VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D379/2014

CATCHWORDS

Domestic building –application for costs – Victorian Civil and Administrative Act 1998 - relevant considerations

APPLICANTS	Peter Bernard Carey and Kim Michelle Carey
FIRST RESPONDENT	MK Building Group Pty Ltd (ACN: 098 226 003)
SECOND RESPONDENT	William John Naughton Bradley
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs application
DATE OF HEARING	16 December 2014. Submissions received by 26 February 2015.
DATE OF ORDER	29 June 2015
DATE OF WRITTEN REAONS	7 August 2015
CITATION	Carey v MK Building Group Pty Ltd (Building and Property) [2015] VCAT 1211

WRITTEN REASONS FOR DECISION PROVIDED AT THE REQUEST OF THE RESPONDENTS

This proceeding came before me on 29 June 2015 on an application by the Respondents that the Owners pay their costs of the proceeding. I made orders at the time and provided oral reason for making those orders. The Respondents have now requested that written reasons be provided. The following is an edited version of the reasons fro decision that I gave at the time.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	In person
For the Respondents	Mr. J Bowers-Taylor, solicitor

REASONS FOR DECISION

Background

1. This is an application for an o5der for the costs of this proceeding brought by the Applicants ("the Owners") following the determination of this proceeding on 28 April this year.

2. The proceeding related to the construction by the First Respondent ("the Builder") of a house in Mount Martha ("the House") for the Second Respondent ("Mr Bradley"). Mr Bradley worked for the Builder in some capacity, but whether he was an employee, associate or sub contractor was not determined.

3. After the House was completed and Mr Bradley took possession, he carried out some further work on it. He then sold the House to the Owners.

4. The Owners complained to the Builder of defects in the House and there were attempts made by the Builder to address their concerns. On one occasion the Builder repaired some plaster in the ceiling in the master bedroom which was damaged as a result of a fault which I subsequently found was the responsibility of Mr Bradley and not the Builder. The Builder also repaired a leak in the air conditioner.

5. As to other matters the Builder took the view that it was not responsible for the defects and there the matter lay until this proceeding was commenced by the Owners.

This proceeding

6. The Owners issued their application on 15 April 2014. They commenced the proceeding without first getting an expert's report. They said that was because they hoped to achieve some resolution of the matter by mediation. That hope was not realised and subsequently they engaged a firm of solicitors for the purpose of the proceeding and also the services of Mr Mackie, a building expert, who prepared a report.

7. There was some delay between the time the report was prepared and the date upon which it was served on the Builder and there is no explanation for that. The Owners said that they did not know the reason for the delay and since their solicitors who had charge of the matter are no longer acting they were not present to provide an explanation. In any event it was not until October that the Builder's solicitors got the report.

8. In the meantime, on 12 August 2014 Mr Bradley was joined as a party.

The hearing

9. The matter came before me for hearing on 16 December. Mr J. Cotton, solicitor, appeared for the Owners and Miss A. Mapp of Counsel appeared for the Builder and Mr Bradley.

10. Expert evidence was given on behalf of the Owners by Mr Mackie, and on behalf of the Respondents by an architect, Mr Forrest. Lay evidence was given by Mr Carey, by Mr Bradley, by the director of the construction manager of the Builder and by a neighbour. There was no site visit and the whole of the evidence was disposed of within a day.

11. Counsel for the parties then said that they wished to make submissions and so directions were given for the filing of submissions.

12. Following receipt of submissions and consideration of the matter a written decision was handed down on 28 April 2015.

13. The order that I made was that the Builder pay the Owners $8,651.50 and, following correction of a typographical error, that Mr Bradley pay the Owners $8,452.11. Costs were reserved and the Owners are now applying for an order for their costs.

Offers of compromise

14. The Owners made two offers of compromise during the interlocutory stages but in each instance the order in the proceeding was less favourable to the Owners than the offer made and so neither offer is of any relevance in terms of being either a "Calderbank" offer or within s112 of the Act.

Costs

15. I have to decide the matter in accordance with the usual principles. The relevant section of the *Victorian Civil and Administrative Tribunal Act* 1998 is s.109(1), which provides that, prima facie, everybody pays their own costs. By s109(2), the Tribunal may order one party to pay the costs of another party if it considers it fair to do so.

16. In determining the issue of fairness, sub-section (3) of s109 directs the Tribunal's attention to a number of matters which are set out in that sub-section. Most of those relate to the manner in which the proceeding is conducted but some relate to the merits of the matter. Those are, the relative strengths of the parties' cases, the nature and complexity of the proceeding and any other factor the Tribunal considers relevant.

17. Mr Bowers-Taylor referred me to a comment that I made in *Cosgriff v. Housing Guarantee Fund Ltd* [2006] VCAT 463, where I said (at para 16):

> "Costs are very commonly ordered in this list but the fact that they are commonly ordered does not mean to say that there is any presumption that they should be."

18. He also relied upon the following passage from the judgment of Mr Justice Ormiston in *Pacific Indemnity Underwriting v. Maclaw* [2005] VSCA (at para 35)

> "Now it does not follow that particular factors in building disputes, especially building insurance disputes of this kind, cannot activate the Tribunal's power

to award costs as laid down by s.109, such as the "nature and complexity" of some building disputes or the unreasonableness of a builder's or insurer's conduct, but it should be borne in mind at all times that the scheme of the VCAT legislation is that prima facie each party is to "bear their own costs in the proceeding". Why Parliament saw this to be appropriate in cases such as the present and why it chose not to vary s.109 so far as domestic building disputes, or at least claims against insurers, are concerned, may, to some eyes, be hard to fathom. If the same disputes were still able to be litigated in one of the ordinary courts of this State, there would be the conventional "bias" in favour of the conclusion that costs should follow the event, even if only on a party/party basis. But that is not the presumption of the present legislative scheme, as represented in particular by s.109".

19. For further guidance as to the manner in which an application for costs should be determined, Mr Bowers-Taylor referred to the following well known passage in the judgment of Gillard J in *Vero Insurance v. Gombac* [2007] VSC 117 (para 20):

> "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." (*emphasis in original*)

20. I accept Mr Bowers-Taylor's submission as to the relevant principles. I must apply them to the present case.

Relevant matters

21. The Owners have appeared today on their own behalf and have urged me to make an order for their costs. They point to the results of the case and say that they have been largely successful. They said that all they ever wanted was to have everything fixed and to do that they have had to come here and incur the expense of this proceeding.

22. They said that they had attempted to avoid the costs of an expert's report by issuing a proceeding without one in the hope that their claim might be resolved at mediation. That did not happen and, because the Builder would not return to fix what was wrong with the House or make any offers they have had to go to the expense of an expert's report and

thereafter the cost of conducting the proceeding in order to recover the amounts they were awarded.

23. In response, Mr Bowers Taylor went into quite some detail concerning the matter. He pointed out the matters which I have already mentioned, that is, the late obtaining of the expert's report and the late service of it.

24. He pointed out the extent to which the Respondents did not succeed, that is, there was a claim made for the checking of windows which I did not allow, and that not all have been monetary claims were allowed.

25. Some amounts were allowed against the Builder and not against Mr Bradley and vice versa. He said that the amounts recovered were less than those that were pleaded, that the amounts allowed were bolstered by the addition of a 30% margin which, he alleged in his written submission, I added of my own motion.

26. Although I do not have any specific recollection of the evidence concerning the margin, it is not my practice to pull figures out of the air. If I had made a finding otherwise than in accordance with the evidence that would have been grounds for an appeal. Mr Bowers Taylor was not present at the hearing and the suggestion in his submission was based upon the recollection of a young lady who was there. However, Mr Carey said he thought that both of the experts had agreed on the 30% margin and I believe that to be the case.

27. In any event, there was no appeal and I am only looking at the bottom line. The amounts recovered were substantial, relative to the amounts claimed, although they might be seen to be relatively small amounts compared with awards made in some of the other cases that we hear in this list.

28. I think the Owners had a substantial level of success in that the claims that they made largely succeeded. That reflects upon the relative strengths of the parties' cases. The Owners' case was strong compared with the cases of the Respondents.

29. Mr Bowers Taylor criticised the Owners for initially including as one of the alleged defects that the air conditioning unit was defective. At that time the allegation was made, it was acknowledged that it was defective. The Builder offered to fix it and at first the Owners were reluctant to allow access to fix only some of the items complained of. However they relented and the Builder ultimately was allowed in to fix the air conditioner and did so. Mr Bowers Taylor suggested that by behaving in this was the Owners had unnecessarily disadvantaged the Respondents.

30. Causing unnecessary disadvantage is one of the matters referred to in section 109(3), but that is in connection with the manner in which the case is conducted, not the conduct of the parties outside the litigation.

31. In any event I cannot see that any disadvantage is demonstrated. It was fixed and it was acknowledged that it was fixed. It was not part of the claim by the time of the hearing.

32. Mr Bowers Taylor also criticised the Owners for having commenced the proceeding against the Builder alone, even though, he said, they were made well aware in advance of the commencement of the proceeding that the Builder had not performed all of the work complained of.

33. In regard to that, he referred me to some correspondence and there were certainly denials by the Builder to that effect but the full situation as to who had done which work was not detailed in any of that correspondence and there was no acknowledgement by Mr Bradley that he was responsible for any of it.

34. I do not know everything that passed between the Owners on the one hand and the Builder on the other hand in regard to all these issues and I am unable to make anything more than very general of assessment of the state of the Owners' knowledge as to what the Builder was asserting in this regard.

35. They bought a House built by the Builder, there were defects in it and so the issue was prima facie with the Builder. The Builder denied that it had done some of the work and subsequently Mr Bradley was joined. I do not have detailed understanding of the change in the Owners' state of knowledge between the commencement of the proceeding and the application for the joinder.

36. In any event the joinder was justified because an order was made against Mr Bradley and to that extent it deflected the attack from the Builder onto him.

37. There was a doubt right up to the end of the hearing in the expert evidence as to who was responsible for the garage, which may well have turned out to Mr Bradley, but the Builder was denying this and pointing the figure at Mr Bradley. That did not turn out to be justified. But that was not known until the hearing.

38. The Owners have been criticised for commencing the hearing without first obtaining expert opinion as to the defects. The obvious danger in that course is that a judgement on inadequate material might prevent you from claiming afterwards for anything else. In any event the explanation of the Owners is they did not want to incur the considerable cost of a report before attempting to settle the matter at mediation. I do not see that is really relevant to this application for costs.

39. The other complaint was that the Owners did not provide their expert report until 8 October. That appears to have been the fault or decision of their solicitors for whom they are responsible. The Owners cannot explain why the solicitors did that and so no explanation has been given. If the late service of the report had caused an adjournment of the hearing, the

Owners might well have suffered an order for the resulting costs. But it did not cause an adjournment nor does it appear that any other costs were wasted and so I do not see that it is relevant.

40. A further complaint was that the Owners failed to provide their further and better particulars until six business days before the hearing. Again, if that had caused the hearing to be adjourned the Owners might have been ordered to pay any wasted costs but that did not occur, probably because that document contained no surprises. It really set out what was in Mr Mackie's report and by that stage I think it was fairly clear that the parameters of the dispute were as defined by the experts.

41. Mr Bowers Taylor says that the scope of the alleged defective work was in essence a moving feast with the Respondents not knowing the case against them until on or around the final hearing. I do not think that is a fair comment. From the service of Mr Mackie's report it was fairly clear what the case was. Obviously, what is to be awarded will not be known down to the finest detail until the last piece of evidence is given and the evidence is weighed but I think the allegations were quite clear when the hearing commenced.

42. He suggested they conducted the proceeding vexatiously in regard to the consequential losses. I do recall that there was a claim for the replacement bed that I considered excessive but I do not think that is vexatious conduct. Parties will always quantify their claims on the most optimistic view of their case. Usually the result is something less than what both sides are hopeful of getting. There was some justification in Mr Carey's evidence for the higher claim that they made and so although I did not find the claim justified I cannot say that it was vexatious.

43. Another complaint was that the Owners provided the Tribunal Book on the day of the hearing without first liaising with the Respondents about what it should include. There should have been a liaison with the Respondent with respect to its contents so as to ensure that any documents considered relevant by the Respondents would be included. However I do not recall there being any problem arising from a lack of documents and it is not suggested that anything that was relevant to the proceeding was not produced and considered. Certainly Tribunal Books should be filed and served in accordance to whatever directions are given but the failure in this case does not seem to me to be relevant to the question of costs.

44. Mr Bowers Taylor says that I should find that the Builder acted reasonably and was at all times ready, willing and able to rectify the defects. There is some justification for that. The Builder went back very promptly and fixed the ceiling even though at that stage it did not know that it was at fault. As it turned out, that problem was not due to any defect by the Builder. That is certainly creditable behaviour. It is not the behaviour of a Builder seeking to evade its responsibilities.

45. Nevertheless, the Builder thereafter took a particular view as to its liability and would not be moved from that and it was a view that I later found to be unjustified.

46. If the Builder had acknowledged all the things that were wrong and offered to come back and fix them that would be a relevant matter to take into account but I cannot find that here. In the end, I have to find that if the Owners were going to do anything other than accept the Builder's assessment that it was not liable for these matters, then they had to issue these proceedings and incur the cost of doing so.

47. Mr Bowers Taylor said the Mr Bradley cannot be held liable for any of the Owners' costs incurred prior to his joinder and I think that is right. If an order for costs is made against Mr Bradley it can only be with respect to the costs incurred after he became a party.

Conclusion for the costs apart from the joinder

48. It is true that the Owners were not entirely successful in their claim but it is a rare case when applicants recover absolutely everything they seek. Although one does not encourage ambit claims it is quite proper and understandable for parties to put their best case in the hope of achieving that even though experience has shown that the result generally tends to be less than all that they had hoped for. In an application such as this I think you have to look at what the result was in substance and, in this case, they substantially succeeded and that is reflective of the relative strengths of the parties' cases. So one of the matters referred to in s109(3) is relevant.

49. Another factor is that, although initially manifesting an intention to deal with some matters, the Builder then denied liability and persisted in this stance despite a mediation. The nature of the case was such that, in order to pursue their claim they would need to engage an expert witness, which was expensive. The Builder was legally represented and so it is understandable that the Owners sought legal assistance as well. The nature of the case therefore caused them to incur these expenses and if no order for costs is made they will have had a pyrrhic victory when their costs are compared with the amounts awarded.

50. Ultimately the Owners who had a defectively constructed House were largely successful in recovering costs that were assessed to fix the defects. The Builder, although initially exhibiting some willingness to do something about it, then denied liability. Mr Bradley does not appear to have made any offers at all. Ultimately, the Owners had to come here to seek relief. The Owners have substantially succeeded and the Respondents have substantially failed. I think in these circumstances, leaving aside the costs of the joinder, I ought to make an order for costs.

Costs of the joinder

51. Mr Bowers Taylor submitted that the Builder's costs thrown away by reason of the joinder should be awarded in its favour. Generally if a party has not joined sufficient parties at the beginning when he should have done so, and subsequently seeks to join others, putting the other party to expense by the joinder then generally, the party that applies for the joinder does so at his cost.

52. In this case, the costs of the joinder application were reserved.

53. Mr Bowers Taylor said that the Builder's costs of the joinder should not have been incurred by it and that Mr Bradley should have been made a party to start with.

54. Certainly the Builder blamed Mr Bradley for some matters but there was no corresponding acknowledgement by Mr Bradley that he was responsible for these things and, in the case of the garage, I found that he was not responsible as the Builder had alleged.

55. I do not think that enough was done by the Builder to set the Owners right about which party should bear responsibility and it left the Owners in a situation of uncertainty in regard to that.

56. On the other hand, the Owners were legally represented at the time the proceeding and were aware that the Builder claimed that responsibility lay with Mr Bradley, at least in regard to some matters.

57. In regard to the joinder I see no reason to depart from the prima facie position of s,109(1) that both parties pay their own costs for the joinder and I will so order.

The scale of costs

58. Mr Bowers Taylor says that the appropriate scale of costs should be the Magistrates' Court scale, because the amounts awarded individually against the Respondents did not in either case exceed $10,000 and the hearing did not exceed one day. That is true, except that both matters were run together and it is artificial to talk as though they were two separate cases of less than $10,000.

59. The usual scale upon which costs are awarded by the Tribunal in this List is the County Court Scale and that is reflective of the nature and complexity of these sorts of proceedings and the manner in which the cases are generally conducted. An award of costs on the County Court Scale is more likely to reflect the actual costs incurred than the Magistrates' Court Scale.

60. This proceeding was conducted as a hard fought building case, much more akin to a County Court proceeding than to a summary case in a Magistrates' Court. There were particulars requested, a Tribunal Book prepared and the parties were legally represented.

61. I do not think it would be appropriate to award costs on the Magistrates' Court scale.

Order

62. The order will be that, apart from the application for joinder as to which there shall be no order as to costs, there will be an order that the Builder pay the Owners' cost of the proceeding including reserved costs up to and including 12 August 2014 and half the costs thereafter, such costs if not agreed to be assessed in accordance with the County Court Scale on the normal basis by the Victorian Costs Court. Against Mr Bradley there will be an order that he pay one half of the Owners' costs of this proceeding including reserved costs after 12 August 2014, such costs if not agreed to be assessed in accordance with the County Court Scale on the normal basis by the Victorian Costs Court.

SENIOR MEMBER R. WALKER