

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. W76/2014

**CATCHWORDS**

*Property Law Act 1958 Part IV –co-owned land - order for sale – costs of proceeding - generally parties pay their own costs - Victorian Civil and Administrative Tribunal Act 1998 – S.112 - offer of compromise - order less favourable to offeree than terms of offer – offeror’s prima facie entitlement to an order for costs unless tribunal otherwise orders - whether the tribunal should “otherwise order” - must be something about the circumstances of the case to justify departing from the order contemplated by the section*

<b>APPLICANT</b>	Anatole Riabczenko
<b>RESPONDENT</b>	Henri Riabczenko
<b>JOINED PARTY</b>	Valentina Riabczenko
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Costs Hearing
<b>DATE OF HEARING</b>	11 December 2015
<b>DATE OF ORDER</b>	15 December 2015
<b>CITATION</b>	Riabczenko v Riabczenko (Building and Property) [2015] VCAT 2025

**ORDER**

1. Order that the Respondent pay the Applicant’s costs of this proceeding, including any reserved costs, from 23 September 2014, save for any costs related to the directions given in Chambers on 29 October 2014, such costs if not agreed to be assessed in accordance with the County Court scale on the standard basis by the Victorian Costs Court.
2. Direct that Wilckens Roche, Solicitors:
  - (a) pay to the Applicant \$20,000 from the sum of \$40,000 held by them pursuant to the order made on 23 October 2015;
  - (b) retain the balance of \$20,000 pending determination of the Applicant’s costs by the Victorian Costs Court; and
  - (c) disburse the said balance to the Applicant up to the amount of any assessment of the said costs by the Victorian Costs Court and if that is less than the said sum of \$20,000, to pay the balance to the Respondent.

3. Liberty to apply to the parties and to Wilckens Roche, Solicitors.

## **SENIOR MEMBER R. WALKER**

### **APPEARANCES:**

For the Applicant      Mr P. D. Trevorah, Solicitor

For the Respondent    In person

## **REASONS FOR DECISION**

### **Background**

1. This proceeding, which was determined on 16 April 2015, related to a co-owned dwelling house registered in the names of the parties (“the Property”). The Applicant had sought a sale of the Property and a division of the proceeds which I ordered. The directions concerning the sale included an order that the Solicitor charged with its conduct should pay to the Respondent the sum of \$18,643.00 from the net proceeds of sale before they were divided.
2. The Applicant now seeks an order for payment of his costs of the proceeding. The ground of the application is that he made an offer of settlement to the Respondent which was more favourable to him than the order that was made.

### **Hearing**

3. The application for costs came before me for hearing on 11 December 2015. Mr P. Trevorah, Solicitor, appeared on behalf of the Applicant and the Respondent appeared on his own behalf.
4. The application was supported by three affidavits by Mr Trevorah setting out the background of the matter and why it was suggested that the order that was made in the proceeding was less favourable than the offer the Respondent rejected. No material was filed on behalf of the Respondent, although he made submissions as to the orders that he considered ought to be made.
5. After hearing from the parties I informed them that I would provide a written decision after considering the submissions made.

### **The offer**

6. The offer of settlement relied upon was made on 23 September 2014. It purported to be made pursuant to section 113 of the *Victorian Civil and Administrative Tribunal Act 1998* and was said to be in settlement of both

the claim and counterclaim. It adopted the terms of an earlier offer made to the Respondent's former solicitor, which was attached to the offer, and offered the Respondent the choice of two alternatives made in that offer, with the following alterations:

- “(a) in relation to option (a) therein, being the buyout option, the purchase price of the Applicant's one half interest is to be fixed at 45% of the Property's current market value, determined in the same way as set forth in the previous offer, rather than 50% thereof; and
  - (b) in relation to the option (b) set forth therein the Applicant shall receive 45% of the net proceeds of sale, as described therein, and the Respondent/counterclaimant 55% thereof – rather than there being an equal division of the said net proceeds of sale, as defined therein.”
7. The offer proceeded to say that both parties would bear their own costs and that the two alternatives were mutually exclusive. The offer was said to be open for acceptance for a period of 14 clear days after receipt by the Respondent and if not so accepted, would thereafter automatically lapse and be unavailable for acceptance.
8. The offer was not accepted by the Respondent. The effect of the order finally made in the proceeding was that he was to have an amount of \$18,643 from the net proceeds of sale before the balance was equally divided.

### **The Act**

9. The relevant provisions of the Act pursuant to which this offer purported to have been made are as follows:
- “S.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 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.”

10. By section 114 (2) an offer must be open for a minimum period of 14 days.
11. I am satisfied that the offer was in accordance with sections 112 to 114, both inclusive. The next matter then to be determined is whether or not the orders made by the Tribunal in the proceeding were or were not more favourable to the Respondent than the offer.

**Was the offer more favourable?**

12. Following the making of the order the Property was sold by auction to the Respondent for a price of \$729,000.00. Mr Trevorah deposes in his first affidavit that the costs of the sale were as follows:

Agent’s commission	\$9,940.91
Advertising	\$1,385.00
GST	\$ 994.09
Solicitor’s costs	<u>\$1,235.00</u>
Total costs of sale:	<u>\$13,555.00</u>

13. In his first affidavit, Mr Trevorah submitted that the share of the Respondent pursuant to the orders made was \$376,365.50, which he said was half of the net proceeds of sale plus the additional amount to be paid the Respondent of \$18,643.00. However on the figures supplied, I calculated the Respondent’s share at \$367,044 as follows:

Sale price	\$729,000.00
less costs of sale	<u>\$ 13,555.00</u>
Balance for distribution	\$715,445.00
less amount payable to the Respondent	<u>\$ 18,643.00</u>
Balance to be divided equally	\$696,802.00
less Applicant’s share	<u>\$348,401.00</u>
Respondent’s share	\$348,401.00
add additional amount to be paid	<u>\$ 18,643.00</u>
Amount to be paid to the Respondent	<u>\$367,044.00</u>

14. Mr Trevorah submitted that if the Respondent had accepted the offer to receive 55% of the net proceeds of sale he would have received an amount of \$393,494.75 instead. I checked that calculation and arrived at the same figure. As a result, Mr Trevorah submitted that the outcome of the proceeding for the Respondent was not more favourable than the offer. On the above figures it would seem that he would have been \$26,450.75 better off if he had accepted the offer.

15. In his second affidavit, Mr Trevorah deposes that the actual net proceeds of sale after allowing for adjustment of outgoings was \$717,870.16. It does not seem to me that this makes any difference in terms of the comparison of the two situations because the relativity would be the same.
16. It cannot be assumed that, if the offer had been accepted and a sale effected at the time the offer was made, these figures would have been the same. The market might have been different. The expenses of sale might have been less if the parties had cooperated in appointing an estate agent and solicitor. However I think it is clear enough that, unless the Property had sold for a much lower price, the Respondent would have been better off accepting the offer. In effect, he was being offered an extra 10% of the value of the Property in exchange for his entitlement, which I assessed at only \$18,643.00.
17. As a consequence, by s.112(2), the Applicant, as the party who made the offer, is entitled to an order that the Respondent, as the party who did not accept the offer, pay all his costs incurred after the offer was made "...unless the Tribunal orders otherwise." The question then is, should I order otherwise?

**"Otherwise order"**

18. The onus of persuading the Tribunal that it should exercise its discretion to "otherwise order" is on the party who did not accept the offer. There must be something about the circumstances of the case to justify refusing the order contemplated by the section (see *Paleka v. Suvak* [2000] VCAT 58 at para.19; *Pizer: Annotated VCAT Act* 5<sup>th</sup> Ed. Para 112.100 and the cases there cited).
19. The Respondent defended his decision not to accept the offer on the ground that he thought that it was unreasonably low, considering the amount of work that he had done on the Property. He told me that he considered that he had expended in excess of \$150,000.00 on it. Certainly, if he thought that the offer was too low that would be a reason for him not to have accepted it. However the comparison that I have to make is between the value of the offer and the actual outcome of the case, not what the Respondent hoped that it would be.

**The Respondent's application for costs**

20. No application was filed and served by the Respondent seeking an order for his costs. Nonetheless, he said that he sought such an order. Although he represented himself at the hearing he had sought the advice of solicitors from time to time and it seems that it was these costs that he was seeking to recover. How and in what circumstances these costs were incurred is not apparent from the Respondent's submissions.
21. The Respondent pointed out that there was non-compliance by the Applicant with an order of the Tribunal that I made on 12 September 2014 when I directed that the Applicant file and serve points of claim by 13

October 2014. On 14 October 2014 the Respondent telephoned the tribunal to complain that no points of claim had been received. He was invited to put his complaint in writing and request a compliance hearing. However no compliance hearing was listed because, on 20 October 2014, the points of claim were received. The Respondent then requested additional time for the filing of this points of defence and this was granted by an order in Chambers made 29 October 2014. The non-compliance appears to have been minor and does not appear to have caused any expense to the Respondent. However I should exempt from any costs order that I might make in the Applicant's favour, any costs relating to the order made on 29 October 2014.

22. The Respondent pointed out that he was partly successful in that it was ordered that he should receive the sum of \$18,643.00 from the net proceeds of sale before the division with the Applicant. However the offer made to him by the Applicant contemplated a greater award than that in his favour.

### **Conclusion as to costs**

23. I cannot see any basis upon which I should make an order that the Applicant pay any part of the Respondent's costs. I am also not satisfied that there is anything about the circumstances of this particular case that should cause me to depart from the general rule established by the section that the Respondent should pay the Applicant's costs from the making of the offer, which was on 23 September 2014. The Applicant is therefore entitled to an order in those terms.
24. I see no reason to make any order concerning any costs incurred before 23 September 2013. By s. 109(1) of the Act, parties pay their own costs unless it is fair to make an order that another party pay them. In the present case both parties benefited from the order for sale and, apart from the provisions of section 112, the costs of obtaining the order should not be visited on one party at the expense of the other unless for good reason and no good reason has been demonstrated here.

### **Other matters**

25. The Respondent said on several occasions that he was dissatisfied with the amount of money that he had actually received. The documents exhibited to Mr Trevorah's affidavits from the solicitors handling the conveyance are confusing and I cannot see how the figures are arrived at. I ordered that an amount of \$40,000 be retained from the proceeds of sale pending the determination of the respective applications for costs. My calculation of the amount that the Respondent ought to have received before adjustments of outgoings is set out above. From that figure there would have to be deducted the Respondent's half share of the \$40,000 that has been retained. If the Respondent is dissatisfied with the solicitor's explanation as to the amount that he received that is a matter that he should pursue through other avenues.

26. Some confusion has arisen over the deduction by the solicitor of the \$18,643.00 from the Applicant's share of the proceeds of sale. I have been asked to make a ruling on that but it is not the function of the tribunal to interpret its own orders. The order is in force according to its terms and cannot be altered except to correct a slip or omission pursuant to section 119 of the Act.
27. The relevant part of the order is in the following terms:
- “As soon as practicable after receipt of the balance of the purchase price the Solicitor shall apply the proceeds of sale as follows:
1. pay to the Agent any commission, advertising, auctioneer's fees and other disbursements owing to him for the marketing and sale of the Property;
  2. pay to the Solicitor any reasonable costs and disbursements for the conveyance of the Property and anything done by him pursuant to this order;
  3. pay to the Respondent the sum of \$18,643.00;
  4. divide the balance equally between the parties.”
28. Quite obviously, the order provides that the amount paid to the Respondent is to be taken from the proceeds of sale before the division between the parties and that is what ought to have occurred. It was apparent during argument that the Respondent was dissatisfied with that, and said that it meant, in effect, that he was paying one half of this sum to himself. However the amount awarded was for improvements that he had made to the Property and since he was a part owner, he shared in the benefit of those improvements. It was therefore appropriate that he should share the cost.
29. The amount of \$40,000 held by the solicitors, Wilckens Roche, has been taken equally from the shares of both parties. Since I have refused the Respondent's application for costs and made an order for costs in favour of the Applicant, it follows that the Applicant's one half share should be returned to him and the other half representing the share of the Respondent should be retained until costs are assessed. To ensure that such an assessment occurs within a reasonable time I will reserve liberty to apply.

### **Orders to be made**

30. There will be an order that the Respondent pay the Applicant's costs of this proceeding from 23 September 2014, such costs if not agreed to be assessed in accordance with the County Court scale on the ordinary basis by the Victorian Costs Court, save for any costs related to the directions given in Chambers on 29 October 2014. Save as aforesaid, will be no order as to costs.
31. I will direct that Wilckens Roche, Solicitors, pay to the Applicant \$20,000 from the sum of \$40,000 held by them pursuant to the order made on 23 October 2015 and retain the other \$20,000 pending determination of the

Applicant's costs by the Victorian Costs Court. They may then disburse the funds to the Applicant up to the amount of any assessment and pay any balance to the Respondent.

**SENIOR MEMBER R. WALKER**