VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1281/2017

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.109 - order for costs - claim under the *Water Act 1995* – s.16 – unreasonable flow of water – damages awarded in favour of the Applicant but claim for declaratory and injunctive relief refused - Applicant seeking an order for costs - relevant factors - order for costs on standard basis

APPLICANT	Elizabeth Wong Chii Leung
RESPONDENT	Luke Harris
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs hearing
DATE OF HEARING	8 March 2019
DATE OF ORDER	17 April 2019
CITATION	Leung v Harris (Building and Property) [2019] VCAT 608

ORDER

Order the Respondent to pay the Applicant's cost of this proceeding, including any reserved costs, 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

APPEARANCES:

For Applicant:	Mr A. P. Downie, of counsel
For Respondent:	Mr D. Triaca, of counsel

REASONS

Background

1. This proceeding concerned an application by the Applicant for damages and various other orders in regard to water penetration into her unit in Grattan Street, Prahran ("the Applicant's Unit") which is immediately below a unit belonging to the Respondent on the floor above ("the Respondent's Unit").

2. The application, which was brought pursuant to the *Water Act 1995*, came before me for hearing on 17 July 2018, with four days allocated. After the hearing, written submissions were filed by both sides by 31 August 2018.

3. On 22 October 2018 an order was made that the Respondent pay to the Applicant $52,250.39. Applications for declarations and injunctive relief by the Applicant were refused and costs were reserved.

4. The Applicant now seeks an order for payment of her costs of the proceeding.

The application for costs

5. The application for costs came before me on 8 March 2019 with only one hour allocated. Mr Downie of counsel appeared on behalf of the Applicant and Mr Triaca of counsel appeared on behalf of the Respondent.

6. Affidavits sworn by the solicitors for the respective parties had been filed and were relied upon. Counsel spoke to written submissions that they had prepared which had also been filed.

7. The small amount of time allocated did not permit proper consideration of the points raised and so I informed the parties they would receive a written decision.

Power to award costs

8. The power of the Tribunal to award a party costs of a proceeding is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") which, where relevant, provides 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.

……
…"

9. In the case of *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J in said (at para 20 et seq.) that the proper approach to be taken by the Tribunal in regard to any application for costs is as follows:

> "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."

10. His Honour added (at para 22):

> "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."

Submissions

11. The relevant factors to be found in s.109(3) were said by Mr Downey to be the nature and complexity of the proceeding, the unreasonable refusal by the Respondent to accept a proposal to settle the claim made by the Applicant and what he said was the dilatory and uncooperative manner in which the Respondent conducted the proceeding.

12. He said that if no order for costs were to be made then, considering the extent of the costs incurred as deposed to in the affidavit filed by the Applicant's solicitor, she would have a pyrrhic victory, in that the costs greatly exceed the amount awarded.

13. Mr Triaca pointed out, correctly, that the starting point is that parties pay their own costs. He said that, having regard to the respects in which the Applicant's claim did not succeed, and the manner in which her case was conducted, it was not fair in the circumstances to order the Respondent to pay the Applicant's cost.

The nature and complexity of the proceeding

14. Mr Downey said that the proceeding was complex and protracted and that the Applicant was required to produce expert evidence and call witnesses to prove their claims, all of those claims having been disputed by the Respondent.

15. The significance of the nature and complexity of the proceeding was considered by the then President of the Tribunal, Morris J, in *Sweetvale v. Minister for Planning* [2004] VCAT, where his Honour said (at para 19):

> "19 What can be said is this. It is more likely that the nature and complexity of a proceeding will make it fair to make an order as to costs if:
>
> - the proceeding was in the tribunal's original jurisdiction, not its review jurisdiction;
> - the proceeding involved a large number of issues, or a small number of particularly complex issues;
> - the proceeding involved a large sum of money or a major issue affecting the welfare of a party or the community;
> - the proceeding succeeded and was a type which was required to be brought, either by reason of a statutory duty or by reason of some unlawful or improper conduct by another party which warranted redress;

- the proceeding failed and was a type where a party has asserted a right which it knew, or ought to have known, was tenuous;
- a practice has developed that costs are routinely awarded in a particular type of proceeding, thus making an award of costs more predictable for the proceeding in question."

16. However, there is no practice to award costs routinely in a particular type of proceeding. In *Pacific Indemnity Underwriting v. Maclaw* [2004] VSCA 165, Ormiston J said (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."

17. Mr Downey said that the Tribunal must assess the nature and complexity of the proceeding before it in each case.

18. He said that in the present case, the Applicant's building expert, Mr Ryan, provided four highly detailed expert reports and there was also a report from a mould expert, Mr Murphy.

19. He said that the legal issues raised were complex and required submissions as to legal interpretation that a layperson would not have been able to readily grapple with. In particular, he referred to:

    (a) the issue of the boundary between the Applicant's unit and the common property and the ceiling level;
    (b) the interpretation of the *Subdivision (Registrar's Requirements) Regulations* 2011; and
    (c) the scope of the orders that are able to be made under s 9(5) of the *Water Act* 1989.

20. Mr Triaca did not appear to dispute that the claim was complex, although he said that this was substantially increased by the injunction claim. I do not think that the evidence in the case would have been much different even if the injunction claim had not been made and so I do not accept that it increased the complexity of the proceeding.

21. I think this was a complex case in terms of the legal issues and the expert evidence required. To conduct such a case is expensive, requiring lawyers and experts to be engaged. It would not have been possible for the Applicant or her husband to have conducted the proceeding in any other way. That factor is supportive of the notion that it would be fair to make an award of costs in the Applicant's favour.

Unreasonable refusal to accept an offer

22. The offer referred to was made in a letter of demand dated 9 August 2017. In the letter, the solicitors required the Respondent to advise in writing within seven days, his intentions -

    (a) to arrange and pay for the work necessary to remedy the cause of the water ingress and advise how he proposed to go about it; and

    (b) pay to the Applicant the cost of repairs to the unit.

23. The letter advised that, if the dispute should be satisfactorily resolved within the required time period the Applicant would not pursue her claim for the rental losses to date as a result of the water ingress. Such a claim would be made, however, if she were to be compelled to commence legal proceedings.

24. Mr Downey described this as being a generous offer and an incentive for the Respondent to agree to fix his unit and stop the flow of water into the Applicant's unit. He said that it was ignored. He said that the Respondent's refusal to accept this proposal was unreasonable and necessitated the issue of proceedings in which the Applicant sought and recovered, not only the cost of rectification but also, damages for loss of rental and a re-letting fee.

25. He also pointed out that there had been numerous attempts by both the Applicant, her estate agent and the Owners Corporation to persuade the Respondent to carry out necessary repairs to the balcony of his unit.

26. The offer did lack detail, in the sense that no scope of works was specified. However, it did indicate to the Respondent a willingness on the part of the Applicant to resolve the matter on a reasonable basis without going to the expense of litigation. It seems to me that this overture fell on deaf ears.

27. Only two days after receiving this offer the Respondent had received a notice from the Owners Corporation requiring him to address the problem. Yet instead of engaging in some sensible dialogue to resolve a situation that was seriously affecting the Applicant, the Respondent did nothing until March the following year.

28. Mr Triaca said that the Respondent himself made an offer on 12 June 2018 to carry out waterproofing works and pay the Applicant $30,000 in 14 days which was not accepted. By that stage the proceedings were well advanced and the hearing date was imminent. The work the Respondent proposes to do was also considered by Mr Ryan to be inadequate. I do not find that it

was unreasonable for the Applicant not to have accepted this proposal. The amount offered was also less the amount awarded at the hearing.

29. The failure of the Respondent to take any action in regard to the leaking problem until shortly before the hearing made it necessary for the Applicant to take these proceedings. When she did so, she received more than she had said she was willing to accept in her offer before the hearing. I think that is a relevant factor supporting an award of costs in the Applicant's favour.

The conduct of the proceedings

30. Mr Downey said that the Respondent had conducted the proceedings in a dilatory and uncooperative manner that made it difficult for the Applicant to understand the defence and prosecute the matter. In particular, he referred to:

    (a) the late filing and service of the Respondent's witness statement, which had been ordered to be served by 31 May 2018 but was not served until two business days before the trial;

    (b) the late filing and service of the Respondent's expert's report, which had been ordered to be filed and served by 28 May 2018 but was not filed and served until three business days before the trial;

    (c) the non-discovery of a significant email from the owners' corporation manager to the Respondent was not discovered and was only produced on the day of the trial; and

    (d) the failure of the Respondent to appear personally at the compulsory conference, as a result of which the Applicant's costs thrown away were reserved.

31. As a result, Mr Downie submitted that the Respondent had failed to comply with orders of the Tribunal and had conducted the proceeding in a manner causing unnecessary disadvantage to the Applicant.

32. The Respondent ought to have appeared at the compulsory conference but given his apparent general attitude to the claim it is unlikely that it would have made any difference had he done so. Despite the other non-compliances by the Respondent, the Applicant's solicitors and counsel were able to prepare and conduct the case without, so far as I can see, any disadvantage to the Applicant.

33. Mr Triaca pointed out that the Applicant had amended her claim twice from the Points of Claim filed with the application. The first amended pleading is dated 12 June 2018 and includes allegations that the Respondent was aware of the problem and had not taken reasonable steps to prevent it. The relief sought was also extended. The additional particulars appear to have been derived from documents obtained in discovery and by subpoena.

34. The second amended pleading dated 12 July 2018 updates the loss and damage claimed and includes substantial additional detail of the claim. Although these documents added considerable detail, sought further relief and raised some additional arguments it was still substantially the same case.

35. The hearing itself was conducted competently on both sides.

36. I do not think that the manner in which either party conducted the proceeding assists me in determining whether or not an order for costs should be made.

Relative strengths of the parties' cases

37. Mr Downie also referred to the outcome of the case as supporting an application for costs. Insofar as that is indicative of the relative strengths of the parties' cases, that is a factor referred to in s 109(3)(c).

38. Mr Triaca said that I should start by looking to see the respects in which the Applicant's application was unsuccessful. He pointed out that the application in the prayer for relief for declarations and a mandatory injunction were refused and that the Applicant was only partially successful in her damages claim.

39. He said that by the time of the hearing, rectification works had been completed and two water tests have been carried out which showed that there were no continuing leaks. He said that the Applicant persisted with the claim because she was dissatisfied with the manner of rectification. He said that a substantial amount of hearing time is taken up with the claim for a mandatory injunction.

40. I do not think that it is accurate to say that the defects in the Respondent's unit had been rectified. The leaking membrane on the balcony was not rectified and the loose tiles were not replaced. Rather, the Respondent had a contractor apply a membrane over the top of the tiles which has succeeded in preventing the water ingress into the Applicant's unit, at least for the time being.

41. However, the contractor that applied the membrane refused to guarantee that it would work and the preponderance of expert evidence was that it should not have been done in this way. The Applicant proceeded to seek a mandatory order that the balcony be repaired properly in order to prevent further damage in the future. I do not think that I can find that it was unreasonable in the circumstances for her to have done that. The application for a mandatory injunction was refused because I found that all the Respondent was required to do was stop the flow and it was a matter for him how he did it.

42. As to the time taken with respect to the mandatory injunction, it is impossible to disentangle the evidence in regard to that from all the other evidence. I should add that the basis upon which a mandatory injunction was sought was that the rectification method adopted by the Respondent

was quite unsatisfactory. I found that to be established. The claim for a mandatory injunction failed because of the nature of the proceeding rather than a lack of evidence to support it.

43. Concerning the monetary claim, the Applicant was successful, in that she recovered damages of $52,250.39, comprising $25,480.75 for repairs to her unit, $24,938.07 for loss of rent and $1,841.07 for a reletting fee.

Conclusion

44. Weighing up all these factors, I think that it is fair in the circumstances to make an order that the Respondent pay the Applicant's costs. Costs, including reserved costs, will be allowed on the standard basis in accordance with the County Court scale.

R Walker
Senior Member