VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP69/2016

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 - application for costs - domestic building dispute – s.112-114 – offer of compromise – whether offer made complies – offer to be interpreted literally – whether more favourable than order - regard to amount of costs that would have been ordered - meaning – Calderbank offer – whether failure to accept offer unreasonable – how assessed - s.109 – relative strengths – how assessed - both parties partially successful - following set-offs substantial sum awarded to the applicant - relevant considerations.

APPLICANT	Sightway Constructions Pty Ltd (ACN 165 522 136)
RESPONDENTS	Kosala JayaJayasinghee and Jeanne JayaJayasinghee
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing
DATE OF HEARING	5 September 2018. Submissions received by 9 October 2018
DATE OF ORDER	12 November 2018
CITATION	Sightway Constructions Pty Ltd v JayaJayasinghee (Building and Property) [2018] VCAT 1754

ORDER

Order that the Respondents pay the Applicant's costs of the proceeding including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court on the standard basis.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant	Ms J. Johnston, Solicitor
For Respondents	Mr A. Thapliyal, Solicitor

REASONS

Background

1. This proceeding was a claim by the Applicant ("the Builder") against the Respondents ("the Owners") seeking an order for payment of amounts that were said to be due pursuant to a major domestic building contract. The Owners denied that the Builder was entitled to payment of the sums claimed and counterclaimed for damages for breach by the Builder of the building contract.

2. The proceeding was heard over five days, with a substantial break in the middle, and a decision was given on 26 April 2018 that the Owners pay to the Builder $88,364.70. Costs were reserved for further argument and the Builder now seeks an order for payment of its costs of the proceeding.

The application for costs

3. The application for costs came before me for hearing on 5 September 2018. Ms J. Johnston, solicitor, appeared on behalf of the Builder and Mr A. Thapliyal, Solicitor, appeared on behalf of the Owners. After hearing Ms Johnston, I gave directions for the filing and service of further written submissions by both parties and ordered that upon receipt of those, I would determine the application on the papers. Pursuant to these directions, submissions were subsequently received by 9 October 2018.

4. The primary application by the Builder was for a special order for costs on the basis of an offer of settlement that it made following the first day of hearing. In the alternative, it seeks an order for costs pursuant to the general power of the Tribunal to award costs.

Offer of settlement

5. The hearing commenced on 15 May 2017. There was an on-site inspection and it was then adjourned part heard and directions were given for the Owners to file and serve further expert reports and particulars of loss and damage. Directions were also given for the Builder to file and serve further expert reports in reply.

6. The hearing was fixed to resume on 27 September 2017 but that date was vacated due to the unavailability of witnesses. The proceeding eventually came back before me for hearing on 6 February 2018 with a further four days allocated.

7. In the meantime, on 19 May 2017, in a letter from the Builder's solicitor to the Owners' solicitor, the Builder made an offer to the Owners in full settlement of its claim, interest and costs. The relevant part of the letter was as follows:

"…our client is prepared to settle the claim, counterclaim, costs and interest on the following basis:

1. Your client makes payment of $90,00.00 (sic.) to our client.
2. Payment is to be made within 30 days of acceptance of this offer.
3. This offer is open for a period of 14 days from the date of service of this offer.
4. If the offer is accepted, acceptance is to be made in writing.
5. This offer is subject to the parties entering into Terms of Settlement.
6. This offer is made on a without prejudice basis in accordance with Section 113(1)(b) of the *Victorian Civil and Administrative Tribunal Act* (Vic)1998.
7. If this offer is not accepted and the Applicants obtains an order or orders from the Tribunal, which are more favourable than this offer then the Applicants shall produce this offer on an application that the Respondent pay all the costs incurred by the Applicant after making this offer pursuant to Section 112(2) of the Act.

In the alternative, this offer is made in accordance with the principles set out in *Calderbank v. Calderbank* [1975] 3 All ER 333." (sic.)

8. The offer was not accepted and the Builder now seeks to rely upon the provisions of ss. 112 to 114 of the Act which, where relevant, are 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 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."

"113. Provisions regarding settlement offers

……

(4) If an offer provides for the payment of money, the offer must specify when that money is to be paid."

"**114 Provisions concerning the acceptance of settlement offers**

(1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.

(2) The minimum period that can be specified is 14 days."

Does the Act apply?

9. Ms Johnston submitted that the offer made complied with the requirements of sections 113 and 114 and that, taking into account interest up to the date of the offer and an order for costs that I would have made at the time of the offer, the offer was more favourable to the Owners than the order that was made in the proceeding.

10. The manner in which the amount awarded was calculated is set out in the final paragraph of the reasons for decision. A significant component of the amount awarded was interest at the contract rate of 14.5%. If I re-calculate the award as at the date upon which the offer was made, the final figure is reduced from $88,364.70 to $79,112.77.

11. That is $10,887.23 less than the amount of the offer. It is not possible to say that the offer was more favourable to the Owners than the order made unless I conclude that the costs that would have been ordered in favour of the Builder at the time of the offer would have been $10,887.23 or more.

12. In her submission, Ms Johnston set out the costs that she submitted would have been awarded to the Builder as follows:

(a)	Application fee to the Tribunal	$ 1,073.40
(b)	Daily hearing fee 15 May 2017	$ 87.90
(c)	Expert witness fees, including attending the hearing on 15 May Expert witness fees, including attending the hearing on 15 May	$11,102.00
(d)	Solicitor's fee for appearing on the first	$ 4.491.20

	day of hearing	
(e)	Appearance at the directions hearing 18 August 2016	$ 2,296.00
(f)	Appearance of compulsory conference 5 July 2016	$ 4.491.20
(g)	Copy Tribunal books (5 copies) approx..	$ 1,500.00
		$ 25,041.70

13. In addition, she said that there would have been legal costs incurred by the Builder for preparation for the hearing, instructions and preparation of Tribunal books, instructions and preparation of witness statements and witness statements in reply, perusal of witness statements and experts' reports from the Owners, taking instructions in preparation for the compulsory conference, instructions and preparation of Points of Claim, perusal of Points of Defence and Counterclaim, instructions preparation of Defence to Counterclaim, instructions and preparation of consent orders for 18 March 2016 and 9 December 2016, instructions and preparation of offers of compromise on 5 and 19 May 2017, correspondence, review and consideration and skill care and responsibility.

14. She said that it was clear that, if costs are added to the amount the Builder would have been awarded, the total would have been well in excess of $90,000.00. On the basis of the figures that she has supplied, that would seem likely.

15. Mr Thapliyal submitted that, in order to rely upon the presumption as to costs provided for in s.112(2), there must be strict compliance with the requirements of sections 112 to 114. I accept that submission, although I do not think that the word "strict" adds anything. If the offer does not meet the requirements of the relevant provisions the Tribunal has no discretion to ignore or waive any non-compliance and apply the presumption.

16. He submitted that the offer was not within the regime established by those sections for the following reasons:

    (a) The amount the Builder offered to accept is stated to be "$90,00.00". He said that that was uncertain and unintelligible and required the Owners to speculate as to what the amount was.

    (b) Because the offer was subject to the parties entering into terms of settlement, the parties were required to agree upon the content of the terms of settlement before there was any requirement to pay money. The offer was incapable of acceptance until the contents of the terms of settlement were known. Further, as a result of that, the date for the payment of the money was at large, notwithstanding that a date was specified in the offer, because the payment would not be made until the agreement was concluded.

(c) The Builder had not demonstrated that an order for costs would have been made in its favour at the time the offer was made.

17. I think that the first of these submissions is opportunistic and unrealistic. Although the scheme of the Act must be followed, the figures appearing in paragraph 1 of the offer are a clear typographical error, since there is no such figure as $90,00.00. The presence of a comma after the first two numerals coupled with the amount of the claim indicate that the figure of $90,000.00 was intended and I think that is how any recipient of the offer would have interpreted it.

18. As to the third submission, s.112(3)(a) refers to any costs that the Tribunal would have ordered. The provision is directed to the amount of costs that the Tribunal would have ordered rather than the costs order that the Tribunal would have made (*Metricon Homes Pty Ltd v. Sawyer* [2013] VSC 518 at para 38). Since the Tribunal must, in applying this section, make that assessment without regard to any facts that became known after the offer was made and so without the benefit of any findings of fact, it would not be possible to apply the criteria set out in s.109(3). The only consideration in determining whether to make an order for costs would be the fact that one party was entitled to receive what was offered. I think that the intention of the legislation is that the Tribunal should assume for the purpose of applying s.112(3)(a), that an order for costs would have been made.

19. However, I think that Mr Thapliyal is correct in saying that making the offer subject to the parties entering into terms of settlement without specifying what those terms were took it outside the scheme of the Act. The contents of the terms of settlement were necessarily part of the offer and the recipients of the offer were required to know what it was that they were to accept or reject.

20. Since the offer that was made does not fall within s.112, the application for costs must be brought under the Tribunal's general power to award costs under s.109 of the Act.

Power to award costs

21. The general power of the Tribunal to award costs is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which, where relevant, as in the following terms:

> *"***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 subsection (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.

……"

22. As to how this power should be exercised, in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 Gillard J said (at para 20 et seq.):

"20. In approaching the question of any application for costs pursuant to s.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."

23. His Honour added (at para 22):

> "22. Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule."

Submissions

24. In the application of this section, argument before me focused primarily on 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, and the nature and complexity of the proceeding.

25. As to "any other matter the Tribunal considers relevant", Ms Johnston sought to rely upon the offer that she made as a Calderbank offer.

The relative strengths of the parties' claims

26. Ms Johnston submitted that there was no basis in fact or law for the Owners' contentions that the Builder had not reached base stage, as that term had been defined in the contract, or that the Builder had repudiated the contract. I think that puts it too highly. There was substantial evidence either way on the question whether base stage was reached or not. However, I agree that the interpretation of the contract adopted by the Owners was untenable and the repudiation argument followed from that.

27. She said that the Builder succeeded in its claim for interest and, although it failed on its loss of profits claim, that was due to the lack of expert evidence tendered. That is true, but from the Builder's poor performance of the contract to date, I concluded that it was unlikely that it would have made a profit had it been able to complete the project.

28. Ms Johnston also pointed out that the Builder was partially successful in its claim for variations. Again that is true although, as Mr Thapliyal pointed out, the largest variation in regard to Unit 3, including the claim for the additional concrete, failed.

29. Mr Thapliyal said that the Owners also succeeded in the claim for concrete overspill, the non-removal of the tree and the non-payment of the building permit fee. That is true, although they were minor items. He acknowledged that the Builder succeeded on the issues of failing to construct the drainage retention system, suspension and termination, the validity of the Builder's notice and the fact that the Builder was found not to be in substantial breach.

30. Mr Thapliyal submitted that the disputed issues were found in favour of the parties in relatively equal proportions and that the damages awarded to the Builder were significantly below the amount claimed.

31. The biggest success that the Owners had was the failure of the Builder's claim for loss of profits of almost $135,000.00 which, in terms of value, was the major part of the claim. However, that was simply not proven and in view of the lack of evidentiary material filed or subsequently led to support that claim, I do not regard that as being a significant victory. Hence, although it may be correct that, arithmetically, the Builder only succeeded in 38% of claim, that does not reflect its level of success on the key issues that were argued in the case.

32. The amounts awarded to the Owners were modest. I do not think that it is accurate to say that findings on the issues in dispute were "evenly spread between the parties" as Mr Thapliyal urged.

33. In any proceeding, there will be successes and failures on various issues. A party will generally take every point that can be taken without necessarily expecting to succeed on them all. In determining the relative strengths of the parties' cases, it is important to focus on what the case was really about. In this case, it was the Builder's claim for the base stage, which is what triggered the dispute.

34. On that issue, the Builder succeeded. As a result, not only did the Builder recover the base stage payment but it also justified its termination of the contract which was the other major issue because, as a consequence of the success of the Builder on the termination issue, the Owners' counterclaim for $121,700.02 failed.

35. I think that the relative strengths of the parties' cases strongly favoured the Builder.

The nature and complexity of the proceeding

36. Ms Johnston submitted that the proceeding was complex as it included legal argument concerning matters of repudiation, termination of the contract and the interpretation of contractual terms.

37. Mr Thapliyal did not appear to dispute that the case was complex. However he submitted that complexity will rarely be enough in itself to justify an order for costs and I accept that that is the case (see *Solid Investments Aust. Pty Ltd v Greater Geelong CC* [2005] VCAT 244 at para 8).

38. Having regard to the amount of expert evidence led and the numerous issues of fact and law, I find that the case was complex and, although that is not in itself conclusive, it is nonetheless supportive of an argument that an order for costs would be appropriate.

Calderbank

39. The basis of an application for costs based upon a Calderbank offer of settlement is that there has been an unreasonable refusal of an offer of compromise.

40. In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298, the Court of Appeal, after considering the authorities, summarised the approach to be taken as follows (at paras 23 to 25) (citations omitted):

> "23 In our view, these competing considerations can be sufficiently accommodated by applying a test of (un)reasonableness. The critical question is whether the rejection of the offer was unreasonable in the circumstances. We see no justification for a more stringent test such as "manifestly" or "plainly" unreasonable.
>
> 24 Of course, deciding whether conduct is "reasonable" or "unreasonable" will always involve matters of judgment and impression. These are questions about which different judges might properly arrive at different conclusions. As Gleeson, C.J. said recently, "unreasonableness is a protean concept". But a test of reasonableness is, we think, entirely appropriate to the exercise of a discretion such as this."
>
> *Factors relevant to assessing reasonableness*
>
> 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:
>
> (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 an indemnity costs in the event of the offeree's rejecting it."

41. Ms Johnston submitted that the offer made satisfied all of these requirements and that, having regard to the outcome of the case, the refusal of the offer was unreasonable.

42. Mr Thapliyal said that the offer was not clear, precise and certain. I think that that is somewhat artificial. Whereas, in determining the applicability of s.12 of the Act, I had to take a literal approach, in assessing the reasonableness of the Owners' conduct in rejecting the offer I should adopt

a common sense approach. On a fair reading, it was clear from the letter from the Builder's solicitor that it was willing to accept $90,000.00 in full settlement of its claim costs and interest. If the Owners had any concerns as to what the Builder expected to be incorporated in the written terms of settlement that could have been clarified. The precise terms the Builder had in mind are not known but I can see nothing in the letter to indicate that the proposed terms of settlement would have been anything more than documenting the agreement reached. I am satisfied that the Owners had the opportunity to settle the proceeding at that time for $90,000.00 "all in".

43. At the time they received the offer the Owners knew that they had not paid for the base stage and, although they had complaints about defects, they had received the benefit of the Builder's work in that regard. The Owners' denial of liability on the claim for the base stage depended upon an interpretation of the contract that I found was not open.

44. As to whether the compromise was a substantial one, it included interest and costs which by then were known to be very substantial. In considering whether or not to accept the offer, the Owners ought to have been alert to the danger that a costs order might have been made at the conclusion of the hearing. However, for the purpose of considering a Calderbank offer, I cannot say that the Owners should, at that time, reasonably have assessed it on the basis that an order for costs would necessarily be made. Hence, the value of what the Builder was offering was dependent on something unknown to them at the time, that is, would such an order have been made?

45. I do not believe that I can conclude that the Owners acted unreasonably in refusing to pay an amount to the Builder that exceeded the amount that I found the Builder was entitled to, on the ground that, since it included costs, the offer was something that it would be unreasonable to refuse. They might well have looked at s.109(1) and concluded that, by giving up any claim for costs, the Builder was not adding anything of value to the offer.

Conclusion

46. Mr Thapliyal referred me to the following passages from the Tribunal's decision in *Zammit v. Home Construction and Design Centre Pty Ltd* [2013] VCAT 469 (at paras. 14 to 17):

> "14. Second, although the proceeding comprised complex engineering issues, I do consider that the proceeding as a whole was substantially more complex than many of the other domestic building disputes that come before the Tribunal. There was very little lay evidence in contest and the issues primarily focused on the structural integrity of the concrete slab. No conflicting evidence was adduced as to quantum and the hearing was concluded within four days.
>
> 15. In my view, the mere fact that the proceeding comprised some complex engineering issues does not, in itself, enliven s.109(3)(d) of the Act.

> 16. Third, given the technical issues in dispute, the litigation was largely driven by expert opinion. The Applicant was guided by his expert engineering consultant who unequivocally opined that the dwelling had to be demolished. This is not a proceeding where a litigant took a position against reasonable advice to the contrary or where critical findings of fact were found against the losing party.
>
> 17. Having regard to the above factors and in particular, that the breach of contract was ultimately proved, I do not consider that it would be fair to depart from s.109(1) of the Act and order costs for the period up to 22 December 2011."

47. It is unhelpful to refer to costs decisions made in the Tribunal's discretion in other cases involving different fact situations. In *Zammit,* the successful respondent was found to have been in breach of the contract and the applicant only failed because he had sought the cost of demolition and reconstruction of the dwelling instead of damages for the cost of rectifying the consequences of the respondent's defective workmanship.

48. As to the facts of the present case, in addition to the foregoing matters, Mr Thapliyal submitted that the Owners did not take positions contrary to advice, that there was some merit in their case, that they succeeded in proving a number of facts upon which their case was based and there were no critical findings of fact made against the Owners, whereas there were critical findings made against the director of the Builder, Mr Bandara, whose evidence I considered unsatisfactory in a number of respects.

49. It was not suggested that the Owners' case was baseless or that it lacked evidence or arguments to support it but it failed on the central issues. Also, the unsatisfactory aspects of Mr Bandara's evidence did not impact on the costs incurred at the hearing.

50. The Owners refused to pay a very substantial sum to the Builder on an interpretation of the contract that I found was not open. They then put the Builder to the considerable cost of bringing these proceedings.

51. Although it is unfortunate that this proceeding was not settled following the making of the settlement offer above, I must disregard the making of that offer for the reasons given.

52. Considering the nature and complexity of the proceeding and the relative strengths of the parties' cases, I think that it is fair to order that the Owners pay the Builder's costs of the proceeding including reserved costs. Costs will be on the standard basis. I see no reason to award costs on an indemnity basis as urged by Ms Johnston, nor is there any justification for

awarding costs only on the Magistrates Court Scale, as urged by Mr Thapliyal. If not agreed, the costs will be assessed by the Victorian Costs Court.

SENIOR MEMBER R. WALKER