Owners have –

(a) engaged in misconduct;

(b) unreasonably prolonged the case; and

(c) made allegations that should never have been made

In these circumstances an enhanced costs order, namely an order for the Builder's indemnity costs, should be made.

The Owners' Submissions

26 Even if Mr Xu's conduct is worthy of censure or reproach, that is not a relevant ground under s109 (3). The purpose of an award of costs is not to punish the party causing those costs to be incurred. Whether Mr Xu made threats to Mr Hall has no substantive bearing on the issue of costs.

27 Whilst it is appropriate for the Tribunal to consider each of the matters specified in s109 (3) and express a view as to the weight should be attached to the particular matters relied upon, it is not sufficient that a party has been disadvantaged by the manner in which the proceeding has been conducted; it must be established that a party claiming costs has been *unnecessarily* disadvantaged.

28 S 109 (3) (a) (VI), in referring to "*vexatiously conducting the proceeding*" is concerned with the manner in which the proceeding was conducted, not whether the proceeding itself was vexatious.

29 The expression "*procedural matters*" in s109 (3) (a) and (b) is more relevant to the apportionment of costs than costs of the proceeding.

30 By failing to complete the rectification works by 4 October 2016, the Builder breached the Terms of Settlement. Therefore, the Owners had a legitimate cause of action in seeking to have the proceeding reinstated. *Houltham v JG King Pty Ltd* [2006] VCAT 807 (*Houltham v King*) is authority for the proposition that where an application for reinstatement is made in respect of a party's failure to conform to Terms of Settlement, that party "*should bear the costs of and in relation to at least applying for the reinstatement*".

The Builder's Submissions in Reply

31 The Builder does not take issue with the Owners' right to reopen the proceeding, but the prudent course was to accept the Builder's First Offer made the same day reinstatement application was served. Had they done so, the Owners would have saved the builder significant inconvenience and

costs. In this respect, *Houltham v King* case is irrelevant, as the Owners did not seek an order for their costs of reinstating the proceeding.

DISCUSSIONS AND FINDINGS REGARDING S 109 SUBMISSIONS

32 In the alternative, the Builder relevantly submitted that it was entitled to its costs of defending the reinstatement application pursuant to s109 of the Act on the basis that –

- the Owners pursued the reinstatement purely in order to make a windfall gain;
- by persistently failing to copy correspondence to the Tribunal to the Builder's solicitors, the Owners failed to comply with Item 12 of Practice Note;
- Mr Xu has either been responsible for unreasonably prolonging the proceeding and/or conducting it in a vexatious manner;
- the First Offer was significantly higher than the sum the Owners were awarded, demonstrating their case was weak.

33 As emphasised by Gillard J in *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs under section 109 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 award 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 make an order.

(iii) In determining whether it is fair to award costs, the Tribunal must have regard to the matters stated in s109(3). The Tribunal must have regard to the sub specified matters in determining the question, and by reason of s109 (3) (e), the Tribunal may also take into account any other matter that it considers relevant to the question.

Gillard J also observed at [22] "… It is the totality of all relevant matters under s109 (3) that must be considered in the context of the prima facie rule."

34 S 109 (3) lists the factors the Tribunal must have regard to in considering a costs order. Of the grounds submitted by the Builder, only the following are relevant to s 109 (3) –

Failing to comply with the Practice Note

I accept that the Builder may have been inconvenienced by the Owners' failure to copy their correspondence to the Tribunal to their solicitors. However, the Builder did not submit that it was disadvantaged by this conduct on the part of the Owners, and I am not satisfied that it was disadvantaged. In any event, it has been held that non-compliance with a VCAT Practice Note is not a matter contemplated by s109 (3) (ii): *Bevnol*

Constructions & Developments Pty Ltd v De Simone [2009] VCAT 546 at [16(ii)]

Vexatiously conducting and/or prolonging the proceeding

The Builder submits that Mr Xu had "*a persistent belief that people who do not agree with his view of matters are either lying of have ulterior motives"* and that the hearing on 8 November 2017 "*was unreasonably extended because Mr Xu was preoccupied with calling Mr O'Bryan's integrity into question and re-agitating past matters".* I am not satisfied that there is evidence of either allegation. In view of the fact that the Owners were unrepresented throughout the reinstatement proceeding, I am not persuaded that such conduct could be said to be was vexatious, or that the Builder was disadvantaged by such conduct.

The Owners' case was self-evidently weak

The Owners were unrepresented, and may not have had the benefit of legal advice. The Owners may therefore have had to make their own assessment of the merits of a reinstatement application. As the Builder had not completed the rectification works detailed in Annexure 2 to the Terms of Settlement, it was reasonable for the Owners to conclude that the Builder was in breach of the Terms. The Terms did not address the possibility of Mr O'Bryan, the agreed expert to assess the rectification works, directing the Builder not to return to the site to complete the works, for occupational and health safety reasons. Therefore, the Owners' only option was to seek reinstatement of the proceeding, and in doing this certainly had a tenable basis in fact and law. I consider the fact that the Owners were awarded a sum for the cost of completion of the rectification works substantially less than the sum they claimed, does not of itself mean that reinstatement of the proceeding should not have been sought.

35 The Builder's claim for costs is dismissed.

BW Thomas
Member