VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D512/2003

CATCHWORDS

Domestic building, costs, vexatious conduct, prolongation of proceeding, nature and complexity of proceeding, offers, ss 109(3) and 112 of the *Victorian Civil and Administrative Tribunal Act* 1998, "not more favourable", monetary and other considerations, offer inclusive of costs, indemnity or party-party costs, scale of costs.

APPLICANT	Grant Wharington
FIRST RESPONDENT	Vero Insurance Limited (ABN 48005297807) (previously known as Royal & Sun Alliance Insurance Australia Ltd) (Struck out from proceeding 22/9/06)
SECOND RESPONDENT	Steven and Athina Deriboklou
THIRD RESPONDENT	Boral Window Systems Pty Ltd (Released by virtue of order of 27/1/06)
FOURTH RESPONDENT	The Truss Works (Vic) Pty Ltd (Released by virtue of order of 27/1/06)
FIFTH RESPONDENT	Eliza Designs Pty Ltd (ACN 006 888 777) (Released from proceeding 15/12/05)
SIXTH RESPONDENT	Nepean Building Permits and Consultants (A Firm) (Released from proceeding 15/12/05)
SEVENTH RESPONDENT	James Sheedy (Released from proceeding 15/12/05)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	17 January 2007
DATE OF ORDER	31 January 2007
CITATION	Wharington v Vero Insurance Limited (Domestic Building) [2007] VCAT 124

ORDER

The Applicant must pay the costs of the Second Respondents of and from reinstatement of the proceeding on 16 May 2006. Such costs include reserved costs and the costs of and incidental to the application for reinstatement and directions on 16 May 2006 but specifically exclude costs of the day of the directions hearing of 2 May 2006, for which day there is no order as to costs. Costs are to be agreed by the Applicant and the Second Respondents, but failing agreement, are to be assessed by the principal registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr D. Pumpa of Counsel
For the First Respondent	Struck out from proceeding 22/9/06)
For the Second Respondents	Mr S. Smith of Counsel
For the Third Respondent	Released from proceeding 27/1/06
For the Fourth Respondent	Released from proceeding 27/1/06
For the Fifth Respondent	Released from proceeding 15/12/05
For the Sixth Respondent	Released from proceeding 15/12/05
For the Seventh Respondent	Released from proceeding 15/12/06

REASONS

1 On 23 October 2006 I ordered that the Applicant ("Mr Wharington") pay the Second Respondents ("Mr and Mrs Deriboklou") $74,415.64 and gave liberty to apply for costs. Mr and Mrs Deriboklou have applied for costs, which application is resisted by Mr Wharington. Mr and Mrs Deriboklou's application is for costs on an indemnity basis from reinstatement of the proceeding. "Costs on a full indemnity basis" was included in the prayer for relief of their points of claim filed subsequent to reinstatement dated 29 May 2006.

2 Both remaining parties filed and served written submissions on costs, and in the course of his submission Mr Wharington sought costs: "[if] opinion of Tribunal is that [an offer by Mr Wharington to Mr and Mrs Deriboklou of 7 August 2006] is more favourable [than the order for $74,415.64] then the Second Respondents to pay all costs incurred by Applicant after offer made."

TERMS OF SETTLEMENT

3 Mr and Mrs Deriboklou have not sought their costs incurred before reinstatement of the proceeding and Mr Smith of Counsel for Mr and Mrs Deriboklou stated that they consider their costs up to and including the settlement had been compromised under the Terms of Settlement dated 15 December 2005.

4 Mr Pumpa of Counsel for Mr Wharington submitted that the Terms of Settlement did not contemplate that the party seeking reinstatement would be entitled to costs other than for failure to pay an agreed amount. He drew my attention to clause 12 which entitles the innocent party to reinstate and seek the amount payable under the Terms of Settlement "together with interest and the costs of reinstating the VCAT proceedings and obtaining the said order." In contrast, when seeking recompense for other than payment of an amount due, clause 13 entitles the innocent party to reinstate "and seek monetary or other relief". Clause 13 applied because Mr Wharington failed to arrange for work to be done.

5 Mr Pumpa drew my attention to s102 of the *Magistrates' Court Act* 1989 which makes the distinction between monetary relief and costs, and the decision of the Federal Court in *Australian Performing Rights Assn v Pashilidies* [2000] FCA 1815. *Pashilidies* also deals with interpretation (in this case of the Federal Court Rules) where a distinction is drawn between "monetary relief" and costs. In the proceeding in hand there is no question of statutory interpretation and the only issue is what the parties meant by "monetary relief". If the intention was that the innocent party would be entitled to costs, it is unfortunate that both clauses were not drafted in the same manner. If, on the other hand, the intention was to deprive the innocent party of entitlement to costs, it could have been expressed

unequivocally. The drafting of clause 13 neither clearly includes nor clearly excludes entitlement to costs.

6 I conclude that the Terms of Settlement were silent as to costs of the reinstated proceeding and neither entitled a party to costs nor prevented costs from being ordered. The issue is therefore whether either remaining party is entitled to costs under the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act").

ENTITLEMENT TO COSTS

7 Section 109 of the VCAT Act provides:

> 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.

Alleged vexatious conduct of the proceeding

8 Mr Smith submitted that Mr Wharington vexatiously conducted the proceeding and/or unreasonably prolonged it by his "total disregard" of performing "his fundamental obligations under the Terms of Settlement" and then making "a vigilant effort … to resist fulfilling and abiding by the terms of settlement and the owners' enforcement of the same".

9 It was submitted by Mr Pumpa that the only conduct to be considered is the conduct after the proceeding was reinstated. I accept his submission that, from the date of reinstatement, there has not been any particularly blameworthy conduct of the proceeding by Mr Wharington.

10 I reject Mr Pumpa's submission that I may only have regard to conduct after the reinstatement of the proceeding. A reinstated proceeding is not a new proceeding, but a previously completed proceeding revived. It is reasonable that I should have no regard to conduct before the Terms of Settlement, because the parties agreed to compromise at that point. However I find that "the proceeding" referred to in s109 is the whole proceeding which has been before the Tribunal, not just the reinstated proceeding concerning enforcement of terms of settlement. It was Mr Wharington's breach of the Terms of Settlement alone that led to the necessity for the further hearing.

11 At paragraph 67 of *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813, Judge Bowman referred to *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 and said:

> …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.

12 Vexatious conduct in Bradto differed from conduct complained of here. In the hearings before Judge Bowman there were four days wasted. A hearing which took five days should have taken one. In Judge Bowman's words at paragraph 77*:*

> … the request for documents which [Bradto] made and which if brought back before me was almost as oppressive as what had gone before, and irrelevant material was again sought … I was satisfied that the State of Victoria had complied with the earlier order which had been made … yet here it was back before me again, arguing at inordinate length, in support of an oppressive demand for documents. In addition, it raised complaints and arguments of a highly technical and "nit-picking" nature".

13 Nevertheless, I find that Mr Wharington's conduct in entering Terms of Settlement and then breaching them without justification amounts to vexatious conduct of this proceeding and also the related proceeding, D175/2005. I repeat my observations at paragraph 8 of the Reasons of 23 October 2006 – the approach of Mr Wharington or Ms Taylor-Reed on his behalf to complying with the Terms of Settlement was "at best, cavalier."

Alleged prolongation of the proceeding

14 There is no evidence that the proceeding has been prolonged after reinstatement, but again, had Mr Wharington not breached the Terms of Settlement there would have been no need for a further hearing, and therefore the proceeding and D175/2005 have been prolonged by the need

to reinstate it and conduct an otherwise unnecessary hearing. I find the proceedings were prolonged by Mr Wharington's conduct.

Nature and complexity of the proceeding

15 This is a proceeding where the complexity of the dispute and the amount in dispute more than justified the need for legal representation for both parties, although that factor alone would not necessarily be sufficient to justify an order for costs. Moreover, the failure of Mr Wharington to comply with the Terms of Settlement added a level of complexity which justifies an order for costs in Mr and Mrs Deriboklou's favour. The difficulty they experienced when attempting to reinstate the proceeding without legal assistance demonstrated how important such representation was to them. This proceeding and D175/2005 were sufficiently complex to warrant orders for costs.

SUCCESSFUL DEFENCE OF SOME ITEMS BY MR WHARINGTON

16 As Mr Pumpa correctly submitted, once the proceeding was reinstated, Mr Wharington's defence of the claim was necessary and, in part, effective. There were items withdrawn at the commencement of the hearing, dismissed items, and items not allowed in full. These items were not trivial, being in excess of $25,000.00 when the order is compared with the Points of Claim.

OFFERS

Service of "quotation to carry out the work" of 25 July 2006

17 In the written submission on behalf of Mr Wharington, Mr Pumpa said:

> On 25 July 2006 the Applicant served a quotation to carry out the work in the sum of $64,397.00. The value of work determined by the Tribunal was $63,674 ie less than proffered by the Applicant. Had the owners accepted the sum put forward by the Applicant the rectification costs need not have been argued before the Tribunal, leaving only the issue of the Vero funds and other items which the Second Respondents either withdrew or did not succeed.

18 This "quotation" was filed as Mr Keith Dangerfield's expert witness statement and nothing in the document or the covering letter from the solicitors for Mr Wharington indicated that it was an offer capable of acceptance. In particular, there was no indication that the works could be dealt with under this report and other matters referred to the Tribunal for determination.

19 The report of 25 July 2006 was rapidly followed by another report of 10 August 2006, reducing the "estimate" or "quoted price" to $55,974.00. I do not accept that the document of 25 July 2006 is relevant to the question of costs. Both documents were evidence filed at the Tribunal in defence of the Mr and Mrs Deriboklou's counter-claim.

The offer of 7 August 2006

20 Solicitors for Mr Wharington sent a letter to solicitors for Mr and Mrs Deriboklou dated 7 August 2006 which included an offer, the relevant parts of which are:

> In full and final settlement of the abovementioned proceedings inclusive of interest and costs, our client is prepared to pay to your clients the sum of $74,397.00 on the following basis:
>
> 1. It is made 'without prejudice' within the meaning of section 113(1)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") and it is served in accordance with Part 4 of Division 8 of the Act.
> 2. Further or alternatively it is made without prejudice under reservation of our client's rights to rely on this offer on the question of costs;
> 3. Further or alternatively it is made in accordance with the principles contained in *Calder Bank* [sic] (1995) 3 All ER 333 and *Cutts v Head* (1984) 1 All ER 597;
> 4. This offer is open for acceptance until the expiration of a period of fourteen (14) days from the date of service of this offer on you;
> 5. This offer may only be accepted in writing;
> 6. Otherwise each of the parties shall bear their own costs;
> 7. If accepted payment of the sum of $74,397.00 will be made by way of instalment on the basis that:
>
>   a. Our client will pay the sum of $14,397.00 on the later of 1 September 2006 or within seven (7) days of written acceptance of this offer and the balance will be paid as follows:
>
>   b. $10,000.00 on 1 October 2006;
>
>   c. $10,000.00 on 1 November 2006;
>
>   d. $10,000.00 on 1 December 2006;
>
>   e. $10,000.00 on 1 January 2007;
>
>   f. $10,000.00 on 1 February 2007;
>
>   g. $10,000.00 on 1 March 2007;
>
> This offer is made in full and final satisfaction of both[*] VCAT proceedings inclusive of interest and costs and the Terms of Settlement.

The offer contained in the Applicant's witness statement

21 Paragraph 7 of the offer of 7 August 2006 was repeated at paragraph 28 of Mr Wharington's witness statement of 17 August 2006, with the exception

[*] That is, this proceeding and D175/2005.

that dates set out in 'b' to 'g' were not stated. Instead, the offer gave fixed periods of days after the first payment was due. The last payment was to be made 180 days after the first payment was due, that is, by 28 February 2007 at the earliest. There was no limit in the witness statement as to when the offer could be accepted.

Whether order "not more favourable" to Mr and Mrs Deriboklou than the offers

Offering to pay by instalments

22 Mr Smith submitted that for an offer to be a relevant offer under s112 of the VCAT Act, it should not be an offer to pay by instalments. I do not accept that this fact alone is necessarily fatal to the consideration of whether an order is not more favourable than an offer.

Monetary sum

23 It has been asserted for Mr Wharington that the Tribunal's orders were not more favourable than the offer, and therefore the onus falls on him of proving his assertion. Mr Pumpa argued that, if the offer had been accepted, it would have been equivalent to the Tribunal determining the proceeding on the date the offer was accepted and therefore interest on the unpaid sum of $10,000.00 would also have ceased on that date. Given the last payment of $10,000.00 was not to be made until 1 March 2007 I see no justification for such an assertion. Rather, to provide a true comparison between the order and the offer, interest on at least the outstanding $10,000.00 should be imputed from the date of the order to 1 March 2007. This would enable the last payment to be equated with the payment for the $10,000.00 forgone which would otherwise have been paid by Vero Insurance Ltd. It is also arguable that interest should be imputed to all sums outstanding after the date of the order. Both alternatives make the offer significantly less advantageous to Mr and Mrs Deriboklou than the order.

24 Mr Smith pointed out that the offer of 7 August 2006 was inclusive of interest and costs, whereas the order does not include costs. This is a matter to be taken into consideration. Even though Mr and Mrs Deriboklou conceded that they were not entitled to costs up to and including the Terms of Settlement, I have found that the complexity of the proceeding justified an award of costs from reinstatement. It is therefore possible that, had the matter settled with the exception of costs shortly after 7 August 2006, the Tribunal would have been persuaded to exercise its discretion in favour of awarding costs for that brief period to Mr and Mrs Deriboklou. This factor also militates against a finding that, in monetary terms alone, the order was not more favourable than the offer.

25 The offer in the witness statement did not make allowance for costs, and was made at a time when Mr and Mrs Deriboklou would have incurred even more costs.

26 As I said at the costs hearing, the present value of future money can be calculated by use of actuarial discounting. This step was not taken on behalf of Mr Wharington, and he has failed to prove that the order was not more favourable than the offer in amount, without other considerations.

Confidence that the proposed settlement would be honoured

27 Mr Smith submitted that the expression "not more favourable" means more than an arithmetic comparison of the amount offered and the amount ordered, and in this case, I agree.

28 Mr Smith also asserted from the bar table that Mr Wharington had still not paid Mr and Mrs Deriboklou, despite the order of 23 October 2006 that payment be made forthwith. The assertion was neither sworn nor relevant and is not taken into account.

29 Of more relevance is Mr Wharington's behaviour before the first offer was made. He had already entered terms of settlement with which he did not comply. Having been disappointed once, Mr and Mrs Deriboklou were justified in treating any offer by Mr Wharington with some degree of caution. The offer did not provide that if any payment were not made, the whole of the remaining sum would become payable and neither did it provide that if there were a default, Mr and Mrs Deriboklou would be entitled to enter judgement for the remaining sum. It follows that a possible outcome was to delay Mr and Mrs Deriboklou's entitlement to some or all of the amount due under the proposed terms of settlement until 1 March 2007 – the date upon which the last payment was to be made.

30 Even if the monetary sum were for an equal or greater amount than the amount ordered, these considerations would militate against a finding that the Tribunal's orders were not more favourable than the offer.

31 For the reasons given above, I find that there was no offer upon which Mr Wharington is entitled to rely to which s112 of the VCAT Act responded, or under the principles in *Calderbank v Calderbank* (1995) 3 All ER 333 and *Cutts v Head* (1984) 1 All ER 597.

TYPE OF COSTS

32 Justice Nettle said in the Court of Appeal decision, *Pacific Indemnity Underwriting Agency v Maclaw No* 651 [2005] VSCA 165:

> Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in Domestic Building List proceedings on an indemnity basis. But those occasions will be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the Supreme Court (General Civil Procedure) Rules 1996.

33 The learned author Williams said in his commentary on Rule 63.28(c) that indemnity costs are:

> … being reserved for cases where the losing party has engaged in unmeritorious or deliberate or high-handed or other improper conduct as to warrant the court showing its disapproval and at the same time preventing the successful party being left out-of-pocket.

34 Even in proceedings before courts where costs are purely discretionary and tend to follow the event, obtaining an order for indemnity costs is far from easy. As Deputy President Aird said in *Rosalion v Allianz Australia Insurance Limited* [2005] VCAT 541 the test for indemnity costs at the Tribunal should be even stricter than in the courts, but there is a discretion.

35 Mr Smith referred me to a number of authorities including *Ugly Tribe Co Pty Ltd v Sikola & Ors* [2001] VSC 189, where Harper J emphasised that indemnity costs are only awarded in special circumstances, which class is not closed. His Honour gave examples of cases where indemnity costs had been awarded including false allegations that the other party is guilty of fraud, irrelevant allegations of fraud, conduct causing loss of time to the Court or other parties, ulterior motive, contempt of court, wilful disregard of known facts or clearly established law and failure to discover documents the discovery of which would have shortened the trial or made it unnecessary. Mr Smith concentrated on the loss of time caused to Mr and Mrs Deriboklou and the Tribunal by Mr Wharington's breach of the Terms of Settlement, and while it is a factor that deserves consideration, it is ameliorated by Mr Wharington's partial success at the hearing.

36 Had Mr and Mrs Deriboklou's reinstated claim been, in practical terms, completely successful, it is likely that there would have been an order for indemnity costs. As this is not the case, I find that the appropriate order is for party-party costs.

SCALE OF COSTS

37 Counsel for both parties agreed that if I were against them on their other submissions, and I was inclined to order costs on a party-party basis, the appropriate scale would be County Court Scale D. I also consider that it is the appropriate scale.

DIRECTIONS OF 2 MAY 2006

38 Mr and Mrs Deriboklou made an unsuccessful application for reinstatement at a directions hearing on 2 May 2006, at which costs were reserved. As Mr Pumpa said, his client was represented unnecessarily on that day. However the eventual outcome was that the proceeding was reinstated and a substantial award was made against Mr Wharington. As Mr Smith submitted, had Mr Wharington fulfilled the terms of settlement, no costs need have been incurred. There is therefore no order for costs of the day of that directions hearing.

CONCLUSION

39 Mr Wharington must pay the costs of Mr and Mrs Deriboklou of and from reinstatement of the proceeding on 16 May 2006. Such costs include reserved costs and the costs of and incidental to the application for reinstatement and directions on 16 May 2006 but specifically exclude costs of the day of the directions hearing of 2 May 2006, for which day there is no order as to costs. Costs are to be agreed by Mr Wharington and Mr and Mrs Deriboklou, but failing agreement, are to be assessed by the principal registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN