VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP348/2017

CATCHWORDS

Claims for expert witness fees for site inspections, provision of reports and attendance at Tribunal to give evidence.

APPLICANT	Mr John Apostolou
RESPONDENT	Edgeton Properties Pty Ltd (ACN: 098 874 107)
WHERE HELD	Melbourne
BEFORE	B. Josephs, Member
HEARING TYPE	Costs Hearing (In Chambers)
DATE OF REASONS	31 January 2019
CITATION	Apostolou v Edgeton Properties Pty Ltd (Building and Property) [2019] VCAT 145

ORDERS

1 The applicant's claim for costs is dismissed.

2 The respondent's claim for costs is dismissed.

B. Josephs
Member

REASONS

1 This proceeding arises out of an application by the applicant, owner of a residential property, against Edgeton Properties Pty Ltd, the builder of the property, claiming damages for repair and rectification costs for alleged defective building works.

2 The hearing took place over two days with final submissions delivered after conclusion of evidence. Both parties were self-represented with Mr Aprile, director, appearing for the respondent.

3 In his submissions, the applicant reduced his claim to $63,223.50.

4 On 8 October 2018, I made orders with written reasons. I ordered that the respondent must pay $22,944.50 to the applicant. I reserved costs with liberty to apply until 30 November 2018.

5 Both parties have made an application for costs which I further ordered would be decided "on the papers."

6 The applicant has sought costs of $5,120, for payment of fees to an expert witness. The fees were charged by New Home Inspections Pty Ltd ("NHI"). The first fee is $580 for a pre-settlement inspection with written report invoiced on 27 July 2016. The second fee is $360 invoiced on 2 December 2016 for reinspection of the defective items identified in the previously supplied pre-handover inspection report and provision of an updated report. The third fee is $4,180 which was invoiced on 15 May 2018. This is described as being for "VCAT & Legal Work" charged at an hourly rate of $220. This would appear to relate to preparation and attendance to give evidence, noting that Mr Kevin McDonald, director of NHI, also provided a report and gave evidence on 10 May 2018, the second day of the hearing.

7 The respondent has sought costs of $1,700, for payment of fees to an expert witness. The fees were charged by SPI Property Inspections ("SPI"). The first fee is $1,250 for provision of an expert report and was invoiced on 14 November 2017. The second fee is $450 invoiced on 1 May 2018. This fee presumably represented a pre-paid witness attendance fee for the giving of evidence by Mr Alan Green, also on 10 May 2018.

8 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act"), as to the power to award costs, relevantly provides:

> (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 to 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) 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.

…….

9 While the general rule in VCAT that each party bears their own costs is designed to promote access to justice generally and to minimise the overall level of costs in tribunal proceedings as far as is practicable (*Stonnington CC v Blue Emporium Pty Ltd* [2004] VCAT 1441 at [13]), each case depends on its own facts and circumstances.

10 In *Johnstone v Mansfield SC* [2009] VCAT 287 at [15], it was observed that the awarding of costs is not a form of punishment, but is "rather a reimbursement of expenses that a party may have been put to over and above the expenses expected to be incurred when one commences a proceeding in the Tribunal."

11 However, in *Sabroni Pty Ltd v Catalano* [2005] VCAT 374, His Honour Judge Bowman (then VP) (at [5]) endorsed the view that there was nothing in the nature of a proceeding in the (former) Domestic Building List (predecessor to the Building and Property List) that would justify departure from the presumption contained in section 109 of the Act. According to His Honour (and as already noted), each case must be viewed on its own merits. His Honour continued:

> It may well be that cases in the Domestic Building List, because of their nature, have a propensity to fall within the exceptions contained in s 109 (3), but that does not mean that each case should not be considered on its merits, or that cases in the Domestic Building List automatically fall into a different category when issues of costs arise.

12 Similar sentiments were expressed in *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463, where the Tribunal observed (at [16]) that costs were very commonly ordered in the (former) Domestic Building List "but the fact that they are commonly ordered does not mean to say that there is any presumption that they should be."

13 After considering the circumstances in this proceeding, I find that there is no reason to depart from the general principle that each party should bear their own costs. Accordingly, I have made orders dismissing each party's costs application.

14 The applicant's first two fees were incurred prior to the proceeding. The first NHI report dated 27 July 2016 was obtained pursuant to the Contract of Sale between the developer and the applicant. The Certificate of Occupancy for the property was issued the day after. Solicitors who acted for the applicant in relation to the sale wrote a letter of demand to the respondent dated 22 December 2016 after the second NHI report was obtained. In that letter, among other matters, they noted that the respondent, subsequent to receipt of the first report, had attended to some of the defects identified in the first report but had not attended to the balance. The second NHI report had confirmed the repairs which had been undertaken and had also added some additional alleged defects.

15 The application to VCAT was made on 7 March 2017 after the parties failed to reach agreement about the further repairs allegedly required to be undertaken by the respondent.

16 The respondent obtained its first SPI report on 16 November 2017 prior to the first hearing day of 15 February 2018. The report was obtained to directly respond to the second NHI report.

17 The proceeding was initially fixed for two consecutive hearing days. However, given the considerable divergence in opinions between the experts and parties about the defects, their cost and method of repair, and the responsible entity, I adjourned the hearing part-heard to 10 May 2018 so both parties could have their witnesses available to attend to give evidence and to be cross-examined. It was, in fact, only ascertained by the applicant during the first hearing day, when requested by the Tribunal to find out his expert witness's availability, that his expert witness (who had provided the first two NHI reports) was no longer able to give evidence in the proceeding as he had left NHI, retired, and his whereabouts were unknown. Hence, there was a need for Mr McDonald, who had not himself been involved in the previous reports and inspections, to become personally involved. In doing so, he undertook his own inspection of the property and provided a report dated 20 March 2018.

18 The respondent then obtained a further report from Mr Green of SPI dated 23 April 2018 in response to Mr McDonald's report after Mr Green again inspected the property on 20 April 2018. While some concession as to responsibility was made by Mr Aprile about some allegedly defective items

after receipt of Mr Green's report, considerable disputes still existed between the parties about the majority of aspects relating to the remainder of alleged defects.

19 Both expert witnesses attended on the second day of hearing and were examined, cross-examined and re-examined.

20 Although I ultimately found for the applicant, he was not substantially successful in his claim. No information was provided about any settlement offers having been made, or, if made, on what terms.

21 Neither party conducted themselves in a manner which would bring any of the potential factors in s 109 (3) (a) – (e) into consideration. Accordingly, I cannot find on any basis that it would be fair to order any costs against either party.

B. Josephs
Member