

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D198/2013

CATCHWORDS

Domestic building, costs, s109 of the *Victorian Civil and Administrative Tribunal Act 1998*, applicant not represented at the hearing, claim for personal time and travel, more than one firm of solicitors, type of costs, proportion of costs awarded.

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| APPLICANT | Ms Fay Maree Lee |
| RESPONDENT | A.C.N. 132 709 105 (ACN 132 709 105) |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member M. Lothian |
| HEARING TYPE | Costs Hearing |
| DATE OF HEARING | 10 June 2015 |
| DATE OF ORDER | 7 July 2015 |
| CITATION | Lee v A.C.N. 132 709 105 (Building and Property) [2015] VCAT 982 |

ORDERS

- 1 It having come to my attention that the orders and reasons of 23 April 2015 contain a clerical error and a miscalculation, the reasons and orders are amended as follows under s119 of the *Victorian Civil and Administrative Tribunal Act 1998*:
 - (a) Item 27a in paragraph 838 of the Reasons is \$279.30, not \$2,790.30;
 - (b) The total in paragraph 838 of the Reasons is \$71,606.17, not \$74,117.17;
 - (c) “less defects and deviations” in paragraph 847 of the Reasons is \$71,606.17, not \$74,087.17; and
 - (d) The total shown as payable by the Builder to the Owner in two places in paragraph 847 of the Reasons, and by the Respondent to the Applicant in Order 1, is \$69,207.87, not \$71,688.87.
- 2 **I direct the Principal Registrar to amend the record to show that the Respondent has changed its name to A.C.N. 132 709 105 (ACN 132 709 105).**
- 3 The Respondent must pay Applicant interest of \$358.36.

- 4 The Respondent must pay Applicant's costs to be agreed, but failing agreement, 39% of the Applicant's costs assessed by the Costs Court on a standard basis on the County Court Scale.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Ms F. Lee in person

For Respondent

Mr S. Ryan of Counsel

REASONS

- 1 On 23 April 2015 I made orders in the substantive proceeding. I ordered that the respondent-Builder pay the applicant-Owner \$71,688.87. I also reserved interest and costs with liberty to apply.
- 2 The Owner applied for her costs. The Builder did not apply for costs. On 10 June 2015, I conducted a costs hearing. The Owner seeks \$91,351.23.
- 3 The Owner was self-represented at the costs hearing, as she had been at the hearing of the substantive matter. However, the Owner had been legally represented at various times before the hearing and also incurred the cost of her experts at the hearing.
- 4 Mr Ryan of Counsel appeared for the Builder at both hearings.

CORRECTIONS

- 5 At the commencement of the costs hearing Mr Ryan sought correction of various clerical or similar mistakes in the reasons, leading to a miscalculation of the amount payable by the Builder to the Owner in Order 1 of 23 April 2015. I was satisfied that the items raised by Mr Ryan were errors and these corrections were made at the hearing under s119 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”).
- 6 The Owner expressed concern that the Builder had waited until the costs hearing to raise these issues. Mr Ryan said the Builder had only recently checked the figures and discovered the errors then.

INTEREST

- 7 The reservation of interest concerns any amounts within the order that should have interest added to them, such as amounts previously paid by the Owner and for which she was granted reimbursement. The Owner made no claim for items of this nature.
- 8 The Owner said that at the date of the costs hearing the Builder had not paid the amount ordered, even though the order was that payment be made forthwith. In consequence she seeks interest under the *Penalty Interest Rates Act 1983*.
- 9 The Owner registered the order with the Magistrates Court at Geelong on 11 May 2015. In consequence, interest is a matter for the Magistrates Court from 11 May 2015. However I find that the Owner is entitled to interest from the date of the order, 23 April 2015, to the day before registration, 10 May 2015.
- 10 I award interest under the *Penalty Interests Rate Act 1983* on \$69,207.87, a sum of \$358.36.

COSTS

- 11 Section 109 of the VCAT Act says in part:

s.109:

- (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.

12 The Owner appeared unfamiliar with s109 and its significance in her claim for costs until I explained it to her during the costs hearing. As I said at the costs hearing, I treat the Owner's application as based on ss.109(3)(b) and (d) of the VCAT Act. I also have regard to s109(3)(c) and (e).

13 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

- (i) The prima facie rule is that each party should bear their own costs of the proceeding.
- (ii) The Tribunal should 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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

s.109(3)(b) – Prolonging Unreasonably the Time Taken to Complete the Proceeding

- 14 As I said in the Reasons of 23 April 2015, the hearing was far longer than it needed to be because of the Builder's failure to properly document variations to the contract. Under sections 37 or 38 of the *Domestic Building Contracts Act* 1995 the Builder was obliged to obtain the Owner's written consent before proceeding with many of the variations to the building contract. It did not do so. In consequence many items were in dispute that might not have been the subject of a dispute. The Builder's failure certainly added to the length of time necessary to consider each of these items, both in preparation for the hearing and during the hearing itself.
- 15 Even if s109(3)(d) should properly be reserved for matters that arise after the proceeding commences, I find this is a matter I can take into account under s109(3)(e) – any other matter the Tribunal considers relevant.
- 16 Further, the Owner submitted that the hearing was made longer because of:
- Changes to the witness statements of Mr Farrelly of the Builder and Mr Connors of the cabinetry sub-contractor;
 - Failure of the Builder to supply its building consultant expert, Mr Lees, with the approved building plans;
 - Failure by the Builder to inform its engineering expert, Mr Yttrup, that the balcony joists were not in accordance with the building permit.

I accept that the first and third of these items are accurate and added some length to the hearing.

- 17 I also accept Mr Ryan's submission that the Points of Claim were amended three times and had to be responded to on each occasion.
- 18 The Owner was not legally represented during the hearing, but incurred the cost of her experts when they appeared.
- 19 I find on balance that the Builder unreasonably prolonged the time taken to complete the proceeding to a somewhat greater degree than the Owner.

s.109(3)(c) – The Relative Strengths of the Claims made by each of the Parties

- 20 I remark upon the relative strengths of the claims made by the parties. As Mr Ryan submitted at the costs hearing, the Owner was awarded less than half the amount she claimed. I calculate that of the figure of \$178,061 that she was claiming by the close of the hearing on 24 November 2014, she has obtained an order for approximately 39%. Mr Ryan submitted that the Owner was successful for a similar proportion of the 196 items in dispute between the parties.

- 21 Mr Ryan submitted that as the Builder has been approximately 61% successful in defending the case against it, it is not reasonable to order any costs against it – it too has incurred costs in defending itself and those costs should be set off against the costs sought by the Owner.
- 22 Nevertheless, the Owner was awarded a substantial amount, and there is nothing to demonstrate that she could obtain an amount close to that magnitude without prosecuting her case to the end of the hearing. Further, the Builder's failure to properly document changes to the contract extended the length and complexity of the whole proceeding, including regarding some matters concerning which the Builder was eventually successful.
- 23 I find that it is fair that she recover some costs, but reduce them, having regard to the Builder's successful defence.

s.109(3)(d) – The Nature and Complexity of the Proceeding

- 24 The hearing occupied 15 days. It was long and at times complex, made more so by the Builder's poor contractual documentation. The preparation for the case was similarly arduous for the parties. I find that the nature and complexity of this proceeding justifies an award of costs in favour of the applicant. However, as previously mentioned, given the limited success of the Owner, I find that it is fair to reduce the amount she recovers.

s.109(3)(e) – Any Other Matter the Tribunal Considers Relevant

- 25 As mentioned above, the Builder did not seek costs, but made mention of a settlement offer of 30 September 2013, stated to be in accordance with sections 112, 113 and 114 of the VCAT Act. The offer was to pay the Owner \$40,000 plus costs on a standard basis.

- 26 Section 112 provides that:

- if a party makes an offer which is compliant with sections 113 and 114, and
- the offer is not accepted by the other party, and
- the Tribunal considers the orders made are not more favourable to the other party than the offer,

there is a presumption that the offering party recovers their costs from the other party incurred after the offer was made.

- 27 Although somewhat difficult to follow, the Builder's submission appeared to be that the orders made were not more favourable to the Owner than the offer, so no costs should be awarded to her.
- 28 Mr Ryan referred me to my own decision in *Ashjam v Carroll* [2007] VCAT 661. In *Ashjam* I found that I would not have made an order for costs in favour of the applicant at the time the offer was made, and included an approximate sum for costs contained in the offer to enable me to

determine that the orders made were not more favourable to the party receiving the offer than the offer.

- 29 Mr Ryan said that having regard to the costs claimed by the Owner in her document “Fay Lee – VCAT Costs”, by 30 September 2013 she claimed to have incurred approximately \$50,000 of costs, or approximately \$30,000 on a standard basis. When this is added to the principal offered of \$40,000, it is \$70,000; and therefore, he submitted, more advantageous than the amount awarded.
- 30 In this proceeding I have found that it is fair to make a limited order for costs in favour of the Owner. Mr Ryan’s submission would only succeed in this proceeding if I had found that it was not reasonable to make any award of costs.

Proportion of costs

- 31 I find it is fair that the Owner receive the same proportion of her costs as the award in her favour. That proportion is 39%.

The Owner’s time and travel

- 32 The Owner has claimed \$6,585.18 for her lost wages and \$336 for travel for the 15 days of her hearing. I said that in the 4th edition of his book, *Annotated VCAT Act* the learned author Jason Pizer says at [VCAT.109.120]:

... it is well established that “costs” do not include the time taken by an unrepresented person (who is not a lawyer) in preparing or conducting his or her case.

- 33 I asked the Owner whether there was a basis upon which she should recover these amounts. She indicated that she had not previously appreciated the difference between the type of costs that she could recover and the other amounts forgone by her because of the hearing. She made no further submission regarding these expenses and I do not allow them.

More than one firm of solicitors

- 34 The Tribunal notes that at various times that Owner engaged Samo Lawyers, Wighton Lawyers and Cinque, Oakley & Senior Lawyers. The Owner is not entitled to costs that have been incurred by more than one firm for the same task, or for familiarizing themselves with the file, unless for a compelling reason.

Type of costs

- 35 The Owner seeks all she has spent – in legal parlance, indemnity costs or solicitor-own client costs. I am not satisfied that there is any basis upon which other than standard costs should be awarded.

Hearing fees

36 The Owner obtained a dispensation not to pay hearing fees, and was successful in the proceeding, so there are no hearing fees into account.

CONCLUSION

37 I find that it is fair that the Builder pay the Owner's costs to be agreed, but failing agreement, being 39% of the costs to be assessed by the Costs Court on the County Court standard basis and having regard to the above remarks about the Owner's time and travel and her engagement of more than one firm of solicitors.

SENIOR MEMBER M. LOTHIAN