VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D409/2013

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Costs – Whether offer of settlement complied with s 113 and s 114 of the *Victorian Civil and Administrative Tribunal Act 1998*. Discretion to order costs where settlement offer does not comply with *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Yiqun (Jane) Yan
RESPONDENT	Brown Bros. Cabinet Works Pty Ltd (ACN 006 825 672) T/as Merchant Kitchens
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	27 November 2013 (submissions last filed 7 February 2014)
DATE OF ORDER	21 February 2014
CITATION	Yan v Brown Bros Cabinet Works Pty Ltd (No2) (Domestic Building) [2014] VCAT 177

ORDER

The Applicant must the Respondent's costs from 9 August 2013, fixed in the amount of $5,261.50.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Ms Y Yan, in person
For the Respondent	Mr S Rowland of counsel

Introduction

1. On 16 September 2013, I ordered that the Applicant's application be dismissed. *Reasons* were published on the same day. Pursuant to the liberty given to the parties, the proceeding was returned on 27 November 2013 upon the application by the Respondent for an order that the Applicant pay its costs of the proceeding. At that costs hearing, Mr Rowland of counsel appeared on behalf of the Respondent. The Applicant appeared in person. At the commencement of the costs hearing the Applicant advised that she had intended to engage a legal practitioner to represent her but had not had sufficient time to organise for that to occur. She submitted that she was not, therefore, in a position to properly answer the Respondent's application for costs.

2. In order to avoid an adjournment of the costs hearing, I ordered that the Applicant be given an opportunity to obtain an audio recording of the costs hearing on 27 November 2013 so that the Applicant could provide her, yet to be appointed, legal representative with an audio recording of the oral submissions made by Mr Rowland on that day. I further ordered that by 31 January 2014, the Applicant could then file and serve written submissions on the question of costs, with liberty given to the Respondent to file and serve any reply submissions by 31 January 2014. That course was accepted by both parties.

3. On 24 January 2014, the Applicant filed her written submissions. However, the submissions were not served on the Respondent. Consequently, the Tribunal arranged for service, which was effected on 7 February 2014. On the same day, the Respondent wrote to the Tribunal advising that, in its opinion, the submissions of the Applicant related to the subject matter of the original proceeding and did not address the Respondent's claim for costs. Accordingly, the Respondent indicated that it did not intend to file any written submissions in reply.

4. In my view, the written submissions of the Applicant barely touch on the question of costs. Indeed, the penultimate paragraph of the written submission merely states:

> We are reject the cost seeking under VCAT sec112 because the order base on the lie of the respondent, there are not true fact, consumer's contract right under the Competition and Consumer and 2010 was taken off. [sic.]

5. It appears from the substance and language used in the written submission filed by the Applicant, that she did not avail herself of legal assistance, despite the fact that she had based her adjournment application on the ground that she required legal representation. In that regard, I note that there is no record on the Tribunal's file of any solicitor acting on behalf of the Applicant. This is regrettable because the written submission filed by the

Applicant does little, if anything at all, to respond to the oral submissions made by Mr Rowland at the costs hearing on 27 November 2013.

6. The background to this proceeding is set out in detail in my *Reason*s dated 16 September 2013. In summary, the dispute concerned a contract for the manufacture of kitchen, bathroom and other joinery to be installed into two residential dwellings that were being constructed by the Applicant, as an owner builder. The parties fell into dispute during the design phase of their relationship, with the result that no joinery was actually manufactured by the Respondent, despite the Applicant having paid a deposit and prepared various design drawings. Ultimately, I determined that the conduct of the parties was such that they had each implicitly agreed to rescind their bargain, with the effect that the contract between them was held to have been mutually abandoned. Given that the deposit monies paid by the Applicant were returned to her during the course of the hearing, the remaining claims made by the Applicant were dismissed.

Costs

7. Sections 109(1), (2) and (3) of the *Victorian Civil and Administrative Tribunal Act 1998* (**'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 s 109(1) of the Act that the general rule is that costs do not follow the event and that each party is to bear their own costs in a proceeding. By s 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 s 109(3).

9. There are also provisions in the Act which deal with offers of compromise. Section 112 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
>
> (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; …

10. As indicated above, the Respondent seeks an order that its costs of the proceeding be paid on a party and party basis up to 17 June 2013 and thereafter on a full indemnity basis, or alternatively on a solicitor and client basis calculated on the *Magistrates' Court Scale of Costs 'F'*.

Costs up to 17 June 2013

11. 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 s 109 of the Act:

[1] [2007] VSC 117.

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

12. Mr Rowland, counsel for the Respondent, submitted that costs should follow the event because the dispute was a commercial inter-party dispute. He further submitted that the manner in which the Applicant conducted the proceeding unreasonably delayed the proceeding and that this was a further factor for the Tribunal to consider in exercising its discretion.

13. In my opinion, the mere fact that the proceeding was a commercial inter-party dispute does not support the conclusion that there is some rule of practice that costs will routinely be awarded in a domestic building proceeding

14. In *Gombac*, Gilliard J considered an argument that costs were less likely to be awarded when the matter was an administrative review proceeding compared with inter-party commercial disputes. His Honour rejected that argument and held that the Tribunal had misdirected itself on a question of law as to the exercise of its jurisdiction under s 109 because it had applied a principle in the exercise of its discretion of a predisposition that costs were less likely to be awarded in an administrative review proceeding. The same can be said in answer to the submission advanced by Mr Rowland in support of the Respondent's application for costs. In particular, the Tribunal's discretion under s 109 would be fettered if the Tribunal were required to adopt a principle or guideline that costs should routinely be ordered in inter-party commercial disputes.

15. Having said that, I recognise that it might be the case that many domestic building disputes attract an order for costs. However, this is because the nature and complexity of such proceedings makes it fair to order costs. Ultimately, however, each case must be assessed according to its own circumstances and it would be improper to simply award costs to the winning party, merely because the proceeding was a commercial inter-party dispute.

16. Turning then to the circumstances of the present case. In my view, the way in which the Applicant conducted the proceeding and the outcome of the proceeding do not justify an order that costs should follow the event. In particular, as I noted in my *Reasons* dated 16 September 2013, the proceeding was ultimately dismissed because the deposit monies, which had formed part of the claim made by the Applicant when she first issued this proceeding on 15 April 2013, was returned to her during the course of the hearing. Had that not been the case, the Applicant would have succeeded with that part of her claim. Moreover, there is no evidence to suggest that the Applicant had conducted the proceeding in manner that unnecessarily disadvantaged the Respondent by engaging in the type of conduct set out under s 109(3)(a) of the Act. Therefore, I do not consider that it would be fair to order costs against the Applicant for the period up 17 June 2013.

Costs after 17 June 2013

17. Mr Rowland submitted that the issue of costs should be viewed in a different light after 17 June 2013 because a number of settlement offers were made by the Respondent on and after that date. The first offer was in the form of letter dated 17 June 2013. It was made seven days prior to the listed commencement date of the hearing.[2] It states, in part:

> We confirm that you have issued an application against our client in the Victorian Civil and Administrative Tribunal in respect of a contract for the supply of kitchen and cabinet works. We confirm that our client intends to defend your application and will shortly file a counterclaim of approximately $20,000.
>
> Solely in the interest of avoiding further cost and delay, our client is willing to settle this matter with you. Our client will agree to cancel the contract for the supply of relevant cabinetry and will return the deposit paid $13,659. Our client's offer is in full and final satisfaction of your claim in this matter and will entitle you to engage a new company to complete the cabinetry works …

18. The second offer of settlement was also in the form of a letter. It was dated 17 July 2013, 12 days prior to the re-listed commencement date of the hearing. That letter stated:

> Pursuant to our client's Points of Defence, we confirm that the contract executed between yourself and our client was cancelled on or about 5 April 2013. Accordingly and in accordance with previous offers made to you, our client is willing to unconditionally return the deposit paid. Upon your acceptance of our client's offer, each party will discontinue their respective claims in the Victorian Civil and Administrative Tribunal and your application will be dismissed.

[2] The listed commencement date of the hearing of 24 June 2013 was adjourned by order dated 20 June 2013 to 29 July 2013.

> Our client's offer is made pursuant to Section 113 of the Victorian Civil and Administrative Tribunal Act 1998. We advise that should the above offer not be accepted and you fail to obtain judgment against our client more favourable than the offer made above, then this letter shall be used on the issue of costs with an application being made for costs on an indemnity basis in accordance with Section 112 of the Victorian Civil and Administrative Tribunal Act 1998.

19. The first and second offers of settlement did not specify when the deposit money was to be returned, nor did they specify for what period of time the offers were open. Consequently, I do not consider that either of these offers complied with s 113(4) of the Act.

20. Moreover, the offers did not provide for the payment of the Applicant's costs of the proceeding. Notwithstanding the fact that the Applicant was not legally represented at the hearing of the proceeding, the Applicant has still incurred costs associated with the proceeding, even if those costs were limited to the application filing fee of $322. Therefore, if those costs were taken into account, it is difficult to see how the offers were more favourable than the outcome of the hearing. I also note that the first offer of settlement failed to provide any warning to the Applicant of the consequences in rejecting the offer. In my view, that is an additional factor which I consider relevant to the exercise of my discretion under s 109 of the Act.[3]

21. I am of the opinion that when all these factors are taken into consideration, it would be unfair to order costs simply on the basis that the Applicant failed to accept either of those two offers.

22. The third offer of settlement was also in the form of a letter. It was dated 9 August 2013 and was made at a time between the conclusion of the first day of hearing and the return date of 11 September 2013. It stated, in part:

> Solely in an effort to bring about a resolution of this matter and to avoid further costs of litigation we are instructed to make a final offer of settlement in this proceeding. Without any admission of liability our client is willing to unconditionally return to you the deposit paid of $13,659.00 in addition to the further sum of $3,341.00 by way of compensation. The settlement sum of $17,000.00 will be remitted within seven days of your acceptance of our client's offer. Following acceptance, each party will discontinue their respective claims in the Victorian civil and Administrative Tribunal and your application will be dismissed.
>
> Our client's offer is made pursuant to Section 113 of the Victorian Civil and Administrative Tribunal Act 1998. We advise that should the above offer not be accepted and you fail to obtain judgment against our client more favourable than the offer made above, then this letter shall be used on the issue of costs with an application being made for costs on an indemnity

[3] See extract of the joint judgment in *Hazeldene's Chicken Farm Ltd v VWA (No 2)* at paragraph 24 below.

basis in accordance with Section 112 of the Victorian Civil and Administrative Tribunal Act 1998.

23. The offer of settlement dated 9 August 2013 also failed to strictly comply with s 114 of the Act because it failed to specify that it was open for acceptance for a minimum period of 14 days. In fact, it said nothing as to the period that it was open for. Nevertheless, the offer is more favourable than the outcome of the proceeding and cures many of the defects of the two earlier offers made. Therefore, I consider this offer of settlement to be a relevant factor in the exercise of my discretion.

24. In that respect, the question as to how much weight I place on the offer in exercising my discretion really comes down to a consideration of whether it was unreasonable for the Applicant to have rejected the offer. In *Hazeldene's Chicken Farm Ltd v Victorian Workcover Authority (No.2)*,[4] the joint judgment of Warren CJ, Maxwell P and Harper AJA discussed the circumstances that might lead a court to determine whether the rejection of an offer was unreasonable:

> [25] The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to 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 as 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.

25. In my view, it was unreasonable for the Applicant not to have accepted the offer. The offer not only provided for the return of the deposit monies but also offered a further sum of $3,341 by way of compensation. Having regard to the fact that the Applicant was not legally represented, this additional amount was, in my view, generous and it was imprudent for the Applicant not to have accepted it, given the outcome of the proceeding, which was clearly less favourable than the offer made.

26. On 21 August 2013, the Respondent made a final offer of settlement which reinstated the third offer of settlement. Again, it was not accepted. Having

[4] [2005] VSCA 298.

regard to the comments made by the joint judgment in *Hazeldene's Chicken Farm*, I therefore find that it would be fair to order that the Respondent's costs from the day the third offer was made, being 9 August 2013, be paid by the Applicant. I have formed this view because I consider that it was unreasonable for the Applicant not to have accepted the third offer of settlement. I further consider this factor relevant to the exercise of my discretion pursuant to s 109(3)(c) of the Act.

27. However, I do not accept the submission made by the Respondent that costs should be assessed on an indemnity basis. In my view, the third offer of settlement which states, *inter alia*, that the failure to accept the offer will result in an application being made for costs on an *indemnity basis in accordance with Section 112 of the* Act is misleading. Section 112 of the Act does not specify that costs are to be awarded on an indemnity basis.

28. Although s 112 uses the expression 'all costs', the Court of Appeal in *Velardo v Andonov*[5] 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.[6]

29. Consequently, I find that it is fair in the present circumstances to order that the Applicant pay the party and party costs of the Respondent from 9 August 2013, such costs to be calculated in accordance with the *Magistrates' Court Scale of Costs 'F'*.

30. In that respect, Mr Rowland produced a schedule which set out the Respondent's costs pursuant to Scale 'F' of the *Magistrates' Court Scale of Costs.* Although that schedule is based on costs incurred from the commencement of the proceeding, I am able to distinguish various cost items which were incurred after 9 August 2013, sufficient for me to fix what I consider to be a fair amount of costs payable by the Applicant to the Respondent of $5,261.50. That amount is calculated as follows:

Description of work	**Item No**	**Amount**
General preparation (refresher at say 50% of scale cost)	33	$1,559.50
Counsel attending hearing on 15 August 2013	54	$1,385
Counsel attending hearing on 11 September 2013	54	$1,385

[5] (2010) 24 VR 240.
[6] Ibid at [47].

Counsel attending costs hearing on application	42	$462
Offers of compromise (2)	64	$450
Perusal of Applicant's costs submissions (8 folios)	61	$20
TOTAL		**$5,261.50**

31. Consequently, I will order that the Applicant pay the Respondent's costs of this proceeding fixed in the amount of $5,261.50.

SENIOR MEMBER E. RIEGLER