VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE: D617/2002**

CATCHWORDS

Costs – s109 Victorian Civil and Administrative Tribunal Act – Calderbank offer – conduct of proceeding by the applicant

APPLICANT:	Lefkas Builders Pty Ltd
FIRST RESPONDENT:	Dondas Constructions Pty Ltd (ACN 054 385 974)
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Hearing
DATE OF HEARING:	26 August 2005
DATE OF ORDER:	2 September 2005

[2005] VCAT 1827

ORDERS

1. The Respondent shall pay to the Applicant the sum of $10,950.19 forthwith.

2. Liberty to the Applicant to apply for an order for payment of a maximum sum of $3,650.06 being the balance of the indemnity ordered on 8 March 2005.

3. No order as to costs.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr E Riegler of Counsel
For the Respondent:	Mr C Gilligan of Counsel

REASONS

1. On 8 March 2005 I made the following orders:

   1. *The Respondent shall pay to the Applicant the sum of $12,899.80.*
   2. *The Respondent shall indemnify the Applicant for the costs of and incidental to the installation of seven (7) articulation joints to a maximum sum of $14,600.25.*
   3. *The counterclaim is dismissed.*
   4. *Costs reserved – liberty to apply. Direct the principal registrar to list any costs hearing before Deputy President Aird.*

2. The applicant now seeks an order that the respondent pay the sum of $14,600.25 pursuant to order 2 above, and also makes an application for costs. The applicant was once again represented by Mr Riegler of Counsel and the respondent by Mr Gilligan of Counsel. I shall first consider whether the order sought in the sum of $14,600.25 should be made.

The claim for an order for payment

3. The hearing proceeded by way of affidavit and the deponents on behalf of each of the parties were cross examined - Mr Dimitrios Fatouros who is a director of the applicant and Mr Peter Dondas, director of the respondent. Mr Fatouros' evidence is that following the orders of 8 March 2005, the applicant entered into discussions with the owners of three of the townhouses – two of which are owned by his brothers and their wives, and a third by a couple who he said is unrelated to his family. He said that the owners of those three townhouses – numbers 20, 24 and 26 had been aware of the proceedings and following the tribunal's

decision had made a demand on the applicant for its failure to install the articulation joints. He said he obtained quotations for the installation of the articulation joints. The cost would have been approximately $5,000.00 per townhouse which was the amount the applicant agreed to pay each of the owners by way of compensation. Mr Fatouras said this was a commercial decision to ensure the applicant would be relieved of any liability in relation to future cracking which may occur because of the absence of articulation joints.

4. There was no evidence of any written demand by the owners and I am unsure, on the evidence before me, whether the settlement was reached following a demand made by them or an approach by the applicant to them. However, this is immaterial. It is clear that articulation joints were required and that my order of 8 March 2005 contemplated their installation. It was my intention that they be installed, but this, in my view, did not preclude the applicant from entering into a commercial arrangement with the owners of the affected townhouses. I make no findings about whether the agreements entered into with each of the owners will absolve the applicant of any future liability as this is not a matter currently before me. However, the extent of the respondent's liability to the applicant has been determined by me previously, and limited by the amount of the indemnity – to a maximum sum of $14,600.25.

5. My primary concern is that the applicant now seeks an order for payment of the sum of $14,600.25 being the full extent of the indemnity, although it has only

made payment to the owners of three of the affected townhouses. My earlier orders relate to the failure by the respondent to install seven articulation joints along the eastern elevation – the rear wall of townhouses 2-5, which I understand are numbered 20, 22, 24 and 26. Mr Fatouras gave evidence that he had not been in contact with the owner of number 22, which is apparently tenanted, and that he is not sure who the owner is. Under cross examination he said the sale of the townhouse had been handled by his brother but that he had made no attempt to locate the owner or, seemingly, communicate with the owner through the tenants, who, one may expect, might have been prepared to at least give him contact details for the letting agent.

6. It was suggested on behalf of the respondent that the settlement with the owners of numbers 20, 24 and 26 was a sham, primarily, as I understand it, because two of the townhouses are owned by Mr Fatouras' brothers (jointly with their wives). The only evidence before me in relation to the payment of $5,000.00 to each of the owners was the bank statements showing the cheques had been presented for payment and the following agreements signed by each of the owners and Mr Fatouras on behalf of the applicant:

> ……hereby release Lefkas Builders Pty Ltd and its agents from any further claim in regards to the defective or lack of articulated joints (sic) and any further problems arising due to the articulated joints (sic) at our property at …….
>
> In return Lefkas Builders Pty Ltd will pay us the sum of $5,000 as full and final settlement of the above matter.

7. Mr Fatouras had the cheque butts with him and although these were shown to him and identified during cross examination they were not tendered in evidence. No evidence was called by the respondent to support the submission that the settlements were a sham. Its solicitors had written to the applicant's solicitors requesting that each of the owners attend the hearing for the purposes of cross examination. Understandably, as they were not being called by the applicant to give evidence, this was refused. However, no steps were taken by or on behalf of the respondent to subpoena them to give evidence. In these circumstances, I have no alternative other than to accept the only evidence before me – that of Mr Fatouras. However, I am not prepared to order payment to the full extent of the indemnity which clearly anticipates the installation of seven (7) articulation joints or, at least, settlement with the owners of the four affected townhouses. I will therefore order the respondent to pay to the applicant three quarters of the extent of the indemnity - $10,950.19 and reserve liberty to the applicant to apply for an order for payment of the balance of $3,650.06 should the articulation joints be installed or settlement be reached with the owner of number 22.

The application for costs

8. The application by the applicant that the respondent pay its costs is made in the alternative:

   (i) that the respondent pay the applicant's costs of the proceeding on County Court Scale 'A'; or

(ii) that the respondent pay the applicant's costs of the proceeding from 1 February 2005, the date of the applicant's offer to settle the proceeding on the basis the respondent pay to it the sum of $40,000.00 inclusive of costs; or

(iii) that the respondent pay the applicant's costs of the proceeding from the third day of the hearing i.e. 9 February 2005 when the applicant made an oral offer to the respondent to settle the proceeding on the basis that the respondent pay to it the sum of $20,000.00 inclusive of costs.

9. Mr Riegler confirmed the applicant was seeking an order for party/party costs on County Court Scale 'A' in relation to each of the alternative applications.

10. In determining whether to make an order for costs I must have regard to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provide:

> (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.

(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

11. It was submitted by Mr Riegler that the offer of 1 February 2005 is a relevant matter for me to consider in determining whether to exercise my discretion under s109(2) having regard to the provisions of s109(3) and in particular s109(3)(e). The letter of 1 February 2005, omitting the formal parts, provides:

1. We refer to the above matter.

2. In order to finalise the matter without further cost and inconvenience to the parties, our client offers to settle both its claim and your client's counterclaim and all matters relating to the subject matter of the proceeding by your client paying to our client the sum of $40,000.00 in full and final settlement ('the settlement sum') and on the basis that each party bears its own costs in the proceeding.

3. The settlement sum is to be paid by your client to our client within 15 days of the date of acceptance of this offer.

4. This offer is open to be accepted by 5 pm 3 February 2005 and may be accepted by notice in writing from your client, served upon our client within the said time specified.

5. *The offer of settlement is made pursuant to the principles enunciated in the decisions in Calderbank v Calderbank [1975] 3 All ER 333 and Cutts v Head [1984] 1 All ER 597.*

12. An earlier offer of settlement had been made by the applicant on 28 July 2004 whereby the respondent was to pay it the sum of $70,000.00 inclusive of costs in full and final settlement of the claim and counterclaim. This was rejected by the respondent.

13. The offer to accept the sum of $20,000.00 inclusive of costs was apparently made on the second or third day of the hearing. There was some confusion between counsel as to when this offer was made, but Mr Dondas confirmed under cross examination that such an offer had been made and rejected.

14. In support of the application for costs Mr Riegler referred me to the decision of Senior Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (unreported 5 May 1999) when he indicated that where a proceeding in the Domestic Building List involved what could be described as a complex legal dispute, the parties could anticipate that costs would follow the event, subject to the following:

> However, none of these considerations should lead to a presumption that costs follow the event. I consider putting all of this in the balance leaves subsection (c) as the defining criteria, i.e. "The relative strengths of the claims made by each of the parties." I interpret (c) to mean that where the parties have taken opposing views on the matters in dispute, one party's claim is substantially more successful in the determination of the Tribunal. Thereby, there is a large difference in the strengths of the claims as determined by the Tribunal. Taking all of this into account, I consider

> that a substantially successful party before the Tribunal in the Domestic Building List is entitled to have a reasonable expectation that a costs award will be made in its favour.
>
> but
>
> …Further I consider the award of a small amount in proportion to the claim and counterclaim shows a lack of a realistic appraisal by each party of the opposing parties chances of success on the opposing claim. In these circumstances I would not consider that a costs award should be made.

15. These observations have been considered by Judge Bowman, most recently in *Arrow International Australia Limited v Indevelco Pty Ltd* [2005] VCAT 1769 where he said at paragraph 6:

> Mr Miller on behalf of Arrow referred to decisions such as that of Deputy President Macnamara in *Maltall Pty Ltd & Anor v Bevendale Pty Ltd* (delivered 10th November 1998) and of Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (delivered 5th May 1999). With all due respect to Mr Young, and as I stated in the costs ruling in *Sabroni Pty Ltd v Catalano* (delivered 1st March 2005), I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs award will be made in its favour. As I stated in that ruling, and it is a view which I still hold, I prefer the approach adopted by Deputy President Macnamara in *Pure Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31st October 2002) to the effect that there is nothing in the nature of a proceeding in the Domestic Building List that would justify departure from the presumption contained in s.109 and the exceptions thereto. Each case must be viewed on its merits, and I am not of the opinion that some type of general approach should be adopted.

16. None of the offers relied upon comply with the provisions of s112 of the Act, and they must therefore be considered in the context of the applicant's claim and its conduct of the proceeding. It is clear that the applicant has conducted this proceeding in a manner which has disadvantaged the respondent. The quantum of the applicant's claim was frequently amended, and it was not until two days before the hearing that the claim for recovery of costs incurred in a planning

appeal to this tribunal ('the planning appeal costs claim') was abandoned by the applicant and the respondent knew the final case it had to answer. It is trite indeed to suggest that it is difficult for the respondent to establish what proportion of its legal costs, which Mr Dondas indicated are approximately $75,000.00, were incurred in meeting the planning appeal costs claim. This is simply not relevant.

17. A consideration of the various versions of the applicant's claim reveal:

Date	**Claim**	**Amount Claimed**
Application filed 1 October 2002	Defects: Cost of rectification Overcharge on original quotation Reduction of brickwork height	$108,505.00 $ 39,600.00 $120,000.00 $268,105.00
Amended Points of Claim 11 September 2003	Extra costs for excessive bricks Reconstruction of collapsed party walls Failure to install expansion joints Cost of rectifying front gables Planning appeal costs Replacement of windows	$ 8,500.00 $ 12,150.00 $ 28,000.00 $ 5,000.00 $ 40,187.40 $ 58,000.00 $151,837.40
Amended Further Particulars of Loss and Damage 4 February 2005	Additional cost of base brickwork Reconstructing party walls Removal of collapsed party walls Insertion of articulation joints Rectification of parapet height and gables Rectification of mortar staining to windows and doors	$ 2,878.20 $ 6,887.36 $ 1,687.50 $ 25,029.00 $ 16,930.35 $ 60,166.13 $113,578.54

18. As can be seen from the above summary there were significant changes and variations in the claim during the course of the proceeding. It was not until the

final particulars of loss and damage were served on the respondent, on the last business day before the hearing commenced, that the respondent had notice of the final claim it had to meet. Although the total amount of the claim was reduced, following the abandonment of the planning appeal costs claim, the quantum claimed in relation to each specific item increased in some instances, and decreased in others. I accept this made preparation difficult for the respondent and its advisors.

19. There were a number of compliance and other directions hearings, many of which appear to have arisen out of the failure by the applicant to comply with directions in circumstances where its arrangements for legal representation were constantly changing. At times it was represented, at others not and finally it changed solicitors. I reject the submission on behalf of the applicant that orders reserving costs at the conclusion of most of the directions hearings meant the tribunal was satisfied, in each instance, that there was fault on both sides. This is no more than mere speculation and in any event the most that can be gleaned from the making of such orders, in my view, is that the tribunal was not minded to exercise its discretion under s109(2) at that time.

20. Although the counterclaim (in the sum of $10,000.00) was dismissed I do not accept that the applicant was substantially successful. Whilst the applicant may be said to have succeeded in establishing it had a claim against the respondent for many of the items in dispute, it was not overly successful in relation to the

quantum in respect of each item allowed. A careful consideration of my earlier Reasons indicates that I had some concerns about the evidence of Mr Fatouras but ultimately preferred his evidence to that of Mr Dondas about which I also expressed reservations. Further, the evidence in relation to the cost of rectification of the accepted items was generally unsatisfactory as set out in my earlier Reasons. I note that although the claim in respect of a number of the items was successful that it failed in relation to the rectification works allegedly caused by the mortar staining in respect of which the amount claimed was $60,166.13 – more than 50% of the total claim of $113,578.54 once the claim for recovery of the planning appeal costs was abandoned.

21. It was also submitted by Mr Riegler that this case was particularly complex as expert witnesses were required to give technical evidence, and it involved complex questions of law including the concept of future detriment. However, I accept the submission by Mr Gilligan that none of this is unusual for a building dispute where it is to be expected that there will be some expert evidence where a claim concerns allegedly defective works. In fact the number of items in dispute were relatively few in terms of what might be considered to be a typical building dispute. Similarly, it is not uncommon for matters before the tribunal where the parties are legally represented to involve submissions on legal issues and this, of itself, it not sufficient reason for me to exercise my discretion under s109(2).

22. In the alternative, the applicant seeks costs from the date of each of the offers – 1 and 9 February 2005. I accept that the offer of 1 February is in the nature of what is commonly referred to as a *Calderbank Offer* but I cannot be satisfied on the evidence before me that the applicant has done better than that offer. The applicant has indicated in a further affidavit of Mr Fatouras sworn on 25 August 2005, that it has incurred costs in the amount of $18,832.19 and disbursements of $9,147.95 since 1 February 2005. However, no supporting material was exhibited to the affidavit, and exception to its late service on the day prior to this costs hearing was quite properly taken by Mr Gilligan on behalf of the respondent. In my view it was for the applicant to prove that it had incurred those costs (not for the respondent to elicit the detail under cross examination) and that the award of damages was greater than the offer to settle for $40,000.00 inclusive of costs. The applicant has failed to do this. Further, I do not consider that a *Calderbank Offer* has any more weight than being another matter to take into consideration under s109(3)(e) in determining whether to exercise my discretion under s109(2) (*HFK Cement Rendering v Mina* [2005] VCAT 134). Even if I could be satisfied the total award was greater than $40,000.00 inclusive of costs, it would not have persuaded me to exercise my discretion under s109(2). The applicant could have taken the necessary steps to protect itself on costs by making an offer that complied with ss113 and 114 of the Act but failed to do so.

23. Similarly I am not persuaded that I should have regard to the oral offer made on day two or three of the hearing. It clearly does not constitute a Calderbank offer.

The only evidence in relation to the offer was that of Mr Dondas under cross-examination and that only related to the figure of $20,000.00. I am not aware whether that was the extent of the offer and no evidence in relation to it was given on behalf of the applicant.

24. I also note that that the applicant did not comply with the directions of 5 July 2005 requiring it to file and serve any affidavit material in support of its application by 26 July 2005 until 12 August 2005. The respondent was required to file and serve its affidavit material in reply by 12 August 2005 (or some 20 days after receipt of the applicant's material) and did so on 19 August 2005, one week after receipt of the applicant's material. This is a further example of the manner in which the applicant has conducted this proceeding to the disadvantage of the respondent.

25. I am therefore not satisfied on the material before me that I should exercise my discretion under s109(2) and make an order for costs in favour of the applicant. I have also considered the somewhat creative submission by Mr Gilligan that as the applicant did not do as well as its offer of 1 February 2005 the applicant should pay the respondent's costs. He was unable to refer me to any authorities in support of this unusual submission and it is rejected. I will therefore make no orders as to costs.

DEPUTY PRESIDENT C AIRD