VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1025/2011

Catchwords: Costs, sections 109, 112 *Victorian Civil and Administrative Tribunal Act* 1998, indemnity costs, offer of compromise

APPLICANT	Anjina Nair
RESPONDENT	CDD Building Construction and Import Pty Ltd (ACN 105 696 295)
JOINED PARTY	Gungor Gunes
BEFORE	Member R. Buchanan
HEARING TYPE	Costs hearing
DATE OF HEARING	11 February 2014
DATE OF ORDER	14 February 2014
	Nair v CDD Building Construction and Import Pty Ltd (Domestic Building) [2014] VCAT 145

ORDER

The respondent must pay the applicant's costs, including reserved costs, on the County Court scale on a party-party basis to 22 June 2012 and thereafter on a solicitor-client basis, to be assessed by the Victorian Costs Court in default of agreement.

MEMBER R. BUCHANAN

APPEARANCES:

For the Applicant	Mr R Harris of counsel
For the Respondent	Ms K Chong, solicitor
For the Joined Party	Mr P Adami, solicitor

REASONS FOR DECISION

Introduction

1 This proceeding was brought by a home owner, seeking damages from the builder who had constructed her home. For its part, the builder defended the proceeding, joined one of its sub-contractors to the proceeding and sought an indemnity and damages from him.

2 When the matter was heard, I found in favour of the applicant home owner and in favour of the respondent builder in its claim against the sub-contractor. I reserved liberty to apply on the question of costs. The applicant home owner has now applied to the Tribunal for an order for her costs. The application was opposed by the builder.

Power to award costs

3 This Tribunal's power to award costs is discretionary and is set out in section 109 of the V*ictorian Civil and Administrative Tribunal Act* 1998. The power is not general and is heavily circumscribed. The clear legislative intent behind these provisions, namely that an award of costs in the Tribunal should be the exception, not the rule, has been frequently pointed out.[1]

4 The approach to be taken by the Tribunal in considering whether to exercise its discretion under section 109 was considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd*, [2] where he said [3] :

> The Tribunal should approach the question [of costs] on a step by step basis, as follows –
>
> i. The prima facie rule is that each party should bear their own costs in 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 section 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] it considers relevant to the question.

5 Section 109(3) of the *Victorian Civil and Administrative Tribunal Act* 1998 sets out the matters about which the Tribunal must be satisfied before it makes a cost order.

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[1] *Stonnington CC v Blue Emporium Pty Ltd* [2004] VCAT 144, *Gresham v Bass Coast SC* [2004] VCAT 153
[2] [2007] VSC 17
[3] at [20]

The applicant's application for costs

6 The applicant argued that a number of the matters referred to in section 109(3) were relevant to her application. She relied on facts set out in an affidavit sworn by her solicitor, Patrick Lennon, on 28 November 2013. The builder proffered no evidence and did not dispute the matters to which Mr Lennon had deposed.

Section 109(3)(a)(i)

7 This section says:

> 109(3)(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the preceding by conduct such as:
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse.

8 Mr Lennon deposed in his affidavit that the builder failed to comply with Tribunal orders on a number of occasions:

(a) The builder failed to give a document setting out a summary of its position to the applicant on the business day prior to the compulsory conference in the proceeding, or at all, in breach of the order of 23 February 2012.

(b) The builder failed to serve its amended points of defence by 5 July 2012, as was required by the order of 24 May 2012.

(c) The builder failed to serve a list of documents by 16 October 2012, as was required by the order of 14 August 2012.

(d) The builder failed to serve witness statements by 4 February 2013, as was required by the order of 25 October 2012.

(e) The builder failed to serve its list of documents by 16 February 2013, in breach of the order of 7 February 2013.

(f) The builder failed to serve its witness statements by 25 February 2013, as was required by the order of 7 February 2013.

(g) The builder failed to serve an affidavit of documents by 15 March 2013, as was required by the order of 13 March 2013.

(h) The builder failed to serve an amended witness statement of Mr Ahmet Cagin and an expert report by 22 April 2013, as was required by the order of 18 March 2013.

9 The builder did not dispute the applicant's evidence, which I accept and did not advance any excuse for its actions. I find that the builder did fail to comply with orders of the Tribunal without reasonable excuse.

Section 109(3)(a)(iv)

10 This section says:

109(3)(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the preceding by conduct such as:

(iv) causing an adjournment.

11 Mr Lennon deposed in his affidavit that the builder caused three adjournments:

(a) On the day of the compulsory conference on 24 May 2012, the builder advised that it would seek to amend its defence, join other parties and potentially make a counterclaim and, as a result, Senior Member Levine vacated the scheduled hearing of the proceeding.

(b) When the matter first came on for hearing on 18 March 2013, the proceeding was adjourned after the first day of hearing because of the failure by the builder to file and serve key documents.

(c) The builder's application for joinder was adjourned by reason of the builder's lateness and delay and the builder was ordered to pay costs of an aborted directions hearing.

12 The builder did not dispute the applicant's evidence, which I accept and did not advance any excuse for its actions. I find that the builder did cause the adjournments alleged by Mr Lennon.

Section 109(3)(a)(v)

13 This section says:

109(3)(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the preceding by conduct such as:

(iv) attempting to deceive another party or the Tribunal.

14 Mr Lennon deposed in his affidavit that the builder, in a letter dated 22 January 2013 seeking a second compulsory conference, misrepresented that the applicant had breached an order made by the Tribunal on 25 October 2012.

15 The builder did not dispute the applicant's evidence, which I accept and did not advance any excuse for its action. I find that the builder did attempt to deceive the Tribunal.

Section 109(3)(a)(vi)

16 This section says:

109(3)(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the preceding by conduct such as:

(vi) vexatiously conducting the proceeding.

A proceeding is conducted in a vexatious way "… if it is conducted in a way productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging".[4]

17 In my view, the builder did conduct the proceeding in a vexatious manner. I am led to that in conclusion by the following matters:

(a) Mr Lennon deposed in his affidavit that, at the compulsory conference on 24 May 2012 the builder announced for the first time that it would seek to join parties to the proceeding and would amend its defence. Before the date of the conference, the builder had had sufficient time in which to attend to those issues. The effect of the builder's announcement was to render the conference pointless.

(b) Much of the behaviour described in the earlier paragraphs amounts to vexatiously conducting the proceeding.

18 The builder did not dispute the applicant's evidence, which I accept and did not advance any excuse for its actions. I find that the builder did conduct the proceeding in a vexatious manner.

Section 109(3)(c)

19 This section says:

> 109(3)(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.

In general, "a substantial disparity between the strength of one claim and the weakness of its competitor must exist before an order for costs will be fair".[5] In my opinion, no such disparity existed between the positions of the parties in this proceeding. The applicant argued that the fact that she had succeeded in the majority of her claim showed that a substantial disparity had existed between her claim and the builder's defence. I do not agree. The mere fact of winning does not prove a disparity and it is possible that a litigant will enjoy success, even though the competing positions were relatively evenly balanced.

Section 109(3)(d)

20 This section refers to

> 109(3)(d) the nature and complexity of the proceeding.

The proceeding was self-evidently drawn out and complicated:

- There were a number of interlocutory applications.
- There were expert witnesses.
- There were disputed matters of fact.

[4] *Warrington v Vero Insurance Ltd* [2007] VCAT at [11]
[5] *Beasley v Victoria* [2006] VCAT 2044 at [20]

- Counsel appeared for both parties.
- The proceeding occupied four hearing days.

The builder's submissions

21 The builder formally opposed the applicant's application for costs and submitted that each party should bear their own costs, but beyond that presented no submission, argument or evidence.

Conclusions

22 I am satisfied that it is fair to order that the builder should pay the applicant's costs of this proceeding, having regard to:- my finding that the builder conducted the proceeding to the builder's disadvantage; and the nature and complexity of the proceeding.

The builder's offer

23 On 22 June 2012 the applicant wrote to the builder making an offer of settlement. I have been provided with a copy of the letter. The offer in the letter complied with sections 113 and 114 of the *Victorian Civil and Administrative Tribunal Act* 1998. The letter offered to settle the proceeding on the basis that the builder pay to the applicant $115,000 inclusive of costs. The builder did not accept the offer and the result ultimately obtained by the applicant was not more favourable to the builder than the offer contained in the letter.

24 Relying on section 112 of the *Victorian Civil and Administrative Tribunal Act* 1998, the applicant, sought indemnity costs from the date of the offer.

25 Section 112 of the *Victorian Civil and Administrative Tribunal Act* 1998, says as follows:

> (1) This section applies if –
>
> (a) a party to a proceeding ... 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.

26 By asking for indemnity costs the applicant was in effect submitting that in the present case, the words "all costs incurred" should mean indemnity

costs. This Tribunal's interpretation of these words has varied. The Tribunal has held the words to mean costs on a solicitor client basis [6] and costs on an indemnity basis [7]. That variation is not surprising, in view of the very wide discretion conferred on the Tribunal by section 112(2).

27 The object of section 112 is to provide an incentive to settlement. In a case like the present, its nature and complexity made it likely that there would be an award of party-party costs against the losing party. In such a case, the risk of an award of solicitor-client costs is usually sufficient to give effect to the object of the section.

28 Indemnity costs are not usually given and for the Tribunal to make such an order there "… should exist special circumstances which lift the case out of the ordinary" [8]. In *Pacific Indemnity Underwriting Agency Pty Ltd v MacLaw No 651 Pty Ltd* [9] the Victorian Court of Appeal commented that, while there may be times when it is appropriate to award indemnity costs in the Tribunal's Domestic Building List, they would be exceptional.

29 When the issue of indemnity costs is raised, the comments on this issue in the judgement of Sheppard J. in *Colgate Palmolive Co and another v Cussons Pty Ltd* [10] are often cited. Commencing at page 233 of that judgment, His Honour set out some of the circumstances when one might depart from the normal practice of awarding costs on a party/party basis:

> In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the Court in departing from the usual course. That has been the view all judges dealing with applications for payment of costs on an indemnity or some other basis whether here or in England. The test has been variously put.
>
> … Most judges dealing with the problem, have resolved a particular case before them by dealing with the circumstances of the case and finding in it the presence or absence of factors which would be capable, if they existed of warranting a departure from the usual rule. But as French J said, in *Tetijo*, "the categories in which the discretion may be exercised are not closed"...
>
> Notwithstanding the fact that it is so, it is useful to note some of the circumstances which would be thought to warrant the exercise of the discretion. I instance the making of allegations of fraud, knowing them to be false and the making of irrelevant allegations of fraud… evidence of particular misconduct that causes loss of time to the Court and to other parties… the fact that the proceedings were commenced or continued for some ulterior motive… or in wilful disregard of known facts or clearly established law… the making of allegations

[6] *Tsiavis v Transport Accident commission* VCAT, unreported 26/11/2002
[7] *Duggan v MGS products Pty Ltd* [2001] VCAT 1764
[8] *Golem v Transport accident Commission No 3* (2002) 19 VAR 279
[9] [2005] VSCA 165
[10] 46 FCR 225

> which ought never to have been made or the undue prolongation of a case by groundless contentions…

30 Common to the examples cited by His Honour is an element of culpability or mala fides, which is absent in the present case. While the conduct of the builder in this proceeding was hardly perfect, it lacked the element of mala fides which would justify an award of indemnity costs.

31 Although this is not a case where indemnity costs are appropriate, it is appropriate to give effect to section 112 of the *Victorian Civil and Administrative Tribunal Act* 1998 by awarding costs on a more favourable basis than the usually awarded party-party costs. Accordingly, I will order that the builder pay the applicant's costs on the County Court scale, on a party-party basis up to the date of the applicant's offer on 22 June 2012 and thereafter on a solicitor-client basis.

The joined party

32 The builder succeeded in obtaining an award of damages against the joined party. The builder has not, however, sought a cost order against the joined party and I will therefore make no cost order against the joined party.

MEMBER R. BUCHANAN