VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D666/2006

CATCHWORDS

Costs – offer of compromise – offer to pay 'agreed costs or as determined and/or assessed by the tribunal' – whether offer certain and enforceable – whether indemnity costs should be ordered

APPLICANTS	Baba Afireen Hafis Preena, and Wawage Millika Dap Preena
RESPONDENT	Pryda Developments Pty Ltd t/as Pryda Homes
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs hearing
DATE OF HEARING	4 May 2010
DATE OF ORDER	12 May 2010
CITATION	Preena v Pryda Developments Pty Ltd (Domestic Building) [2010] VCAT 645

ORDER

1 Under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 being satisfied the orders of 15 April 2010 contain an accidental slip or omission I order the respondent to pay the applicants the further sum of $4,740. Accordingly I substitute for order 1 of the orders of 15 April 2010

> The respondent shall pay the applicants the sum of $17,778.12 forthwith.

2 The respondent shall pay the applicants interest of $1,378.91

3 There are no orders as to costs for the period from 21 July 2008 up to and including 15 December 2009.

4 The applicants must pay the respondent's costs including reserved costs of this proceeding from and including 16 December 2009 on a solicitor/client basis. In default of agreement such costs are to be assessed by the Victorian Costs Court on County Court Scale 'D'.

5 I certify for Counsel at $3,300 per day.

6 The orders of 15 April 2010 are stayed from and including 4 May 2010 until its costs are agreed or assessed with the amount of such costs to be set off against the judgement sum.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Ms C Kirton of Counsel
For Respondent	Mr R Andrew of Counsel

REASONS

1 On 15 April 2010 I ordered the respondent builder to pay the applicant owners the sum of $13,038.12, a little more than 20% of their claim of $62,612.93. In the first paragraph of my reasons ('the earlier decision') I observed:

> Litigation is fraught with difficulties and building and construction litigation, in particular, is expensive. In this case, the costs I anticipate the parties have incurred seem to be completely lacking in proportionality to the amount of any possible award of damages.

2 Both parties apply for their costs of the proceeding. The builder relies on an offer of compromise dated 16 December 2009 and the owners rely on clause 8 of the terms of settlement dated 1 December 2006. The owners also apply for an order under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') for an amending order requiring the building to pay the applicants the further sum of $4,740. This application is opposed by the builder.

The application under s119

3 Mr Andrew of counsel for the builder submits that I am functus officio and unable to order payment of this sum. I do not agree. The test as to whether a slip or omission was accidental was discussed by Walker SM in *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463 at [6] where after discussing various authorities as to the interpretation of the so-called 'slip rule' he said at [6]

> The section cannot be used as a substitute for an appeal. It is there to fix a mistake that has been made and it must be a mistake such that, had it occurred to me at the time I would not have made it. I would have picked it up and fixed it at once.

4 I am satisfied this is something which I simply overlooked in finalising my decision. Having found the terms were enforceable, any payments outstanding under the terms are due and payable to the owners.

5 In my earlier decision I found the terms were an accord conditional and that the owners could elect to sue on the terms. In other words, enforce the terms of settlement. The terms had been varied by an exchange of correspondence between the parties' lawyers finalised on 23 May 2007. One of the varied terms was as set out in paragraph 3 of the builder's lawyer's letter to the owners' lawyers on 16 May 2007:

> Our client will either provide landscaping to the value of your clients' legal costs from the front of the house to the fence line or alternatively will pay your client $2,370.00 in 60 days and $2,370.00 in 90 days.

6 The owners' claim for payment of this sum is clearly set out in paragraph 17.3 of their Points of Claim, and was included in the opening[1] and final submissions[2] filed on their behalf.

7 Mr Preena has deposed in his affidavit affirmed 20 May 2008, and stated in his witness statement dated 29 September 2009[3] that sum has not been paid[4]. Although he was not cross-examined about this during the hearing, I did not hear any contrary evidence from the builder nor was this raised as an issue on its behalf.

8 Accordingly, I will amend my order under s119 to provide for payment of the additional sum of $4,970 by the builder to the owners.

Interest

9 In clause 8 of the terms of settlement the parties agreed that the owners would be entitled to obtain an order for 'any statutory interest which has accrued from the date of these terms and the date of the order'. Counsel for the owners submitted they are therefore entitled to interest on the judgement sum from 1 December 2006. Counsel for the builder submitted they are not entitled to interest on the judgement sum insofar as it relates to the cost of rectification works as they have not yet paid to have the works carried out. He conceded that if I was minded to make the order under s119 they would be entitled to interest on the additional sum of $4,740 but only from the date on which it was due under the varied terms – 90 days from 23 May 2007. As I said during the costs hearing, this has to be correct. The builder could not be liable for interest on a sum which was not included in the original terms of settlement.

10 On my calculations 90 days from 23 May 2007 is 21 August 2007. Accepting that counsel's calculations are otherwise correct, noting they were not disputed by counsel for the builder, I will order the builder to pay to the owners interest of $1,378.91

21/8/07 to 31/8/08	376 days @ $1.56 (12%) =	$ 586.56
1/9/08 to 22/2/09	175 days @ $1.53 (11%) =	$ 250.25
23/2/09 to 15/4/10	417 days @ $1.30 (10%) =	$ 542.10
		$1378.91

11 I am not prepared to make any order for interest otherwise. The terms clearly anticipated a summary judgement order for payment of the cost of rectification works as assessed by the expert appointed under the terms. As discussed in my earlier reasons the expert failed to perform the specified task, and in all the circumstances, it would, in my view be unfair to order the builder to pay interest for the period from the date of execution of the

[1] At [41]
[2] At [10]
[3] At [15(e)]
[4] At [9] where he deposes to $4,780 having not been paid which I accept is a typographical error

terms to the date of judgement particularly where the amount ordered is significantly less than the amount claimed by the owners. With the additional $4,970 the amount recovered by the owners is $17,778.12 which is approximately 28% of their claim of $62,612.93. Further, the owners have not yet incurred the cost of carrying out the rectification works.

COSTS

The owners' application for costs

12 The owners rely on clause 8 of the terms of settlement dated 1 December 2006 which provides:

> 8. If the Respondent does not comply with these terms of settlement the Applicant may apply to the List to reinstate the proceedings and obtain an order for the agreed sum and the amount which is determined by the architect in accordance with Clause 3 hereof plus costs of reinstating the action and obtaining the order (to be fixed by the List) plus any statutory interest which has accrued between the date of these terms and the date of the order.

13 It was clearly the intention of the parties that if the builder failed to carry out the agreed works the architect appointed under the terms would determine the cost of carrying out the works, and the owners could then apply to the tribunal to obtain summary judgement for that amount, interest and costs. However, as discussed at length in my earlier reasons, the architect failed to carry out the specified task. He did not determine the cost of carrying out the works, nor were these costs determined by MP Cordia & Associates, quantity surveyors who costed a scope of works quite different to that contemplated by Mr Brandrick.

14 This was not a simple process of reinstating the proceeding and obtaining summary judgement. There have been no less than four amendments to their Points of Claim – making five in total, since the proceeding was reinstated. Although the terms provide for the appointment of an architect to determine the cost of the works, the owners engaged directly with Mr Brandrick (through their lawyers) without any reference to the builder. When Mr Brandrick indicated he was unable to provide the costings himself, MP Cordia, the quantity surveyor was engaged seemingly without any reference to the builder.

15 Accordingly, I find that the builder is not obliged to pay the owners' costs pursuant to the terms, and in considering their application for costs I must have regard to s109 of the VCAT Act, and the builder's offer of compromise

Costs from the date of reinstatement to the date of the builder's offer of compromise

16 Both parties seek their costs on a party/party basis, the owners on County Court Scale 'C' based on the judgement sum, and the builder on County Court Scale 'D'. As I have found the owners were entitled to sue on the

terms I am only concerned with the costs of the proceeding from the date of reinstatement.

17 The proceeding was reinstated, by consent, on 21 July 2008 because of the builder's failure to comply with its obligations under the terms as varied. The approach to be taken by the tribunal in considering whether to exercise its discretion under s109(2) was considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where he said at [20]:

> "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 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.

18 Although possibly inconvenienced by the manner in which the owners conducted the reinstated proceeding up to 16 December 2009 I am not satisfied the builder was disadvantaged or suffered any prejudice. Its expert report was not provided to the owners until 11 December 2009 and its offer of compromise not made until 16 December 2009. These are matters which were entirely within its control.

19 As I said in my earlier reasons *'the costs I anticipate the parties have incurred seem to be completely lacking in proportionality to the amount of any possible award of damages'*. In the circumstances, and in particular having regard to the numerous amendments made by the owners to their Points of Claim during this period, and the adjournments of the hearing whilst they obtained the costings which they should have had at the date of reinstatement, I am not satisfied it would be fair to make any order for costs for the period from 21 July 2008 to 16 December 2009.

The builder's offer of compromise

20 The builder seeks an order for its costs to be paid on an indemnity basis from 16 December 2009 – the date of its offer of compromise. The owners contend the builder's application for costs should be dismissed because the offer did not comply with the provisions of ss112-114 of the VCAT Act.

The builder's costs up to 16 December 2009

21 On 16 December 2009 the respondent made an Offer of Compromise under ss112-115 of the VCAT Act:

> 1. The respondent will pay the applicants the sum of $26,500 ("the settlement sum") in full and final satisfaction of the Applicants' claims in this proceeding.
> 2. The Respondent will pay the Applicants' costs as agreed between the Respondent and the Applicants or in default of agreement as determined and/or assessed by the Tribunal.

3. This offer is open for acceptance until (and including on) 2 January 2010;

4. Should this offer be accepted by the Applicants, the settlement sum referred to in clause 1 hereof is to be paid within 30 days of acceptance of the offer and the costs provided for in clause 2 hereof shall be paid within 30 days of agreement or determination and/or assessment by the Tribunal.

5. This offer is made without prejudice save as to costs.

6. This offer may only be accepted by signed notice of acceptance from the Applicants in accordance with s114(6) of the *Victorian Civil and Administrative Tribunal Act* 1995 [1998] ("the Act")

7. If this offer is not accepted and the Applicants obtain an order, or orders from the Tribunal, not more favourable than this offer, then the Respondent shall produce this offer on an application that the Applicants pay all costs incurred by the Respondent after making this offer pursuant to section 112(2) of the Act.

22 The owners' lawyers acknowledged receipt of this offer of compromise on 21 December 2009. On 13 January 2010 the owners made an offer of compromise in identical terms save that the settlement sum was $40,000.

23 Section 112 of the VCAT Act provides:

(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 them 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.

24 Counsel for the owners submitted that the builder's offer is uncertain because the scale on which costs were to be assessed has not been specified.

The offer simply provides that the builder will pay the owners' costs either as agreed, or as determined and/or fixed by the tribunal. Because a scale has not been specified the owners were not able to properly assess the value of the offer being made, nor is the tribunal able to satisfy itself under s112(1)(c) that 'the orders made by the Tribunal are not more favourable to the other party than the offer.'

25 I find this a curious submission, which I reject. The settlement amount has been clearly specified. It is not a lump sum amount so there is no presumption that it includes costs. Under s112(3) the tribunal is required to 'take into account any costs it would have ordered on the date the offer was made'. In considering this I must have regard to s109 of the VCAT Act which provides that each party must bear their own costs of a proceeding unless the tribunal is minded to exercise its discretion under s109(2) and make an order for costs having regard to the factors set out in s109(3). Most importantly, the tribunal must be satisfied it is fair to exercise its discretion, and in doing so must have regard to the parties' conduct of the proceeding.[5]

26 I have not made an order for costs for the period up to the date of the offer. However, the builder offered to pay the owners' costs as agreed or otherwise as determined and/or assessed by the tribunal. Whilst it might seem desirable for a scale to be nominated in an offer, failure to do so does not render it unenforceable. If the offer had been accepted and costs had not been agreed, the owners could have applied to the tribunal to determine the appropriate scale and then to assess the costs. The owners had the certainty of an order for costs in their favour, contrary to any expectation they could otherwise have had considering the provisions of s109(1). Their understanding and acceptance of this is clearly demonstrated by their offer dated 13 January 2010 which as I noted above, was in identical terms to the builder's offer except for the amount of the settlement sum.

On what basis should costs be assessed?

27 The builder seeks its costs on an indemnity basis. The owners contend that if I find the offer of compromise is effective I should exercise the tribunal's discretion and make no order for costs, or alternatively, if any order for costs is made it should be on a party/party basis on County Court Scale 'C' as the judgement sum is less than $20,000.

28 A consideration of the numerous decisions which have been made under s112 reveals that there is no hard and fast rule as to how costs should be assessed where an order for costs is made under s112.

29 Whilst I agree with counsel for the builder that 'all costs' should be given its literal meaning: 'all' not 'some', s112(2) grants the tribunal a wide discretion to determine the basis upon which to order costs – it provides an entitlement for an order for all costs unless the tribunal orders otherwise.

[5] *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20]

30 In support of their submission that there should be no order as to costs, the owners rely on *Wharington v Vero Insurance Limited* [2007] VCAT 124 where the tribunal considered whether in circumstances where Mr Wharington had previously entered into terms of settlement which he had failed to honour, Vero could have any confidence that he would comply with the terms of the offer of compromise if accepted. However, this is a quite different situation. Although the builder failed to carry out the agreed works set out in the terms he did pay the $3,500 as required. Mr Pearce of the builder gave evidence at the initial hearing about his difficult, personal circumstances which had led to the failure of the builder to carry out the agreed works. There is absolutely no evidence that the builder would have failed to pay the settlement sum had the offer been accepted. Further, I understand the builder owns a number of properties in the Bendigo area.

31 Alternatively, the owners submit any order for costs should be on a party/party basis as discussed by SM Walker in *Paleka v Suvak* [2000] VCAT 58 at [30] where he said:

> Generally, party-party costs should be awarded. Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party-party costs if they are unsuccessful. Solicitor / client costs are ordered when the party against whom the order for costs has been made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy. That is, the circumstances justify a harsher order than even solicitor / client costs

32 He went on to say at [31]

> I think the foregoing represents the general thrust of the various authorities referred to but it is not intended to express any hard and fast rule. In each case it is for the Tribunal in its unfettered discretion to decide what order is appropriate in the circumstances of that particular case.

33 I am also mindful of the recent comments by Ashley JA in *Velardo & Anor v Andonov* [2010] VSCA 38 at [47(i)]:

> The offer foreshadowed an application for solicitor and own client costs. Such an order is the frequent, but by no means the inevitable, concomitant of a successful *Calderbank* offer. Section 112(2) creates, on the other hand, a prima facie entitlement to payment 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 - <u>although the Tribunal would be empowered to allow costs on a more favourable basis.</u> [emphasis added]

34 In this case I think it is appropriate to order the owners to pay the builder's costs on a solicitor/client basis from 16 December 2009 when it made a

very reasonable offer to pay them $26,500 – approximately 33% more than the judgement sum (as amended).

35 Although the owners have obtained an order for payment of $17,778.12 it is helpful to reflect on the judgement sum in the context of the owners claim:

Item	Claimed	Allowed
Cost of rectifying defects from the original terms (the schedule 1 items)	$27,436.35	$11,200.00
Half of the costs associated with the appointment of the expert under the terms	$ 5,005.78	$ 637.50
+ Owners' legal costs in accordance with varied terms	$ 4,740.00	$ 4,740.00
+ Reimbursement of additional costs for air conditioning	$ 8,757.00	nil
+ Cost of rectification of additional defects (the schedule 2 items)	$16,673.80	$ 1,200.62
	$62,612.93	**$17,778.12**

36 In relation to the schedule 1 items, the scope of works costed by Mr Cordia was generally not in accordance with the scope contemplated by the terms or by Mr Brandrick, and for this reason his costings were not accepted.

37 Schedule 2 contained eight additional items including the airconditioning which has been noted separately above. Of these, an allowance for rectification was only made in respect of two of the items – the others either having been conceded by Mr Brandrick following the view as not being defective, or which I was not satisfied were defective. A large part of the schedule 2 costings was the removal and replacement of the driveway at a cost of $12,590.08. Not only was this item pursued by the owners, even though their expert evidence confirmed the driveway was not defective, they failed to file a copy of Mr McLennan's report prepared in May 2009.

38 It was submitted by counsel for the owners that they had relied on their expert advice, in good faith and that any failings by their experts should not be visited on them. If the owners have any concerns about their expert advice that is a matter between them and the experts. They are not matters for which the builder should be penalised.

39 In the circumstances of this proceeding I consider it appropriate to adopt the approach set out by Walker SM in *Paleka v Suvak* and order the owners to pay the builder costs on a solicitor/client basis from 16 December 2009. In default of agreement such costs should be assessed having regard to County Court Scale 'D' which I consider appropriate having regard to the amount of the owners' claim and the complexity of the legal issues.

40 The builder has requested I certify for counsel's fees at $3,300 per day which in the circumstances of this proceeding I consider appropriate.

STAY OF ORDERS OF 15 APRIL 2010

41 The builder has applied for a stay of the orders of 15 April 2010 nunc pro tunc until its costs are assessed, on the basis that its costs should be set-off against the judgement sum. I accept that it is probable that the builder's costs, once assessed, will be significant. I am unable to say whether they will exceed the judgement sum, but in the circumstances consider a stay is appropriate but only from 4 May 2010, the date on which the application was made. It could have been made at the conclusion of the hearing, or immediately after my earlier decision was handed down. The application for a stay was not made until the commencement of the costs hearing. I do not consider it appropriate to grant a stay nunc pro tunc.

DEPUTY PRESIDENT C. AIRD