VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D586/2012

BUILDING AND PROPERTY LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.119 - correction of an accidental slip or omission – principles – damages in the nature of interest pursuant to s. 53 of the *Domestic Building Contracts Act* 1995 – when awarded - nature of – damages are part of award – not applicable to period following determination of proceeding - claim for costs of proceedings Domestic building dispute –– s.109 – when awarded – relevant factors.

APPLICANTS	Tharwat Bestawaros, Jacqueline Bestawaros
FIRST AND SECOND RESPONDENTS	Domiano Sorace, Felice Sorace
THIRD RESPONDENT	Melton City Council
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs application – in chambers
DATE OF SUBMISSIONS	3 April 2018
DATE OF ORDER	6 July 2018
CITATION	Bestawaros v Sorace (Building and Property) [2018] VCAT 1034

ORDERS

1 Pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998 and on the application of the Applicants, paragraph 1 of the Tribunal's order of 17 June 2016 is corrected to read as follows: "Order the First and Second Respondents to pay to the Applicants $62,502.39".

2 Order the First and Second Respondents to pay to the Applicants damages in the nature of interest of $25,674.25.

3 Order the First and Second Respondents to pay the Applicants' costs of these proceedings, including any reserved costs but excluding any costs relating to the claim against the Third Respondent, such costs if not agreed to be assessed by the Victorian Costs Court on the Standard basis in accordance with the County Court Scale.

SENIOR MEMBER R. WALKER

REASONS FOR DECISION

Background

1. In this proceeding, the Applicants ("the Owners") sought damages against the First and Second Respondents ("the Builders") for defective workmanship in a house constructed by them as owner-builders that they sold to the owners in August 2008. Relief was also claimed against the Third Respondent ("the Council") to the extent that the damage complained of was caused by trees the Council had planted nearby.

2. The claim against the Council was settled for an amount of $95,000.00 inclusive of costs. The Council remained in the proceeding for the purposes of apportionment pursuant to Part IV AA of the *Wrongs Act* 1958 but no claim for apportionment was made pursuant to that part.

The hearing and decision

3. The claim against the Builders came before me for determination on 30 March 2016. Mr Pumpa of counsel appeared on behalf of the Owners and Mr Gray, solicitor, appeared on behalf of the First and Second Respondents.

4. Following a three-day hearing and consideration of written submissions provided by counsel for the parties a decision was handed down on 17 June 2016 that the Builders pay to the Owners $62,502.39. However the operative part of the order, as engrossed, was that "the Respondents" pay that sum to the Owners. That description would include the Council as well as the Builders. Costs were reserved and liberty was reserved to apply for any further orders that were sought.

Further applications

5. An application by the Owners for costs and for further orders was listed for hearing on numerous occasions but each time the date fixed was vacated or adjourned for a variety of reasons. The final date fixed for the hearing of the application was 2 March 2018. On the day before that date the parties submitted consent orders providing for the filing and service, on various dates to 3 April 2018, of written submissions.

6. Submissions have now been filed by both parties. Those on behalf of the Owners were prepared by Mr Pumpa and those on behalf of the Builders were prepared by Mr Gray. I now proceed to determine the following applications.

Correction of the order made

7. The Owners seek an order pursuant to s.119 of the Act, correcting the order of 17 June 2016 by amending the operative part to read:

> "Order the First and Second Respondents to pay to the Applicants $62,502.39."

8. Section 119, where relevant, reads as follows:

> "(1) The Tribunal may correct an order made by it if the order contains-
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> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
>
> (d) a defect of form.
>
> (2) The correction may be made—
>
> (a) on the Tribunal's own initiative; or
>
> (b) on the application of a party in accordance with the rules."

9. In his submission, Mr Pumpa referred me to the following passages in my decision of *Riga -v. Peninsular Home Improvements* [2000} VCAT 56 (at paras 20-22):

> "20. When a proceeding is determined by a court or tribunal the court or tribunal is then functus officio and generally has no power to revisit the matter or undo what it has done in the absence of some provision in the statute or rules authorising it to do so. Section 119 sets out what it is commonly called the "Slip Rule" and a similar provision is to be found in the *Rules of Civil Procedure*, Chapter 1 36.07, which provides:-
>
> > "The court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from an accidental slip or omission."
>
> 21. The extent of the jurisdiction conferred by this rule is extensively discussed in "Williams Civil Procedure Victoria" I. 36.07.55. A reading of the authorities gathered in that reference shows that the operation of the rule is very wide indeed. The learned authors refer to the case of *R. -v.- Cripps ex parte Muldoon* [1984] QB 686 at p. 695 where Donaldson MR said (citations omitted):-
>
> > "It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely, to allow the court to amend the formal order which by accident or error does not reflect the actual decision of the Judge. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of Counsel to ask for it. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended."

> 22. The test as to whether a mistake or omission is accidental is, in my view: " If the matter had been drawn to the court's attention, would the correction at once have been made?" (see *Williams* 1.36.07.65 and the cases there cited)."

10. I still think that is how the section should be applied.

11. Mr Pumpa referred me to the following passage at the conclusion of the reasons that accompanied the decision:

> "I find that the damages to be awarded in favour of the Owners against the Builders are $62,502.39".

The term "the Builders" was defined in the reasons as meaning the First and Second Respondents. Mr Pumpa also said that the Reasons for Decision and the circumstances of the hearing show that any order to benefit the Owners was and could only have been made against the Builders.

12. Mr Gray pointed out that no written application for an order under s.119 has been filed in accordance with the Tribunal's Rules. That is so, and rules are made to be followed. However, I see no point in adjourning the matter to enable the preparation, filing and service of a formal document. Parliament intended this Tribunal to operate in accordance with the substantial merits and with as little formality as possible. Further, a correction can be made on the Tribunal's own initiative and if I am satisfied that there has been an accidental slip of omission, I should correct it myself rather than allow it to remain on the record.

13. Mr Gray submitted that the decision as expressed in the written order was now almost two years old and the parties have arranged their affairs on the basis that no payment or obligation was due from them. There is no evidence of any such arrangements. In any case, if the Builders were of the belief from reading the decision, which includes the supporting reasons, that no payment or obligation was due from them to the Owners there was no rational basis for such a belief.

14. Mr Gray submitted that, by the Owners inaction, they were estopped from seeking the correction of the order. I can see no basis for an estoppel in his submission.

15. Finally, Mr Gray said that I would have difficulty referring to my memory after nearly two years had passed since the case was heard. I have no such difficulty because, as is commonly the case in a correction under s.119, the mistake in the present case is apparent on the face of the decision itself.

16. In the passage contained in the reasons for decision referred to by Mr Pumpa, I stated that the amount awarded was to be paid by the Builders, not by all the Respondents. Further, in the lengthy reasons for decision I apportioned the damage complained of between the damage attributable to the trees the Council had planted ("the Tree Damage"), for which I found the Builders were not responsible, from the other damage, for which they alone were responsible. The settlement with the Council related only to the

Tree Damage, not to any of the damage found to be the responsibility of the Builders. Conversely, the amount awarded against the Builders did not include any Tree Damage.

17. The use of the word "Respondents" in the operative part of the order instead of the words "First and Second Respondents" was therefore "…a material mistake in the description of any person, thing or matter referred to in the order…" and is such an obvious mistake that, had it been brought to my attention at the time, I would have corrected it at once. That correction will now be made.

Interest

18. Notwithstanding that the order was made almost two years ago, the amount awarded has not been paid by the Builders. The Owners now seek interest.

19. There was a claim for interest in the prayer for relief in the Amended Points of Claim but I have not dealt with the claim for interest yet. In the decision I reserved liberty to apply for further orders and interest is now sought.

20. In his submission, Mr Pumpa seeks interest, not only up to the date of judgment, but also afterwards, because the amount has still not been paid.

21. Mr Gray said that no interest should be awarded because:

    (a) The Builders were of the view that there was nothing due from them because the amount was "subsumed" in the amount the Owners had recovered from the Council;

    (b) There is no evidence that the Owners have paid for any of the rectification work;

    (c) There is no evidence that building costs have increased in the meantime; and

    (d) There is no evidence of any demand for payment by the Owners.

22 The application for interest is brought pursuant to s.53 of the *Domestic Building Contracts Act* 1995, which, where relevant, is as follows:

> "53(1) VCAT may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, VCAT may do one or more of the following—
>
> (b) order the payment of a sum of money—
>
> (i) found to be owing by one party to another party;
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest);
>
> (3) In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest

rate fixed from time to time under section 2of the Penalty Interest Rates Act 1983 or on any lesser rate it thinks appropriate."

23 Mr Pumpa referred me to the following passages from my decision in *Quinlan v. Sinclair* [2006] VCAT 1063:

> "9. There is nothing in the *Victorian Civil and Administrative Tribunal Act* 1998 that empowers this Tribunal to award interest or damages in the nature of interest. In domestic building disputes there is the power in s.53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*referred to and there is a similar power in s.108(2)(b)(ii) of the *Fair Trading Act 1999* in regard to claims brought under that Act. In the presence case I can only have recourse to the former section and that allows the award of damages in the nature of interest.
>
> 10. In the Supreme Court there is a statutory entitlement to interest "*unless good cause is shown to the contrary'* (see *Supreme Court Act 1986* s.58(1), s.59(2) and s.60(1)) and the sum awarded becomes part of the damages awarded. It is an additional head of damages (see *Williams v Volta* [1982] V.R.739 at p.746). In domestic building disputes the Tribunal "may" award damages in the nature of interest (s.53(1) & (2)). There is no requirement for the unsuccessful party to show *"good cause"* why they should not be awarded but the use of the permissive "*may"* would suggest that they will not necessarily be awarded in all cases. There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be *"fair"* to do so.
>
> 11. It cannot be *"fair"* to make any order that is not in accordance with the evidence and established legal principles. 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 damage 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."

24 Mr Pumpa submitted that the Owners had been deprived of the funds to correct the defects in their house. He said that the alleged uncertainty as to which of the Respondents the order was directed to was opportunistic and unreasonable.

25 I accept Mr Pumpa's submission that there could not have been any genuine confusion on the part of the Builders that they were required by the order to pay the amount awarded to the Owners. However, damages in the nature of interest are part of the total award of damages in the proceeding and part of the judgment debt (see *Williams v Volta* above). Although argument as to a claim for interest is sometimes determined after the principal decision has been handed down, the claim for damages in the nature of interest is nonetheless for interest up to the date of judgement and not beyond. Interest on an unpaid judgment debt of a court will be provided for under the act and rules of the court concerned. In the case of this Tribunal, that will be from the time the decision of the Tribunal is filed with the court and becomes a court order.

26 Consequently, I am concerned only whether interest should be awarded on the amount of damages up to the time of judgment.

27 Although the Owners had not, at the time of trial, expended any money on rectifying the defects that were found to be present, the damage to the house was nonetheless substantial and their enjoyment of it had been affected. The defects were not technical or lacking in any practical consequence. After becoming aware of the defects and the claim brought against them, the Builders elected to defend the proceedings and retain the money that was ultimately awarded against them for their own benefit for a number of years. In those circumstances I think that it is fair to award the Owners damages in the nature of interest.

28 I see no reason to award interest at any rate other than that fixed by the *Penalty Interest Rates Act* 1983, which, from the date of issue until determination is calculated at $25,674.25.

The claim for costs

29 The power of the Tribunal to award costs is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") which, where relevant, is as follows:

> "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.

30 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J. gave some guidance as to how a claim for costs should be approached. His Honour said (at para 20 et seq.):

"20. In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows –

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question."

22. Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make

> an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule."

The relevant factors

31 The factor relied upon by Mr Pumpa in the present case was the nature and complexity of the proceeding. He said that the case required significant preparation, consideration and costs to be expended on experts and legal representation in order to be properly conducted.

32 Mr Gray said that there was nothing sufficiently unusual or complex about the matter, compared to most building cases conducted by the Tribunal, to justify a costs order. I do not think that is a helpful comparison.

33 This case was of considerable complexity. In particular, there was conflicting engineering evidence as to the nature and causes of the cracks and structural damage to the house. There was considerable conflict concerning rectification methods and costs. Conclaves of experts under the supervision of the Tribunal were held to narrow the issues. It would not have been possible to conduct the proceeding without engaging experts and carrying out the extensive investigations they did. It is notorious that assembling this sought of evidence involves great expense.

34 It would also not have been possible in a practical sense for the Owners to have prepared and conducted this case themselves. Analysing the issues in this case, engaging appropriate experts and instructing them and conducting the proceeding through the interlocutory stages required experience and expertise which again they had to acquire at considerable expense. It was necessary and reasonable for them to incur this degree of expense and, given the likely magnitude of that expense, without an order for costs they would probably have a pyrrhic victory.

35 Mr Gray submitted that the Applicants were largely unsuccessful in their claim, in that, after receiving the settlement sum from the Council, they proceeded to claim $229,000.00 from the Builders and then recovered only $62,502.39.

36 An applicant should not put the other party to expense in having to deal with a claim that is unreasonable brought but that was not the case here. The fact that the amount awarded fell short of the claim made does not necessarily mean that the claim made was an ambit one. Applicants or plaintiffs will always claim the greatest amount that the best view of their case would suggest.

37 To the extent that the amount awarded fell significantly short of the amount finally claimed, that was largely due to the finding that the Builders were not responsible for the Tree Damage. That dispute turned upon the engineering evidence and could have gone either way. Otherwise, it was

because of differences in assessment by the experts rather than a finding that the underlying defects complained of were not present.

38 In all the circumstances I think that this is an appropriate case in which to make an order for the Owners' costs.

Orders to be made

39 The orders to be made will be as follows:

1. Pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998, paragraph 1 of the Tribunal's order of 17 June 2016 will be corrected to read as follows: "Order the First and Second Respondents to pay to the Applicants $62,502.39".
2. Order the First and Second Respondents to pay to the Applicants damages in the nature of interest of $25,674.25.
3. Order the First and Second Respondents to pay the Applicants' costs of these proceedings, including any reserved costs but excluding any costs relating to the claim against the Third Respondent, such costs if not agreed to be assessed by the Victorian Costs Court on the Standard basis in accordance with the County Court Scale.

SENIOR MEMBER R. WALKER