

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP714/2018

CATCHWORDS

Domestic building – proceeding determined pursuant to section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* – assessment of loss and damage – assessment of costs of the proceeding under s109 – costs of the referral to Domestic Building Dispute Resolution Victoria under s12B Schedule 1.

APPLICANT	Carrol James
RESPONDENT	OPM Developments Pty Ltd (ACN: 097 136 984)
WHERE HELD	Melbourne
BEFORE	S. Kirton, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	16 November 2018
DATE OF ORDER	18 December 2018
CITATION	James v OPM Developments Pty Ltd (Building and Property) [2018] VCAT 2017

ORDER

- 1 The respondent must pay to the applicant damages in the sum of \$118,079.07.
- 2 The respondent must pay the applicant's costs and disbursements fixed at \$24,729.45.
- 3 The respondent must, in addition, reimburse to the applicant the filing fee of \$766.40.

S. Kirton
Senior Member

APPEARANCES:

For Applicant	Mr Ritchie of Counsel.
For Respondent	No appearance.

REASONS

- 1 This proceeding came before me for a hearing to assess and determine the quantum of the applicant's damages, following orders made on 1 October 2018 determining the proceeding in her favour.
- 2 A brief summary of the events leading to this hearing, based on the evidence of the applicant, is as follows:
 - a The applicant engaged the respondent to construct a new dwelling on her land in Nunawading, using a standard form HIA building contract signed on 17 March 2014.
 - b Works commenced on or about 16 March 2015, by which time a deposit had been paid and a building permit had been issued. The date for commencement is calculated pursuant to clause 10 of the building contract,¹ and was confirmed by the applicant's photographic evidence showing that the site had been excavated by 2 April 2015.
 - c On 16 June 2016 the applicant issued a notice pursuant to clause 43 of the contract, requiring the respondent to rectify the items of incomplete and defective works listed in the notice, failing which she would terminate the contract.
 - d The respondent failed to remedy the breaches listed in the notice and the applicant terminated the contract pursuant to clause 46.3 on 11 July 2016.
 - e The applicant then engaged another builder and subcontractors to rectify the defective work and to complete the dwelling.
 - f She referred the domestic building work dispute to Domestic Building Dispute Resolution Victoria ("DBDRV"), which issued a 'Certificate of Conciliation - Dispute Not Resolved' on the grounds that the respondent failed to participate in the conciliation process.
 - g The applicant then commenced this proceeding on 15 June 2018.
 - h The respondent failed to attend any of the directions hearings in the proceeding, held on 12 July 2018, 28 August 2018, and 1 October 2018, and failed to comply with any of the orders made.
 - i On 1 October 2018 the Tribunal ordered:

"The proceeding is, pursuant to section 78 of the *Victorian Civil and Administrative Tribunal Act 1998*, determined in favour of the applicant with the quantum of the applicant's damages to be assessed."
- 3 Counsel for the applicant provided the Tribunal with an itemised statement of the amounts claimed and copies of the documents supporting each item

¹ which provides that commencement must occur within 21 days after the builder receives all essential information, the deposit and all necessary permits.

of claim. The applicant gave evidence confirming each of the documents and the amounts she had outlaid. The applicant's expert witness, Mr Tony Croucher, gave evidence affirming the opinions expressed in his report dated 11 October 2016.

4 The amounts claimed are as follows:

Rectification of the defective work		\$49,341.52
Costs to complete the dwelling, comprising:		
i) costs of new builder Jack Lunenburg	\$31,981.00	\$215,451.68
ii) costs paid directly by the applicant to trades and material suppliers	\$183,470.68	
Subtotal		\$264,793.20
Less contract balance		[\$158,030.00]
Subtotal		\$106,763.20
Liquidated damages		\$6,535.71
Total		\$113,298.91
Plus interest		\$4,780.16
And costs and disbursements		\$35,710.60

5 I now consider each of these claims in detail.

Rectification of the defective work \$49,341.52

6 I accept the evidence given by Mr Croucher as to the extent of the defects in the property as at the time the contract with the respondent was terminated. His report is at pages 41 – 99 of the Tribunal Book.

7 I accept the evidence given by the applicant as to the amount she has paid to rectify the defective work. These amounts are confirmed by invoices provided in the Tribunal Book at pages 160 – 173.

Costs to complete the new dwelling \$215,451.68

8 The applicant gave evidence that she completed the dwelling in accordance with the plans and specifications agreed to by the respondent. These plans and specifications are set out at pages 15 – 25 of the Tribunal Book.

9 She engaged a new builder, Jack Lunenburg, to carry out a part of the completion works. The contract with him was contained in two documents, the first at pages 100 – 157 of the Tribunal Book and the second at page 158.

- 10 I accept the evidence given by the applicant that she has paid Mr Lunenburg \$31,981, confirmation of which is contained at pages 175 – 192 of the Tribunal Book.
- 11 I note that although the contract with Mr Lunenburg names the owner of the property as Carrol James Superannuation Pty Ltd (at Tribunal Book page 100), the applicant personally guaranteed the payments due under the contract (at pages 154 – 155) and the invoices and receipts provided to me are all made out to the applicant personally. On that basis, I am satisfied that it was the applicant who has suffered the losses claimed.
- 12 As well as the contract with Mr Lunenburg, the applicant also made direct payments to trades and material suppliers of \$183,470.68, in order to complete the dwelling. The documents confirming these payments are contained at pages 195 – 312 of the Tribunal Book. I accept her evidence that she has made these payments.

Calculation of Balance of Contract Price \$158,030

- 13 The contract price agreed with the respondent was \$292,400, as set out at Schedule 1 clause 2 of the building contract (page 3 of the Tribunal Book).
- 14 The applicant gave evidence that she agreed to two variations to the contract price, which were set out in writing and are at pages 26 and 33 of the Tribunal Book. The first was a negative variation of \$3000 and the second was a positive variation of \$22,178.22. As a result, the agreed adjusted contract price was \$311,578.22.
- 15 The applicant provided proof of payments to the respondent totalling \$153,548.22 (pages 26 – 40).
- 16 I accept her evidence that the balance of the contract price due to the respondent was therefore \$158,030.

Calculation of Liquidated Damages \$6535.71

- 17 Under the building contract, the respondent agreed to pay liquidated damages of \$250 per week for late completion of the building works (Schedule 1 clause 9 of the contract – page 5 of the Tribunal Book). The respondent had allowed 300 days complete the works (Schedule 1 clause 1 of the contract – page 3 of the Tribunal Book).
- 18 I accept the evidence that the work commenced on 16 March 2015 (as discussed at paragraph 2b above) and I calculate that the date for completion was therefore 11 January 2016. The contract was terminated on 11 July 2016, which is a delay of 183 days. I accept that the amount of liquidated damages due is \$6535.71.

Interest \$4780.16

- 19 The applicant claims interest on the judgement sum calculated at the penalty interest rate from the date of commencement of the proceeding to

the date of the hearing. I will allow this amount as damages, in accordance with sections 53(2)(b)(ii) and (3) of the *Domestic Building Contracts Act* 1995, being \$4780.16.

Costs and disbursements **\$35,710.60**

20 Following the hearing, at my request, the applicant provided a breakdown of the amount of costs and disbursements she has incurred and copies of tax invoices substantiating the amounts incurred. The Tribunal has power to award costs under a number of provisions.

21 Costs of the proceeding (that is, the costs incurred following the commencement of the proceeding on 15 June 2018) fall under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 (“VCAT Act”). I am satisfied pursuant to section 109(2) that it is appropriate that the respondent pay the applicant’s costs of the proceeding. In particular, I rely on the following subsections of s109(3):

- (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party by conduct such as –
 - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse, ...
- (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....;

22 Further, the applicant also incurred solicitors’ costs prior to the commencement of the proceeding. The Tribunal has power to make an order for costs incurred as part of the referral to DBDRV, pursuant to s12B, Schedule 1 of the VCAT Act. The respondent failed to attend the conciliation conference there, and s12B relevantly provides as follows:

- (1) This clause applies despite section 109 to a domestic building dispute that is a domestic building work dispute.
- (2) Subject to subclause (3), the Tribunal must make an award of costs against an unsuccessful party to the dispute if the dispute had been referred for a conciliation conference and the party –
 - (a) refused to participate in the conciliation conference...

23 From my perusal of the invoices, I am satisfied that the applicant has paid \$18,020 to her solicitors for work performed either in this proceeding or in the DBDRV referral. The usual order is for legal costs to be assessed on the County Court scale² on a standard basis. I have no evidence before me as to whether the costs actually incurred were calculated on the County Court Scale. I must make a decision based on the information I have, and accordingly I will discount the amounts actually charged by 30%, using the

² Rule 1.02 *Victorian Civil and Administrative Tribunal Rules* 2018.

rough “rule of thumb” that scale costs are often two thirds of what is actually incurred. On that basis, I will allow \$12,614.

- 24 Further, I accept that the applicant has also incurred disbursements in the nature of barrister’s fees of \$6079.20 and expert fees totalling \$6036.25 for Mr Croucher. I will allow these in full, being \$12,115.45. I note that the expert’s fees may also be classified as damages.
- 25 On the basis of the above, I will fix the amount of costs and disbursements at \$24,729.45.³

Reimbursement of filing fee

- 26 Further, as the applicant has been substantially successful in her claim, she is entitled under s115B of the VCAT Act to an order that she be reimbursed by the respondent the filing fee she paid, in the sum of \$766.40.

Orders

- 27 The respondent must pay to the applicant damages in the sum of \$118,079.07.
- 28 The respondent must pay the applicant’s costs and disbursements fixed at \$24,729.45.
- 29 The respondent must, in addition, reimburse to the applicant the filing fee of \$766.40.

S. Kirton
Senior Member

³ I have not allowed the costs paid to the applicant’s previous solicitors, as these invoices contain no detail of the work performed and appear to predate the referral to DBDRV.