VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP752/2017

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Costs – Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether fair to order costs in favour of Respondent where Applicant's claim unproven.

APPLICANT	Phillips Constructions Pty Ltd (ACN 088 339 842)
RESPONDENT	Salvatore Nicosia
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
LAST DATE FOR FILING WRITTEN SUBMISSIONS	8 December 2017
DATE OF ORDER	11 December 2017
CITATION	Phillips Constructions Pty Ltd v Nicosia (No 2) (Building and Property) [2017] VCAT 2069

ORDER

No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	On the papers.
For the Respondent	On the papers.

REASONS

INTRODUCTION

1. On 11 September 2017, I dismissed the Applicant's claim for damages, allegedly sustained as a result of the Respondent having improperly cleaned brickwork of a residential dwelling constructed by the Applicant. In particular, the Applicant alleged that the process adopted by the Respondent to clean the brickwork caused staining to the brickwork mortar, which necessitated remedial work at a cost of $8,415. In addition, the Applicant alleged that it had incurred further expenses associated with the rectification of the brickwork mortar, which included the cost of expert reports and administrative costs, making a total claim of $12,578.

2. The Respondent denied liability. He contended that any discolouration in the mortar was caused by a number of factors which were linked to the work performed by the bricklayer engaged by the Applicant, rather than through any fault on his part.

3. Both parties relied on expert evidence in advancing their respective positions, in addition to their own lay evidence. The hearing occupied one hearing day.

4. Ultimately, due to the conflicting opinions expressed by the experts, coupled with the fact that some staining was also apparent to areas which were not cleaned by the Respondent, I was not persuaded that the staining was caused by any act or omission on the part of the Respondent. Consequently, I dismissed the application, with liberty to apply on the question of costs.

5. The Respondent seeks an order that the Applicant pay his 'out-of-pocket' expenses associated with defending the proceeding. Those 'out-of-pocket' expenses relate to the costs of obtaining expert reports and paying experts to attend and give evidence at the hearing of the proceeding. The Respondent does not seek an order for payment of his legal costs, notwithstanding that he was legally represented by counsel at the hearing of the proceeding. The total amount claimed by him is $6,354.55.[1] The Applicant opposes the Respondent's application for costs.

6. By exchange of correspondence, both parties agreed that the Tribunal determine the Respondent's application for costs 'on the papers', without the need for either party to appear personally at a costs hearing.

[1] Reduced from $6,654.55 in the Respondent's written submission dated 1 December 2017.

In accordance with orders giving effect to that process, the parties have each filed written submissions, to which I have had regard.[2]

COSTS

7. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). Section 109 of the Act states:

> **109 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 sub-section (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;

[2] Respondent's written submissions dated 20 September and 1 December 2017 together with enclosures, and Applicant's written submissions dated 13 November 2017.

(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.

8. In *Vero Insurance Ltd v The Gombac Group Ltd*,[3] Gillard J stated:

> [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.

THE PARTIES' SUBMISSIONS

9. The Respondent points to ss 109(3) (c), (d) and (e) of the Act as the grounds upon which an order for costs should be made. In correspondence dated 20 September 2017, the Respondent's solicitors raise the following factors in support of his application for costs:

> …
>
> In support of our request we note the following:
>
> (a) the Respondent is an independent contractor;
>
> (b) this claim was only brought to his attention on 20 February 2017 (6 months after the Respondent performed brick cleaning works at the relevant premises);

[3] [2007] VSC 117.

(c) the Respondent was not afforded the opportunity to undertake rectification works;

(d) prior to contacting the Respondent in late February 2017, the Applicant:

a. had, on 13 February 2017, already booked rectification works to be completed by another contractor; and

b. obtained two expert reports in relation to the alleged damage;

(c) the Respondent attended the site inspection on 2 March 2017 (8 days after being contacted by the Applicant) at which time the majority of the rectification work had already been completed;

(f) in order to dispute the Applicant's claim, the Respondent was forced to obtain his own expert evidence;

(g) the Respondent obtained these reports at his own expense;

(h) the Applicant did not respond when served with these reports;

(i) our firm was subsequently retained and, following our involvement in this matter, the Applicant continued to refuse to engage in negotiations or attempts to compromise, making no response to:

a. an offer made on 17 July 2017; or

b. an offer made on 7 August 2017,

ultimately resulting in a full day hearing taking place on 7 September 2017;

(j) at the hearing, the Applicant introduced new evidence including numerous photographs, invoices and a further expert report, not previously served on the Respondent, while also informing us for the first time that it did not rely on one of its reports;

(k) even at its best, the Applicant's claim was never properly more than $8,460 (comprising $7,650 for Nawkaw's invoice (excl. GST) and $810 for Sharp & Howell's invoice (excl. GST), but for the Applicant instead inflated its claim by almost 50% to $12,578.50 by also claiming for:

a. an expert that it did not call or rely on;

b. GST that it had offset with input credits; and

c. Staff time for which it had occurred no additional cost;

(l) the Respondent required two experts to give evidence at the hearing, namely Mr Andrew Morrison and Mr Sibrand Ubels.

10. By written submission filed on 13 November 2017, the Applicant responded to that correspondence. It opposes any application for costs and contends that there should be no order for costs, with each party bearing their own costs.

11. By further written submission dated 1 December 2017, the Respondent adds that it was not unreasonable for him to engage experts in order to defend the claim made against him because he was not in a position to assess the matters raised in the two reports given to him by the Applicant. In addition, the Respondent submits that one of the reports given to him was ultimately not relied upon by the Applicant during the course of the hearing. He contends that these are further factors to be taken into account by the Tribunal in the exercise of its discretion.

SHOULD COSTS BE ORDERED?

12. As indicated above, the Respondent relies upon subsections (c), (d) and (e) of s 109(3) of the Act as the basis upon which he contends it would be fair to order costs in his favour.

The relative strengths of the claims made (s 109(3)(c))

13. Section 109(3)(c) of the Act focuses on the relative strengths of the claims made, including whether the Applicant's claim had no tenable basis in fact or law. In my view, that is not the case here. As indicated in my Reasons, the opinion expressed by the expert witnesses was conflicting, notwithstanding that they all presented as credible witnesses with expertise in the area under consideration. However, I was unable to determine which of the theories posited by each expert was more persuasive than the other and as a result, I found the claim unproven. That scenario differs from a situation where a party, faced with persuasive conflicting expert opinion, proffers no contrary view but still continues to defend or prosecute the claim.

14. My conclusion is consistent with previous decisions of the Tribunal, including *Dennis Family Corporation Pty Ltd v Casey CC*,[4] a decision relied upon by the Applicant. In that case, the Tribunal concluded that *it is probably seldom that an order for costs would be made having*

[4] [2008] VCAT 691.

regard to this consideration only where there was a real issue to be tried and real justification for the claims made on either side.[5]

15. In my view, the present case is not one which justifies an order for costs on the ground of the relative strengths of the claims made by the parties. As indicated, the claim and defence were relatively even balanced.

Nature and complexity of the proceeding (s 109(3)(d))

16. The Respondent contends that the nature and complexity of the proceeding justifies an order for costs. I accept that in the present case, complex scientific evidence was at the forefront of the dispute. Each of the experts proffered their own theory as to how the staining of the mortar occurred. However, I do not consider that the mere presence of complex technical or scientific issues, of itself, guarantees that an order for costs will be made in favour of the successful party. Indeed, many building disputes rely upon expert evidence in order to prove or disprove technical issues in dispute. However, not every building dispute will justify or attract an order for costs.

17. In the present case, none of the expert opinion evidence was accepted in whole, largely because the differing theories proffered by the experts were equally compelling. Indeed, that factor, in part, resulted in the Applicant's claim being unproven. In those circumstances, I do not consider that it would be fair to order costs against the Applicant, simply on the ground that the proceeding was complex by reason of the need to call expert witnesses.

Any other relevant matter (s 109(3)(e))

18. The Respondent contends that the Applicant refused to engage in negotiations or attempts to compromise and made no response to two offers of settlement dated 17 July and 7 August 2017. He contends that this unnecessarily resulted in the matter proceeding to hearing on 7 September 2017.

19. Section 112 of Act reverses the presumption against costs where an offer is made in accordance with the Act. It provides:

> **112. Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if –
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and

[5] Ibid, [14].

(b) the other party does not accept the offer within the time the offer is open; and

(c) the offer complies with sections 113 and 114; and

(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

(3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal –

(a) must take into account any costs it would have ordered on the date the offer was made; …

20. Even if an offer of settlement does not comply with s 112 of the Act, a failure to accept an offer of settlement which ultimately proves to be more favourable to the offeree than the determination of the Tribunal, is a relevant matter to consider in the exercise of the Tribunal's discretion on costs.

21. In *Peet v Richmond*,[6] Hollingworth J stated:

> [121] As a matter of principle, if one party has drawn the futility of the case to the attention of the losing litigant, and the losing litigant has wilfully ignored that, those may be circumstances supporting a special costs order. But it does not follow that a special costs order can only be made if the successful party has drawn the futility to the other side's attention.[7]

22. Later , her Honour stated:

> [170] However, an imprudent refusal of an offer of compromise may be sufficient to justify an award of costs on a special basis. The question must be whether the particular facts and circumstances of the case, as they existed at the time the offer was refused, justify an award other than on a party-party basis.[8]

23. Her Honour's comments focused on whether any special or enhanced costs order should be made in the context of a court proceeding, where *standard* costs usually follow the event. However, the same rationale can be applied to the question of costs under s 109(3), in the context of

[6] *Peet v Richmond* [2009] VSC 585.
[7] Ibid, [121].
[8] Ibid, [170].

a Tribunal proceeding, and where the refusal to accept a more favourable offer is raised to rebut the underlying presumption that costs will not usually follow the event.

24. In the present case, orders were made giving the parties liberty to file further submissions and any affidavit material in support of or in opposition to the Respondent's costs application. Despite the liberty given pursuant to those orders, no affidavit material was filed by the Respondent. In lieu thereof, the Respondent's solicitors filed a two-page letter setting out the Respondent's submissions, which largely reiterated what had already been set out in earlier correspondence dated 20 September 2017 (referred to above).

25. Consequently, I have not been provided with copies of the offers of settlement dated 17 July and 7 August 2017 referred to in both the 20 September and 1 December 2017 correspondence. In those circumstances, I am unable to ascertain whether those offers comply with s 112 of the Act or whether the offers were framed in a manner which would justify an order for costs. In particular, there is no information as to what was offered and I am unable to determine whether the offers were, indeed, more favourable than the outcome of the proceeding.

26. Therefore, without those offers being produced and in the absence of any affidavit material, all that I am left with is a bare submission, made in the Respondent's solicitors' letters, that two offers were made, the details of which are unknown. In my view, that is insufficient and I place little weight on that submission.

27. Finally, the Respondent submits that the Applicant refused to engage in negotiation with the Respondent's solicitors or otherwise take reasonable steps to resolve the matter both prior to proceedings being commenced and prior to the hearing.

28. The Applicant disputes that it did not give the Respondent an opportunity to address its concerns. It contends that it scheduled a meeting with the Respondent to discuss the problem prior to any remedial work commencing but that the Respondent did not attend that meeting.

29. It is unclear which of the two submissions is factually correct.

30. Nevertheless, even if the Respondent was not afforded an opportunity to undertake remedial work, I do not consider this to be materially relevant to the question of costs, especially in circumstances where it is not contended that the Respondent had any contractual right to remedy defects. In my view, this factor is more relevant to the question of damages, rather than costs.

CONCLUSION

31. The factors raised in the Respondent's solicitors' correspondence do not persuade me that it would be fair in the circumstances of this case to order costs in favour of the Respondent. As I have already indicated, the expert evidence was evenly balanced. This ultimately led to the Applicant's claim being unproven, rather than there being any positive finding that the brick cleaning process did not cause the mortar staining. In those circumstances, I find that it would be unfair to order costs and that the appropriate order should be that each party bear their own costs, as contemplated by s 109(1) of the Act.

SENIOR MEMBER E. RIEGLER