

**Gerace v Body Corporate Services (Vic) Pty Ltd (Owners Corporations) - [2016]  
VCAT 1750**

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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE: OC2413/2015

CATCHWORDS

Costs – Calderbank offer – made but not accepted – outcome more favourable to respondent than the amount offered – [VCAT Act](#) 1998 s109.

FIRST APPLICANT: Frank Gerace

SECOND APPLICANT: Robert Gerace

Walter Gerace

THIRD APPLICANT:

RESPONDENT: Body Corporate Services (Vic) Pty Ltd ACN: 079 654 103

WHERE HELD: 55 King Street, Melbourne

BEFORE: Senior Member A. Vassie

HEARING TYPE: Hearing

DATE OF HEARING: 26- 27 September 2016

DATE OF ORDER: 19 October 2016

DATE OF REASONS: 19 October 2016

CITATION:

Gerace v Body Corporate Services (Vic) Pty Ltd (Owners Corporations) [2016]  
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## ORDERS

1. The order dated 27 September 2016 having contained a clerical mistake, the order is amended by deleting "\$1,150.00" and substituting "\$1,550.00".
2. The applicants shall pay the respondent's costs of this proceeding incurred after 16 September 2016 to be assessed by the Costs Court on the County Court scale on the standard basis, unless otherwise agreed.

**A. Vassie**  
**Senior Member**

## APPEARANCES:

For the Applicants: Mr. D. Nguyen of Counsel

For the Respondent: Mr. D. Yarrow of Counsel

## REASONS FOR DECISION

1. The applicants, owners of a residential apartment in a subdivision affected by an owners corporation, claimed damages in this proceeding from the respondent, the owners corporation manager. They alleged that the manager breached its statutory duty to them to exercise due care and diligence in the performance of its functions. The alleged breach was a failure to lodge an insurance claim at the proper time and to pursue the insurance claim diligently.
2. The applicants' apartment had become mould-affected as a result of water entry, and its tenants had vacated. The owners corporation held an insurance policy over the buildings in the subdivision. At the instance of the applicants, the manager made a claim under the policy, but the insurer paid only a portion of the loss that the applicants alleged that they had suffered by way of loss of rent. The applicants alleged that it was the manager's delay in making the claim, and

failure to pursue it diligently, which led to the insurer taking the stand that it did and paying only a portion of the alleged loss. So in this proceeding they claimed \$17,068.48 which was the balance of the alleged loss.

3. I heard the proceeding on 26 and 27 September 2016. I found in favour of the applicants but awarded them only \$1,550.00 plus interest of \$160.00, a total of \$1,710.00.
4. Counsel for the respondent manager then made an application for costs, telling me that his client had made an offer of settlement on 8 September 2016 for \$3,000.00. He produced the letter of offer, from the respondent's solicitors to the applicants' solicitors, dated 8 September 2016. The letter constituted a Calderbank offer [\[1\]](#); expressed to be without prejudice except on the question of costs, the letter offered a payment by the respondent of \$3,000.00 in full and final settlement of the proceeding, stated that the offer would remain open until 4.00pm on 16 September 2016, gave detailed reasons for the respondent's arriving at that figure, and stated that if the offer was not accepted but the respondent obtained a more favourable outcome at the hearing the letter would be produced to the Tribunal in support of an application that the applicants be ordered to pay the respondent's costs on an indemnity basis from the date of the offer. I reserved my decision on that application.

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[\[1\]](#) The name comes eponymously from the decision in [Calderbank v Calderbank](#) [1976] Fam 93. The principles found in that case have been applied to such an offer: e.g. [Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority \(No. 2\)](#) (2005) 13 VR345.

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5. In a court, where costs usually follow the event, the court may properly take a Calderbank offer into account in considering whether, in the exercise of its discretion as to costs, the party who made the offer should be awarded costs on a more generous basis than a standard basis. A Calderbank offer is an incentive to the offeree to address the offer seriously; if it rejects the offer and the rejection is unreasonable, it will be at risk of an order for costs against it to be assessed on an indemnity basis.
6. In this Tribunal, costs do not follow the event. The general rule is that parties bear their own costs. [\[2\]](#). The Tribunal has power, however, to make an order that one party pay another party's costs of the proceeding, having regard to a number of specified matters and also "any other matter that the Tribunal thinks relevant". [\[3\]](#). The making and refusal of a Calderbank offer is a relevant matter, but it does not follow that the offering party is entitled to an award of costs at all, let alone an award of costs assessed on an indemnity basis, if the outcome is more favourable to it than the terms of the offer. [\[4\]](#). The weight to be placed upon a Calderbank offer in those circumstances will vary from case to case.

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[\[2\]](#) [VCAT Act 1998 s 109\(1\)](#).

[\[3\]](#) [VCAT Act 1998 s 109\(2\)\(3\)](#).

7. In this proceeding the applicants claimed loss of rent at the rate of \$49.87 per day – a rate which was not in dispute – during two of three consecutive periods. They were:
- (i) 17 November 2012, the date on which the tenants vacated, to 29 May 2013, the date on which the insurer regarded a formal claim under the policy to have been made: 199 days at \$49.87 per day = \$9,649.51;
  - (ii) 30 May 2013 to 28 February 2014 which was the period in respect of which the insurer paid the loss of rent claim;
  - (iii) 1 March 2014 to 31 July 2014: 153 days at \$49.87 per day = \$7,418.97.
8. My award of \$1,550.00 was in respect of part of period (i). I decided that the loss for which the respondent manager was liable commenced on 4 January 2013, the date on which the applicants formally notified the manager of the occurrence of water entry and mould, and concluded on 18 February 2013, the date on which the manager notified an insurance broker of the claim. Loss of rent between those dates would have amounted to \$2,244.15, but I decided that the period should be narrowed by two weeks because it would have taken the applicants at least that time to have notified the insurer or the broker directly themselves: hence the award of \$1,550.00, plus interest.
9. The letter that made the Calderbank offer correctly anticipated the way in which I arrived at the decision. After putting the respondent's case in considerable detail, the letter contained the following paragraphs:

In light of the reasons provided and position taken by my client in respect of your offer I am instructed to make the following offer without any admission of liability:

1. The respondent pays the applicants \$3,000.00 in full and final settlement of the claim.
2. The parties bear their own costs in the subject VCAT proceeding.
3. Each party mutually releases the other from each and every claim arising out of the subject matter in the subject VCAT proceeding.
4. This offer is open and capable of acceptance until 4.00pm on Friday 18 September 2016.

Please note in formulating this offer my client has taken into consideration the following factors that are in addition those stated above.

1. My client may have had an obligation to provide notice of the loss of rent claim on or after 4 January 2013 to the insurer.
2. If it were found that my client ought to have notified the insurer of the loss of rent claim on 4 January 2013 and that liability ended upon the broker being notified on 18 February 2013 then the total loss of rent claim would be as follows 45 days x \$49.87 per day, which equals \$2,244.15.

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The offer made herein is made in accordance with the principles laid down in [Calderbank v Calderbank](#) [1976] Fam 93 and related decisions. If the offer is not accepted by the time specified and the final hearing is conducted wherein the respondent obtains an overall judgement that is the same or more favourable than the offer detailed herein, then the fact that the offer was made will be relied upon in support of an application for the applicants to pay the respondent's costs on an indemnity basis from the date of this offer.

10. In only one instance was the reasoning in the letter materially different from findings that I made when giving my reasons for decision orally. The letter asserted as a fact that the broker, having received a claim from the manager on 18 February 2013, did not forward the claim to the insurer. During the hearing there was no evidence of what the broker did or did not do about that claim, so I said that I could not make a finding on the matter.
11. I have had regard to all the matters to which I am required by law to have regard when deciding whether it is fair to make an order for costs. [\[5\]](#) None of those matters is determinative or of assistance, except "any other matter the Tribunal thinks relevant," which is the matter to which I am about to refer.

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[\[5\]](#) [VCAT Act 1998 s 109\(3\)](#).

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12. The outcome of the proceeding for the respondent was more favourable to it than what would have been the outcome if the applicants had accepted the Calderbank offer.
13. The letter which made the offer set out in well-argued and prescient detail the reasons for having made the offer.
14. The first applicant, Frank Anthony Gerace, was the applicants' only witness. He is an estate agent and is also an owners corporations manager himself. He, more than most applicants would be in a case of this kind, is well equipped to make commercial assessments of the scope of a manager's duty and to make reasonable commercial decisions about offers of settlement. I say "commercial" assessments and decisions because the premises were obviously an investment property from which the applicants were deriving income as rent. The decision not to accept the offer was a business decision. In my view it was unreasonable for the applicants not to have accepted the offer made in the letter.
15. In the above circumstances, the making and non-acceptance of the Calderbank offer are matters which make it fair, I consider, for the Tribunal to order the applicants to pay the respondents' costs of the proceeding incurred after 16 September 2016. There is nothing in the applicants' conduct or about the case which makes it one in which an order for costs assessed on an indemnity basis would be justified. I shall order the applicants to pay the respondent's costs incurred after 16 September 2016 to be assessed on the County Court scale on the standard basis.

16. There is a clerical error in the written order dated 27 September 2016. It should have recorded that the respondent must pay \$1,550.00 (not \$1,150.00) plus interest of \$160.00, a total of \$1,710.00. The order I make today corrects the error.

A. Vassie  
Senior Member

19 October 2016