**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D686/2005

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Domestic Building, interest, costs, settlement offer to which s112 of the *Victorian Civil and Administrative Tribunal Act* 1998 applies, type and scale of costs.

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| **APPLICANT** | Ashjam Pty Ltd T/as Rodian Homes |
| **RESPONDENT** | Paul Carroll |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member M. Lothian |
| **HEARING TYPE** | Costs Hearing |
| **DATE OF HEARING** | 8 March 2007 |
| **DATE OF ORDER** | 1 May 2007 |
| **CITATION** | Ashjam v Carroll (Domestic Building) [2007] VCAT 661 |

## ORDER

The Applicant must pay the Respondent's costs from and including 8 September 2006 to be agreed, but failing agreement, 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:**

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|---|---|
| For the Applicant | Mr P. Lithgow of Counsel |
| For the Respondent | Mr J. Forrest of Counsel |

## REASONS

1 On 20 December 2006 I made an order that the Applicant-Builder pay the Respondent-Owner a nett sum of $24,604.52 and I reserved interest under statute and costs, and gave liberty to apply.

2 The Builder's claim had been $27,548.53 and the nett sum claimed by the Owner, after taking into account the balance due under the contract to the Builder was $52,235.02.

3 The proceeding had been set down for three days for an expedited hearing but was eventually heard for seven.

4 On 11 January 2007 solicitors for the Owner wrote to the Tribunal making application for interest and costs.

5 Mr Lithgow of Counsel for the Builder made no submission with respect to interest and submitted that the facts did not support a departure from s109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides:

> Subject to this Division, each party is to bear their own costs in the proceeding.

6 Mr Lithgow said his client had made two offers, each containing two alternatives. The first was made on 13 December 2005 and the second on 22 June 2006. He acknowledged that neither offer was more advantageous to the Owner than the award.

## INTEREST

7 Mr Forrest of Counsel for the Owner sought interest for his client from the date of filing the counterclaim being 19 October 2005 to the date of the costs hearing at the penalty interest rate and being $3,759.35.

8 There is power to make an order for interest under s53 of the *Domestic Building Contracts Act* 1995 ("DBC Act") and Mr Forrest drew my attention to the decision of Senior Member Walker in *Quinlan v Sinclair* [2006] VCAT 1063. In that case there had been terms of settlement between applicant owners and respondent builders. The respondents defaulted and the applicants had the matter reinstated and obtained judgment for an amount.

9 Senior Member Walker pointed out that under s53(1) of the DBC Act interest can be awarded in circumstances where it is "fair" to do so. He went on to say:

> The Tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damages suffered as a result of the offending party's breach of the Contract.

> Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is "fair" must be determined in each case.

10 Mr Forrest submitted that there were items included in the determination where the award was neither the amount contained in the Owner's expert's report, nor the amount in the Builder's expert's report, but a sum between those two estimates. He said the result was that the Owner was not fully compensated for those items. I do not take this submission into account as each item has been assessed on the basis that the compensation awarded is fair.

11 The fact that s53(1) calls upon the Tribunal to determine whether an award of damages in the nature of interest is fair means that such an award is not automatic. The mere award of an amount of money does not mean that the successful party will also receive damages in the nature of interest. This is unlike the provisions of the *Supreme Court Act* 1986 (sections 58(1), 59(2) and 60(1)) where there is a statutory entitlement to interest "unless good cause is shown to the contrary".

12 It is a principle of economics that money delayed is worth less than current money; the dismal science's version of the adage that a bird in the hand is worth more than two in the bush. Nevertheless, there are a number of considerations about whether it is fair to award interest.

13 The Owner had not undertaken repairs at the date of hearing and therefore was not out of pocket; he had not laid out funds upon which interest was accruing. Both parties had a valid cause of action against the other and neither received all they claimed. This was not a case where one party took the action or made the counterclaim in order to keep the other out of funds. Finally, as found at paragraph 94 of the Reasons of 20 December 2006 the relationship between the parties was acrimonious and neither could be regarded as entirely without fault in this respect.

14 On balance I find the Owner has failed to demonstrate it is "fair" to award interest and I decline to do so.

## COSTS

### Costs for the period before the Settlement Offer

15 The Owner sought costs on County Court Scale "D" from the date of the Notice of Default or at least from the date he filed his counterclaim until the date of service of an offer to which s112 of the *Victorian Civil and Administrative Tribunal Act* 1998 responded on 7 September 2006. Mr Forrest submitted that the Owner should receive such costs under one or more of s109(3) (c), (d), or (e).

16 Section 109(3)(c) provides:

(3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to:

…

(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.

17 The claims and defences of both parties were, to some degree, meritorious, and the fact that the Owner was paid the nett sum is insufficient in itself to fulfil s109(3)(c).

18 Section 109(3)(d) deals with "the nature and complexity of the proceeding". The proceeding benefited by the presence of professional advocates for both parties, however that fact alone is insufficient to establish that costs should be awarded under s109(3)(d). The proceeding was long, mainly due to the numbers of items claimed and the expert evidence that was given regarding a number of those items. Mr Forrest submitted that the amount in dispute should not be taken into account in determining whether an award for costs should be made, and in this case I agree.

19 Section 109(3)(e) refers to "any other matter the Tribunal considers relevant". Returning again to the relationship between the parties I refer to paragraph 95 where I said:

> "This evidence [of the acrimony between the parties] is mentioned because it emphasises how unfortunate it is if antipathy between the parties causes or exacerbates a dispute or stands in the way of a sensible, commercial settlement.

In these circumstances I consider the acrimony relevant and am not persuaded I should make an order of costs up to the date of the settlement offer.

## Settlement offer

20 I am satisfied that the settlement offer of 7 September 2006 made by the Respondent Owner to the Applicant Builder is in accordance with the provisions of sections 112, 113 and 114 of the VCAT Act. S112 provides:

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.

21 I find that the orders made in the proceeding are not more favourable to the Builder than the offer. The offer was that the Respondent offered to settle on the basis that the Applicant pay the Respondent $7,000.00 plus costs on County Court Scale "A" in full and final settlement of the Applicant's claim and the Respondent's counterclaim inclusive of interest and costs.

22 S112(3) provides:

> 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;

23 I would not have made an order for costs, but the offer included costs. The parties agreed that the costs to the date of the offer on County Court Scale "A" would have been approximately $7,000.00, therefore the total money value of the Respondent's offer was approximately $14,000.00; some $10,000.00 less than the Order before costs.

24 In consequence it is reasonable that the Builder pay the Owner's costs of and associated with the proceedings from and including 8 September 2006.

### Type and Scale of Costs

25 S112(2) provides:

> 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.

26 Mr Forrest for the Respondent has urged me to find that "all costs incurred" means indemnity costs. I am attracted to the decision of Judge Bowman in *Hanley v Transport Accident Commission*[2002] VCAT 420 where he interpreted it to mean costs on a solicitor-client basis. However this section contains a discretion as well – "unless the Tribunal orders otherwise". In addition to the acrimony between the parties, the offer was not made until the first three days of the hearing had concluded.

27 In these circumstances I find it is reasonable that the Owner receive party-party costs. Mr Forrest submitted that if costs were to be ordered on a party-party basis, County Court Scale D would be appropriate, and I agreed with his submission during the hearing.

28 The Builder must pay the Owner's costs from and including 8 September 2006 to be agreed, but failing agreement, 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**