VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1590/2017

CATCHWORDS

Costs hearing; Offer of Settlement, Sections 112, 113, 114 *Victorian Civil and Administrative Tribunal Act 1998*; whether offer compliant with requirements of s 114; Costs, Section 109 *Victorian Civil and Administrative Tribunal Act 1998*; discretionary considerations.

FIRST APPLICANT	Owners Corporation 1 PS611240X
SECOND APPLICANT	Owners Corporation 2 PS611240X
RESPONDENT	Anthony Brady
WHERE HELD	Melbourne
BEFORE	Senior Member S. Moraitis
HEARING TYPE	Costs Hearing
DATE OF HEARING	4 July 2018
DATE OF ORDER	30 July 2018
CITATION	Owners Corporation 1 PS611240X v Brady (Owners Corporations) [2018] VCAT 1204

ORDER

1. The application for costs is dismissed.

S. Moraitis
Senior Member

APPEARANCES:

For Applicants:	Mr P. Duggan, of Counsel
	Mr C. Philactides, Instructing solicitor

For Respondent:	Mr A. Schlicht of Counsel Ms N. Wilde, Instructing solicitor

REASONS

BACKGROUND

1 I heard the substantive claim of this proceeding on 21 and 22 February 2018. At the end of the hearing, I set a timetable for submissions which allowed the parties to file and serve submissions in accordance with the timetable, the last of which were due by 30 March 2018.

2 On receiving all submissions, I gave my decision in writing on 26 April 2018 and in my orders granted leave to the respondent to apply for a costs hearing no later than 17 May 2018.

3 The respondent ("Mr Brady") filed his application for costs together with the affidavit in support on 16 May 2018. The applicants ("the OC") filed an affidavit by Christopher Philactides, the OC's instructing solicitor, in response to the application on 14 June 2018.

4 The costs hearing came before me on 4 July 2018 and I reserved my decision, which I now provide in writing.

MR BRADY'S APPLICATION AND SUBMISSIONS ON COSTS

5 Mr Brady's application for costs dated 16 May 2018 is expressed as follows:

> Pursuant to paragraph 2 of the Tribunal's orders dated 26 April 2018, made following a two-day hearing held on 21-22 February 2018, the Respondent respectfully requests that the Tribunal make the following orders (sought in the alternate):
>
> ORDERS SOUGHT:
>
> 1. That the First Applicant and the Second Applicant are jointly and severally liable to pay the Respondent's costs of defending the proceeding in accordance with the County Court Scale on a standard basis, as agreed or assessed, from 5 December 2017, being the date of the Respondent's settlement offer made to the First and Second Applicants made for the purposes of sections 114 of the *Victorian Civil and Administrative Tribunal Act 1998.*
> 2. Any other order as the Tribunal thinks fit.

6 Mr Brady's application, together with his affidavit in support dated 16 May 2018, relies on the settlement offer contained in the letter dated 5 December 2017 (which I will not reproduce in these reasons) which essentially offered the following:

a) The OC agrees to withdraw the claim and consent to orders that the claim be struck out with no order as to costs.

b) Mr Brady agrees not to make an application that the OC pays his legal costs in defending the proceeding.

c) The offer remains open until "12:00pm on 19 December 2017".

7 The offer was rejected by the OC and the matter proceeded to compulsory conference at 9:30am on 19 December 2017 and to hearing on 21 and 22 February 2018.

8 On the basis of this settlement offer Mr Brady made this application for costs under section 112, 113 and 114 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act").

9 In his affidavit in support of the application dated 16 May 2018 Mr Brady outlines the sequence of settlement offers made by the parties. He refers to the offer dated 5 December 2017, which "pointed out that the umbrella claim is misconceived and had no legal basis and the door claim would also fail given the discretion of the tribunal and the fact that, inter alia, the door was in an isolated position, structurally sound and permitted remedial works to be completed on [his] balcony".

10 However, at the costs hearing on 4 July 2018, Mr Brady's counsel added a further basis for their costs claim by making an application for costs under section 109 of the Act. He submitted at the hearing that the OC brought their claim on multiple issues which were ultimately abandoned, the umbrella claim being the most obvious. He proceeded to outline other aspects of the OC's claim that were ultimately not prosecuted including the claims regarding:

a) the structural integrity of the door/doorway;

b) the invalidation/suspension/increase of the insurance premium;

c) the change of use of the lot causing a hazard to health/safety/security.

11 Mr Brady's counsel submitted that large parts of the OC's claim were withdrawn, not prosecuted or were supported by no evidence and that the OC, having a statutory duty to act in good faith, breached that duty. He maintained that Mr Brady gave the OC every opportunity to settle the proceeding and that the outcome of the proceeding was precisely as set out in his letter of 5 December 2017. Accordingly, Mr Brady's counsel submitted that he is entitled to his costs pursuant to sections 109 and 112.

THE OC'S SUBMISSIONS AS TO COSTS

12 In its written submissions dated 4 July 2018, the OC maintains that the Tribunal may only order costs in accordance with sections 109 and 112 of the Act and that the Tribunal's "default position" as to costs is that each party bear its own.

13 They argue that Mr Brady's costs application was made under section 112 of the Act, which creates a presumption that a party which makes a compliant settlement offer will be entitled to costs in certain circumstances. The OC submits that "[a]mong the several statutory preconditions to a s.112

cost entitlement is that the offeror's offer must comply with sections 113 and 114 of the Act".

14 The OC maintains that "s.114(1) of the Act requires that a settlement offer be open until the expiry of a specified period" and that s.114 (2) stipulates that the minimum period that can be specified is 14 days. They submit that "an offer that is open for less than 14 days is hence not a "settlement offer" for the purposes of s.112 of the Act".

15 The OC argues that Mr Brady's settlement offer dated 5 December 2017 was open for acceptance until 12:00pm on 19 December 2017, which they calculate as 13 days. The OC highlights that Mr Brady's settlement offer specifies "12:00pm" not once but three times throughout that letter.

16 In calculating the minimum 14 day requirement under s 112 of the Act, the OC relies on sections 44(1) and (6)(a) of the *Interpretation of Legislation Act 1984,* which provide that:

> 44(1) Where in an Act or subordinate instrument a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period…
>
> (6)(a) …a reference to midnight, in relation to a particular day, shall be construed as a reference to the point of time at which that day ends.

17 The OC maintains that Day 1 of Mr Brady's offer dated 5 December 2017 is 6 December and the offer remained open until 12:00pm on 19 December 2017. 12:00pm being midday, the OC maintains that the offer did not remain open for a minimum 14 days but rather "Mr Brady's offer closed 12 hours too early to be a valid offer for the purposes of s.114 and 112 of the VCAT Act". The OC submits that "12pm" is understood in general terms and in numerous instances by the Victorian Supreme Court to mean noon or midday.[1]

18 The OC further maintains that even if Mr Brady's offer had been compliant with the Act, there are powerful discretionary considerations which would weigh against the making of a costs order in favour of Mr Brady, which are the same as those which are considered in section 109 of the Act.

19 Even though Mr Brady's costs application was initially not brought under s.109 (this position changed at the hearing, where Mr Brady's Counsel included s.109 as an alternative basis for costs) the OC nonetheless addressed s.109 in its written submissions, where they maintained that:

a) there is no suggestion that the OC conducted the hearing in a way which unnecessarily disadvantaged Mr Brady;

b) there is no suggestion that the OC's conduct of the proceeding unreasonably prolonged it;

[1] *Daimleigh Pty Ltd v Brandi* [2002] VSC 327; *Tan v Russell* [2016] VSC 93.

c) "unusually for an unsuccessful party, [the OC's] claims were essentially vindicated in both fact and law *save only* for the Tribunal's exercise of its discretion to order no relief against Mr Brady";

d) the proceeding had no particular complexity (except possibly some issues which the Tribunal overtly or by implication found to ne unmeritorious or extraneous);

e) the OC complied with all VCAT directions and timetable whereas Mr Brady did not; and

f) the OC withdrew the umbrella claim well in advance of the hearing whereas Mr Brady raised numerous (potentially time-consuming) issues, expressly withdrew none of them and ultimately succeeded on only one of them.

20 Having anticipated Mr Brady's application under s.109, the OC invited the Tribunal to consider the preceding matters together with the following further matters:

a) the OC's 'without prejudice offer save as to costs' dated 19 December 2017 that Mr Brady simply reinstate the wall and the proceeding be struck out with no order as to costs;

b) the OC's 'open' offer dated 31 January 2018 unequivocally withdrawing the claim relating to the umbrella and repeating the offer of 19 December 2017; and

c) the Tribunal's several findings against Mr Brady on questions of fact, credit and law including:

(i) his clear breach of special rules 2.1(b) and 4 and model rules 3.3;

(ii) his 'fanciful' evidence that he honestly believed that he had the OC's approval to install the gateway; and

(iii) the finding that Mr Brady was imprudent in creating the doorway on the basis of a couple of conversations with fellow lot owners.

THE LAW

21 Mr Brady relies on sections 109, 112, 113, and 114 of the Act. They are:

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 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.

(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

(7) A power of the Tribunal under this section is exercisable by any member.

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

(1) An offer may be made—

(a) with prejudice, meaning that any party may refer to the offer, or to any terms of the offer, at any time during the proceeding; or

(b) without prejudice, meaning that the Tribunal is not able to be told of the making of the offer until after it has made its orders in respect of the matters in dispute in the proceeding (other than orders in respect of costs).

(2) If an offer does not specify whether it is made with or without prejudice, it is to be treated as if it had been made without prejudice.

(3) A party may serve more than one offer.

(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.

(3) An offer cannot be withdrawn while it is open for acceptance without the permission of the Tribunal.

(4) In deciding whether to give permission, the Tribunal may examine the offer, even if it was made without prejudice.

(5) If the offer was made without prejudice, a member of the tribunal who examines it for the purposes of subsection (4) can take no further part in the proceeding after determining whether or not to give permission.

(6) A party can only accept an offer by giving the party who made it a signed notice of acceptance.

(7) A party may accept an offer even though it has made a counter-offer.

FINDINGS

22 I find that Mr Brady's offer did not comply with the requirements of section 114 as it did not remain open for a minimum of 14 days. I am satisfied that the offer remained open until "12:00pm on 19 December 2017" which I

find amounts to 13 days and 12 hours. I am satisfied that "12pm" does indeed mean 'midday' or 'noon' and that Mr Brady's offer did in fact close 12 hours too early to be a valid offer for the purposes of sections 114 and 112 of the VCAT Act. Mr Brady's claim for costs on that basis must therefore necessarily fail.

23 However, regardless of any non-compliance with the technical requirements of section 112, the Tribunal concurrently maintains the power to consider the discretionary factors outlined in section 109, which may include a consideration of a non-complying settlement offer: *Velardo v Andonov* (2010) 24 VR 240.

24 In doing so, I am not satisfied that the OC's rejection of the settlement offer dated 5 December 2017 was unreasonable in the circumstances. The offer was clearly short-served (which I am satisfied was a fact raised by the OC's solicitor Mr Philactides on 6 December 2017 during a conversation with Mr Brady's solicitor) and I find that the offer placed too much emphasis on the OC's commencement of the proceeding without convening a grievance meeting or an OC Committee vote. No consideration was given to the fact that Mr Brady had not obtained written authority to demolish the door or install the umbrella. Overall, I find that the offer was not based on a balanced or reasonable assessment of the totality of factors which were relevant in this proceeding and I find that the OC did not act unreasonably in rejecting the offer.

25 Furthermore, in considering the factors outlined in s.109, I am not satisfied that the OC conducted the hearing in a manner that unnecessarily disadvantaged or unreasonably prolonged the proceeding. Having examined the Tribunal's file, I accept the OC's submission that the OC "complied with all VCAT directions and timetable whereas Mr Brady did not".

26 I am satisfied that both parties raised issues which were either withdrawn (as was the OC's claim regarding the umbrella), or not prosecuted (such as the OC's claim regarding the safety hazard, the structural integrity of the door and the increase in insurance premiums), or ultimately disregarded or dismissed (such as Mr Brady's accord and satisfaction claim, his estoppel claim, the claim regarding the implied easement and the claim that he had permission or reasonably believed that he had permission to install the doorway). Both parties raised complex issues of fact and law in their pleadings and both parties essentially abandoned the vast majority of these at the hearing.

27 I reject Mr Brady's submission that the manner in which the OC conducted the hearing breached its statutory duty to act in good faith. I am satisfied that both Mr Brady and the OC each brought claims which had tenable bases. I accept the OC's submission that this was a case where the unsuccessful party was actually vindicated in both fact and law but that Mr Brady succeeded only in the exercise of a discretion. That discretion was exercised upon a careful consideration of the evidence presented at the two-

day hearing. The fact that Mr Brady's ultimately succeeded does not mean that the OC did not run a good case. It did and I was comfortable making several findings against Mr Brady on questions of fact, credit and law. However, upon a careful consideration of the totality of events, facts and circumstances agitated in this proceeding, I exercised my discretion to not make any order against Mr Brady.

CONCLUSION

28 Having considered:

a) the failure of Mr Brady's offer to comply with the requirements of sections 112, 113 and 114;

b) the manner in which the parties conducted the proceeding, including the circumstances surrounding the OC's rejection of the settlement offer; and

c) the relative strengths of the parties' claims

I find on balance that it is unfair in all the circumstances to make a costs order against the OC.

29 Accordingly, I dismiss Mr Brady's application for costs.

S. Moraitis
Senior Member