VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D85/2013

CATCHWORDS

DOMESTIC BUILDING–COSTS–Section 109 *Victorian Civil and Administrative Tribunal Act 1998*–whether fair to order costs.

Section 112 *Victorian Civil and Administrative Tribunal Act 1998*–offer served by Respondent pursuant to ss 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998*–whether, alternatively, the Tribunal would have made an order under section 112 *Victorian Civil and Administrative Tribunal Act 1998* "otherwise" than an order entitling the Respondent to costs incurred after offer made–held that there were no circumstances for otherwise ordering.

APPLICANT	Tevans Properties Pty Ltd (ACN 122 584 785)
RESPONDENT	Claudio Ciro
WHERE HELD	Melbourne
BEFORE	Member A. Kincaid
HEARING TYPE	Costs Application
DATE OF HEARING	12 June 2015
DATE OF ORDER	29 September 2015
CITATION	Tevans Properties Pty Ltd v Ciro (Building and Property) [2015] VCAT 1544

ORDER

1. Having regard to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, and because it is fair to do so, the Applicant must pay the costs of the Respondent (including reserved costs, and costs of the costs hearing). In default of agreement within 28 days, they are to be assessed by the Victorian Costs Court, on a party and party basis on the County Court Scale until 5 October 2014, and thereafter on a standard basis on the County Court Scale.

OTHER MATTERS:

Certain costs that may have been incurred by the Respondent in the proceeding are those of Mr Bob Ring of Melbourne Acrylic Coatings Pty Ltd, and Mr Rob Simpson of Build Check Pty Ltd, who were not called by the Respondent to give evidence, nor were their reports tendered by the Respondent in evidence.

MEMBER A KINCAID

APPEARANCES:

For the Applicant	Mr M Dean of Counsel
For the Respondent	Dr P Bender of Counsel

REASONS

Background

1. The Applicant owns a property at Harkaway Road, Narre Warren North, Victoria (the "**dwelling**"). It constructed the dwelling as an owner-builder.
2. The Respondent performed rendering work upon the dwelling in 2012, pursuant to a contract evidenced by an exchange of emails between the parties in early 2012.
3. The Applicant purported to terminate the contract by email to the Respondent dated 9 January 2013. The Respondent did not return to site.
4. Each party claimed that the other had repudiated.
5. The Applicant claimed damages of $45,666. They were calculated by deducting from the total amount paid by the Applicant for the works, including alleged rectification of defective works ($106,366), the amount that the Applicant alleged should have been paid to the Respondent for the works pursuant to the Applicant's construction of the terms of a rates contract between the parties ($60,670).
6. The Respondent counterclaimed on a *quantum meruit* in the amount of $27,874.63. This was calculated by deducting from the alleged value of the works completed by the Respondent at the date of termination ($73,874.63 including GST), the monies paid by the Applicant to the Respondent ($46,000). The Respondent also put forward an alternative *quantum meruit* claim in the amount of $22,472.85.
7. I heard the proceeding over 6 days on 29-31 January 2014, and 15-17 April 2014. Final submissions were made on 20 June 2014.
8. By order dated 1 September 2014 2014, I ordered that the Respondent pay the Applicant the sum of $10,827.25,[1] with costs and interest reserved.
9. The order followed from my finding that the Applicant properly terminated the contract by email to the Respondent dated 9 January 2013, subsequent to the Respondent's repudiation of the contract.
10. By Consent Order of the Supreme Court dated 6 May 2015, the order made on 1 September 2014 was set aside, and substituted with an order that the Applicant pay $10,058.75 to the Respondent.
11. The Consent Order followed the filing in the Supreme Court by Counsel for the parties of a Joint Memorandum[2] to the effect that by the Applicant's

---

[1] Calculated by **deducting from the amount of $20,886** found to be due to the Applicant (made up of completion costs of $34,806, plus amount paid to the Respondent of $46,000, plus rectification costs of $750, less variations of $8,845 and less the value of the works calculated by reference to the contract rates ($51,825) **the sum of $10,058.75** found to be the balance of the value of the works due to the Respondent at the date of termination.

[2] Pursuant to paragraph 6.1 of the Supreme Court of Victoria *Practice Note No 9 of 2015*.

sending of the email to the Respondent dated 9 January 2013, the Applicant repudiated the contract.

12. The Supreme Court made a further order that the matter be remitted to the Tribunal to determine the question of costs in respect of the Tribunal proceeding.

13. The Respondent makes a claim for costs pursuant to sections 109 and alternatively pursuant to sections 112, 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**").

The law

14. Sections 109(1), (2) and (3) of the Act provide as follows:

109. **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 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.

15. It is apparent from the terms of section 109(1) of the Act, that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding. By section 109(2) of the Act, the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3).

16. In *Vero Insurance Ltd v Gombac Group Pty Ltd,*[3] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

> In approaching the question of any application to costs pursuant to section 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.

17. In summary, parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. In exercising its discretion to make such an order, the Tribunal will have regard to the matters set out in section 109(3), although that is by no means an exhaustive list of the things to be considered.[4]

18. It has been said that a “substantially successful party” in what was the Tribunal’s Domestic Building List (now the Building and Property List) was entitled to have a reasonable expectation that an award of costs would be made in his favour.[5] However it is now established that although such awards are commonly made in such cases, there is no presumption that they should be.[6]

19. A domestic building proceeding can be expensive. Experts’ reports are usually required. The discovery process in even a modest building dispute is usually arduous and costly, involving a large number of documents on both sides. Witness statements are usually ordered, and they are commonly drawn or settled by counsel. There are generally many factual issues

---

[3] [2000] VSC 117

[4] See *Martin v Fasham Johnson Pty Ltd* [2007] VSC 54 at [28].

[5] *Australian Country Homes v Vassiliou* (VCAT) 5 May 1999, unreported

[6] *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw* [2005] VSCA 165.

involved as well as legal issues, often requiring complex legal argument. The hearing will usually occupy several days. For these reasons, the "nature and complexity of the proceeding" is often submitted as the reason for making a costs order in favour of the successful party.

20. In each case, however, the question is whether it is fair in the circumstances of the particular case that a party be ordered to pay the costs of another party. Other than where an offer pursuant to section 112 of the Act falls to be considered (and it does in this case), the onus of establishing that is on the party seeking the order for costs. Since every case is different, reference to what occurred in other cases is of limited assistance.

Respondent's claim for costs of the proceeding

21. The Respondent seeks an order that costs of the proceeding should be awarded in its favour from the start of the proceeding. He relies upon the criteria set out in sections 109(3)(c), (d) and (e) of the Act, in support of its submission that it is fair to do so.

22. In regard to section 109(3)(c) of the Act, the Respondent submits that of the total amount of $45,666 claimed by the Applicant, he was wholly unsuccessful against the Respondent, save for assessed rectification costs of $750. On the other hand, he submits, the Tribunal awarded the Respondent $10,058.75 of his claim for $27,874.63.

23. I am satisfied that this outcome demonstrates that the claim of the Applicant, relative to the Respondent's claim, was relatively weak.

24. In respect of section 103(d) of the Act, the Applicant submitted that there were complex questions of fact and law in the proceeding, justifying an order for costs.

25. In respect of issues of the fact, I heard evidence from Mr Evans of the Respondent, and the following further witnesses called by Tevans:

    (a) Mr Murray Hamilton, Quantity Surveyor, an expert witness;

    (b) Mr Antony Croucher, Building Consultant, an expert witness; and

    (c) Mr Lachlan Byrne, the rendering contractor responsible for completing the works for Tevans following the termination of Mr Ciro, and for rectifying alleged defects in the work undertaken by Mr Ciro.

26. I also heard evidence from the Respondent, and the following further witnesses called by him:

    (a) Mr Richard Vaughan, Quantity Surveyor, an expert witness; and

    (b) Mr Mark Vincevic, a renderer who assisted the Respondent in carrying out the works.

27. In addition, I was required to consider a complex legal issue concerning the law of repudiation, in respect of which both parties' counsel made divergent submissions on the law.

28. I consider that there is merit in the Respondent's submission that section 109(3)(d) is enlivened. The need for expert opinion on the Applicant's allegations of defective works, and the challenges made by each party to the other's experts' opinion, contributed greatly to the need for over 6 days of hearing. Numerous experts reports were relied upon. The evidence at the hearing covered many complex technical issues, requiring experienced counsel to advance each party's case. The nature of the proceeding also required a transcript of the hearing to be made. I am in no doubt that the nature and complexity of this proceeding distinguished it from many other civil disputes heard in the Civil Division of the Tribunal.

29. I also accept the Respondent's submission that I should consider a further relevant factor within the meaning of section 109(3)(e) of the Act. That is, that given the modest amount of money involved, to refuse an order for costs would have the effect of depriving the Respondent of the fruits of complex litigation, where the Respondent has been successful to the extent that I have indicated. I think that this is also a matter that I may take into account when considering whether it is fair to make an order for costs.[7]

30. Having regard to these considerations, I find that it is fair to order that the Applicant pay the Respondent's costs of the proceeding.

Respondent's alternative claim for costs of the proceeding.

31. On 6 December 2013, the Respondent made a written offer to compromise the proceeding on the basis that both parties withdraw their claims, with each party to bear their own costs (the **"Offer"**).

32. The Offer was open for acceptance until 23 December 2013.

33. In the alternative to his claim pursuant to section 109 of the Act, and in reliance on the Offer, the Respondent seeks costs from 6 December 2013, on the grounds that it is entitled to such an order under section 112(2) of the Act.

34. Section 112 of the Act provides 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 113and 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.

---

[7] *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463 at [20].

(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.

35. It is always in a party's interest to make an offer of compromise pursuant to the provisions of the Act. This is because, if the final orders obtained by the offeree in the proceeding are not more favourable than the offer, and unless the Tribunal orders otherwise, the offeror becomes *prima facie* entitled to an order for the costs incurred by the offeror after such an offer was made.

36. This avoids the need for the party claiming costs to persuade the Tribunal, in the exercise its discretion, of the application of one of the required factors described in section 109(3) of the Act. Rather, the offeree must persuade the Tribunal that, in all the circumstances of the case, including those applying at the time the offer was made, the Tribunal should "otherwise order".[8]

37. The burden may be discharged where some feature of the case would make it unjust for a section 112 order to be made. Generally, it would need to be a feature which distinguishes it from other cases.[9]

38. I find that the Offer complied with the requirements of sections 113 and 114 of the Act.

39. I would not have awarded any costs to the Applicant on the day the that the Offer was made. I therefore find that the orders made by the Tribunal were not more favourable to the Applicant than the Offer, because the Applicant was ordered to pay $10,058.75 to the Respondent.

40. If an offer is made under section 112(1)(a), in circumstances where the party to whom the offer is made has no opportunity of weighing or assessing the offer, the Tribunal in the exercise of its discretion under section 112(2), may be minded to order "otherwise".[10] Relying on this statement of principle, the Applicant submits:

    (a) that paragraphs 17-19 of the Respondent's Defence and Counterclaim made no allegation that the Applicant had repudiated the building contract by his sending of the email dated 9 January 2013 (it will be remembered that it was only conceded by both parties, on appeal, that it was this email this caused the Applicant to repudiate);

    (b) that at the date of the Applicant's receipt of the Offer on 6 December 2013, there was still no allegation in the Respondent's Defence and Counterclaim that the Applicant had repudiated the building contract in this manner;

    (c) that between 29 January 2014 (the day of the hearing) and 5 March 2014 (the date of a further offer), no allegation had been made by the

---

[8] *Paleka v Suvak* [2000] VCAT 58 at [19].
[9] *Commisso v Transport Accident Commission* [2001] VCAT 417 at [43].
[10] *Transport Accident Commission v Coyle* [2001] VSCA 236 at [21-22];

Respondent that the Applicant had repudiated the building contract in this manner; and

(c) that the allegation that the Applicant repudiated the building contract in this manner became central to the Respondent's case for payment on a *quantum meruit*, which was only made expressly in the Respondent's Closing Submissions to the Tribunal, and before the Supreme Court.

41. I do not accept that the Respondent's Counsel did not allude to the email during his opening submissions on 29 January 2014. It was not possible for the parties to obtain a transcript of the hearing on 29 January 2014, due to a reported malfunction of the Tribunal's recording device that day. My own notes show that Counsel for the Respondent, Mr Sedal, opened the Respondent's case on 29 January 2014 on the basis that the Applicant repudiated the building contract when he "kicked [the Respondent] off the property". In my view, it should reasonably have been anticipated that support for this submission would be drawn from the terms of the email sent by the Applicant to the Respondent on 9 January 2013.

42. I note also that paragraph 18 of the Points of Defence and Counterclaim states that "on or about [Sunday] 6 January 2013 the Applicant refused both the Respondent and the Respondent's trades access to the Property". Paragraph 19 goes on to allege that this conduct (severally, and collectively with other conduct-the alleged failure to pay the balance of Progress Claim No 2) would be relied on by the Respondent as amounting to the Applicant's repudiation. I consider that the Applicant and his advisors would fairly have been left in little doubt, upon reading the Points of Defence and Counterclaim, that it would be argued by the Respondent that certain events from about 6 January 2013, and consistent with the terms of the email dated 9 January 2013 sent by the Applicant to the Respondent, had the effect of excluding the Respondent from the Applicant's property.

43. I therefore do not accept that the Applicant had "no opportunity of weighing or assessing the [Offer]". The Applicant was not prevented from making an intelligent assessment of the Offer, particularly with regard to the legal principles that were, subsequent to the hearing before me, agreed by both Counsel for the parties to be applicable. In this respect, I accept the submission of Dr Bender for the Respondent that the circumstances were distinguishable from those that appear to have been faced by the Respondent in *Transport Accident Commission v Coyle.*[11]

44. I have already determined that it is fair to order that the Applicant must pay the costs of the Respondent pursuant to section 109 of the Act. Had I not done so, I would have concluded that there is nothing in the circumstances that would have persuaded me to order "otherwise" than that the Applicant

[11] Ibid. fn 10 at [21]-[22]. The Court of Appeal found it unnecessary to exercise its own discretion in regard to the matters set out, having remitted the application for costs to the Tribunal for further hearing.

should pursuant to section 112(2) of the Act pay all costs incurred by the Respondent after the Offer was made.

45. The Respondent also made a second alternative claim for costs of the proceeding, based on a written offer dated 5 March 2014. The claim was not pressed by the Respondent with the force of the Offer. This written offer failed, however, to comply with section 113(4) of the Act, as it did not specify when payment of the Respondent's costs was to be made by the Applicant. By force of section 112(4) of the Act, the Second Offer therefore does not fall to be considered under section 112 of the Act. Given my findings above in respect of the Offer, I consider that is unnecesssary for me to consider further either this offer, or the *Calderbank* offer served by the Respondent on the same date.

46. I make the orders attached.

MEMBER A KINCAID