VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP60/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1995 – s.109 - costs – when awarded - relevant considerations - s.119 - correction of an accidental slip or omission - circumstances in which such an order could be made

APPLICANT	Raniti – CBMS Pty Ltd (ACN 082 771 122)
RESPONDENTS	David Ryan, Margaret Ryan
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs application Section 119 - Application to correct a mistake
DATE OF HEARING	8 June 2018 Submissions received 8 May, 8 July, 11 July and 16 July 2018
DATE OF ORDER	17 October 2018
CITATION	Raniti – CBMS Pty Ltd v Ryan (Building and Property) [2018] VCAT 1596

ORDERS

1. Order that:

   (a) the Applicant pay the Respondents' costs of the directions hearing of 22 September 2016;

   (b) the Respondents pay the Applicant's costs of this proceeding, including reserved costs and the costs of this application for costs, but not the costs of the directions hearing of 22 September 2016;

   such costs, if not agreed, to be assessed by the Victorian Costs Court on the Standard Basis in accordance with the County Court Scale.

2. Order that the Respondents' application pursuant to s.119 of the Act to correct the Tribunal's order of 27 February 2018 is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr D. Noble, solicitor
For the Respondents	Mr D. Ryan in person

REASONS

Background

1 In this matter the Applicant ("the Builder") sought to recover moneys due pursuant to a domestic building contract that it had entered into with the Respondents ("the Owners") to rectify defective building work of the original builder of the house.

2 After five days of hearing, including a visit to the site, a decision was handed down on 27 February 2018. Following a subsequent order pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") correcting an accidental slip or omission in the order, it was ordered that the Owners pay to the Builder the sum of $10,117.14 plus damages in the nature of interest, calculated at $2,097.57, making together the sum of $12,214.71. Costs were reserved.

Application for costs

3. The Builder has applied for an order for its costs of the proceeding. The matter came before me on 8 June 2018. Mr Noble, solicitor, represented the Builder and the second respondent, Mr Ryan, represented the Owners. After I heard submissions from Mr Noble, Mr Ryan asked to file and serve written submissions in response. I made an order that any submissions to be relied upon by the Owners should be filed and served by 6 July 2018 and that any submissions in reply be filed and served by the Builder by 13 July 2018.

4. On 6 July submissions comprising 84 pages were received from the Owners. In their submissions, the Owners not only oppose the making of an order for costs in favour of the Builder but also make application for an order that the Builder pay all of their costs of the proceeding.

5. On 11 July reply submissions were received from the Builder's solicitors and on 16 July, further submissions were received from the Owners.

6. The Owners have also sought an order correcting what they claimed was an accidental slip or omission in the order made. Such an application is brought pursuant to s.119 of the Act. I will deal with the applications for costs first.

The nature of the submissions

7. Although they did address the submissions the Builder's solicitor had made, most of the text of the Owners' submissions was to do with re-agitating matters that I had already determined.

8. In support of their defence of the Builder's application and also their own application for costs, they invited me to re-examine the evidence, look at various documents and make findings that some of the documents tendered were not genuine. They attacked the credibility and honesty of the Builder's director, Mr Raniti, and the ethics and honesty of the Builder's experts, Mr Simpson and Mr Rodwell. In the course of determining the proceeding I

had found all three to be credible witnesses. There were also suggestions by the Owners that the Builder manufactured evidence. Such serious allegations should not be made without firm evidence and there was none. The Owners want me to now re-examine the evidence that was led in the proceeding in order to put a different interpretation on it and I cannot do that.

9. The Owners also complained about non-discovery by the Builder of various documents. They were previously represented by a solicitor and counsel and any complaints regarding discovery ought to have been made before the hearing so that the Tribunal could have dealt with them.

10. The Owners also criticised the manner in which the hearing was conducted and claimed that the Tribunal had been misled by the Builder. These allegations should have been made by way of appeal. I cannot now sit in appeal against the order that was made.

Power to award costs

11. Power to award costs is conferred by s.109 of 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.

……"

12. The approach to be taken by the Tribunal on an application for costs was explained in the judgment of Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where the learned judge said (at para 20 et seq.):

> "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."

13. 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."

The nature and complexity of the proceeding

14. In *Sweetvale v. Minister for Planning* [2004] VCAT, the then president of the Tribunal, Morris J, 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."

15. However the notion that there is a practice that costs should be routinely awarded in a particular type of proceeding was disapproved of by Ormiston J in *Pacific Indemnity Underwriting v. Maclaw* [2004] VSCA 165, where his Honour 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."

16. The Tribunal must assess the nature and complexity of the proceeding before it in each case. Here, the Builder's claim was for a relatively small sum, being the balance claimed to be due under its contract with the Owners. In their submissions, the Owners claimed that the Builder's claim was not simple, in that there were defective works and overcharging. I have already made findings on the merits of the dispute and cannot re-open these matters on an application for costs.

17. The Builder's case, on its own, was not of such complexity as to suggest that an order for costs ought to be made. The amount sought was also

modest and was not such as would normally warrant an expensive hearing and a consequent application for costs.

18. The difficulty and complexity of the present proceeding arose from the defences that were taken and the counterclaim that was brought. The hearing and ultimate determination of these turned largely on the expert evidence, as to which there was considerable conflict and extensive cross-examination. Both sides were legally represented. A number of expert reports were tendered and relied upon. Each side called an engineer and a building expert and the Owners also filed a report from a quantity surveyor. The hearing extended over 5 days. The case could not have been conducted without each of the parties spending a great deal of money on expert witnesses and representation.

19. Although this was not a legally complex case, the nature and complexity of the factual issues raised by the unsuccessful defences and the counterclaim, the time taken for the hearing, the expert evidence called and the expense of obtaining it would tend to support an application for an order for costs in favour of the successful party, which in this case was the Builder.

The relative strengths of the parties' claims

20. The Builder's initial claim was relatively modest. The points of claim sought an amount of $16,215.91 including interest to the date of issue.

21. The Owners responded with a lengthy counterclaim, seeking damages of $132,772.20 and then, following the filing of the quantity surveyor's report, their claim increased to $171,969.00.

22. The Builder's claim was largely successful, in that it recovered $12,214.71, which is a little over 75% of the amount it had claimed. The Owners succeeded only on some very minor issues which were dealt with by offsetting them against the Builder's claim to arrive at the amount that was ultimately awarded to the Builder. Some modest success by the otherwise unsuccessful party does not necessarily mean that there should be an adjustment of costs (see *Cretazzo v Lombardi* (1975) 13 SASR 4 per Jacobs J at para. 16).

23. The Owners submitted that they were constrained at the hearing from having their case properly heard, that the tribunal was misled and that in fact the Builder had no right or claim. In their lengthy submission they sought to re-agitate many of the issues in the case. They said that they had a legitimate claim for $171,969.00, that their case was not explored at the hearing and that there was "much procedural unfairness". I do not accept the correctness of these assertions but, in any case, this is an application for costs and the starting point must be the findings that were made in the reasons for decision.

24. In the present case, the relative strengths of the parties' cases, as I found them to be, strongly support the Builder's application for costs. The Builder

was put to the considerable expense of defending the Owners' counterclaim which very largely failed.

Vexatiously conducting the proceeding

25. Mr Noble submitted that the Owners conducted the proceeding vexatiously. He said that the Builder commenced the proceeding claiming a modest amount and that the trial was almost all about defence and counterclaim, in particular, the drainage issue. That is correct. He said that the evidence of Mr Ryan was generally not accepted over that of the Builder's witnesses and Mr Ryan must have known that he had told the Builder not to complete the cut-off drains. He said that the maintenance and pursuit of an unmeritorious counterclaim with no reasonable prospect of success was vexatious and that I should therefore find that the Owners conducted the counterclaim vexatiously.

26. The Owners deny they conducted the proceedings vexatiously and pointed to the large body of evidence called. They also claimed that the Builder's claim was vexatious.

27. There was nothing about the manner in which the trial was conducted that was vexatious. There were lawyers on both sides and the case was conducted competently and professionally without any undue waste of time. As to the Owners' suggestions that the Builder's claim was vexatious and the evidence in support of it was false, although I did not accept Mr Ryan's evidence, there was expert evidence led to support the counterclaim. The defence and counterclaim failed because I did not accept the supporting lay evidence and I preferred the Builder's experts.

Unreasonable prolonging the proceeding

28. Mr Noble further submitted that the Owners unreasonably prolonged the proceeding because most of the time is taken up with the counterclaim and in particular, the drainage issue which was found to be unmeritorious.

29. The issue of prolonging the proceeding was directly addressed in the Owners' submissions, which set out instances where time had, allegedly, been wasted by the Builder in the early interlocutory stages, before lawyers were involved, where they said they were not served with the application and had no knowledge of the proceedings. Having looked at the file it is impossible to know whether those complaints were justified but they are not relevant for present purposes.

30. The Tribunal file shows that the following interlocutory steps were taken after service had been affected upon the Owners:

    (a) A directions hearing by telephone on 20 April 2016 where the Owners unsuccessfully sought to adjourn a mediation that had been fixed;

    (b) An unsuccessful mediation held on 28 April 2016 that the parties attended with lay representatives;

(c) Two subsequent adjournments of direction hearings upon the application of each of the parties due to unavailability of representatives;

(d) Comprehensive directions were given at a directions hearing that both sides attended on 28 July 2016;

(e) A further directions hearing was held on 22 September 2016 to review the directions following the failure of the Builder to file Points of Claim as ordered. The Owners were not legally represented at this hearing;

(f) Consent orders without appearance on 4 November 2016, extending the time for the Owners to file and serve their counterclaim;

(g) A compliance hearing on 16 January 2017 when the time for the Builder to file and serve its points of defence to counterclaim was extended. An order for costs was made in favour of the Owners;

(h) A directions hearing on 10 February 2017 vacating and re-fixing the hearing date on the application of the Owners. An order for costs was made in favour of the Builder;

(i) Consent orders on 28 February 2017, in regard to filing and service of witness statements;

(j) A directions hearing on 13 June 2017, further vacating and re-fixing the hearing date and providing for the filing and service of amended points of claim and other interlocutory steps. The order was due to the Builder amending its claim and an order for costs was made in favour of the Owners;

31. The Owners claim that the Builder filed and served its witness statement three weeks late, causing the adjournment of the proceeding in June 2017 which, they said, greatly favoured of the Builder and seriously disadvantaged the Owners, resulting, they said, in the "flawed decision" that was made. In fact, the adjournment on that date was principally due to the Builder wishing to amend its claim. The Owners obtained an order for costs and they then had ample time to meet the amended claim.

32. The Owners complained about "ongoing non-compliance, continual obstruction and difficulty" in the interlocutory stages. There appears to have been some default on both sides in the interlocutory stages and it would seem that, when thought appropriate, orders for costs were made. I do not find that the conduct of either side could be said to have unreasonably prolonged the proceeding in the interlocutory stages.

Fairness

33. The Owners submit, correctly, that the Tribunal can only make an order for costs where it is fair to do so. They submit that it would be most unfair to make an order that they pay the Builder's costs, considering:

> "…the overwhelming body of evidence in relation to the [Builder's] conduct in these proceedings and the severe disadvantage suffered by the [Owners] which ultimately led to a mistaken decision".

34. As previously stated, I cannot revisit the order made except in the very limited circumstances contemplated by s.119 of the Act. The issue of fairness must be determined, not in the abstract, but having regard only to relevant considerations.

Conclusion of the claim under s.109

35. I am satisfied that, given the nature and complexity of the proceeding and the relative strengths of the respective parties' cases, it would be fair in the circumstances to order the Owners to pay the Builder's costs of this proceeding.

36. I cannot see any basis for making an order for payment of the Owner's costs by the Builder. Not only did they fail to pay money that they owed the Builder, they brought a very substantial counterclaim which failed and in doing so, put the Builder to considerable expense.

Offer of settlement

37. There is an offer of settlement exhibited to an affidavit of Tanya Westermeyer sworn 7 May 2018 and filed on behalf of the Builder. The offer, which was contained in a letter dated 3 June 2016, was that the Owners should pay the Builder the sum of $12,000.00 within 21 days after acceptance of the offer. The offer was open for acceptance for 15 days after it was made and stated that, if the Tribunal should make an order no less favourable to the Owners than the terms of the offer then the Builder would produce the offer in support of an application for an order that they pay all of its costs incurred after the date of the offer and that such costs would be sought on an indemnity basis.

38. In their submissions, the Owners say that they did not receive this offer until 21 June 2016. They say that accordingly, by the time they received it the offer had already expired. I do not think that is a correct interpretation of the wording of the offer or of the section. An offer cannot be said to have been "made" until it has been received. On that basis, if the offer was not received until 21 June 2016 it would, according to its terms, have been open for acceptance until 6 July 2016.

39. The offer was expressed to have been made under Part 4 of the Act, and in particular, sections 112-114 which (where relevant) are as follows:

"**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

(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 subsection (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; and

(b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

113. Provisions regarding settlement offers

……..

(3) A party may serve more than one offer.

(4) If an offer provides for the payment of money, the offer must specify when that money is to be paid.

114. Provisions concerning the acceptance of settlement offers

(1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.

(2) The minimum period that can be specified is 14 days."

40. The order made in the proceeding, on 27 February 2018, was, following the correction order that was made, that the Owners pay to the Builder the sum of $10,117.14 plus damages in the nature of interest calculated at $2,097.57, making together the sum of $12,214.71. For the section to apply, I must be satisfied that the offer the Owners did not accept was more favourable to them than that order and in doing so, I must also take into account any costs that I would have ordered on the date the offer was made.

41. Since I was satisfied that it was appropriate in this case to award the Builder interest, the interest figure must be adjusted to 26 June 2016. From the commencement date of the hearing, which is a date from which interest was allowed, until the date the offer was made, interest at the rate fixed pursuant to s.2 of the *Penalty Interest Rates Act* 1983 would have been $417.54. For the purpose of the required comparison, the amount of the award then becomes $10,534.68.

42. That is less than the amount of the offer and so the offer would have only been more favourable to the Owners if I would have ordered the Owners to pay the Builder's costs on the date the offer was made in a sum that exceeded $1,465.32, being the difference between the adjusted award and the amount of the offer.

43. It appears from the file that the Builder was not legally represented until early June 2016 which was very shortly before the offer was made. In his submission, Mr Noble concedes that the costs that would have been awarded to the Builder at that time would have been limited to the filing fee of $575.30. In those circumstances, it is not possible to find that the Builder's offer would have been more favourable to the Owners than the order that was made and consequently the Builder is not entitled to an order for costs under s.112(2) of the Act.

44. Mr Noble nonetheless seeks to rely upon the offer as a Calderbank offer, that is, an offer made to resolve the proceedings outside the scheme of the Act. He said that the offer was made more than a year before the hearing and if it had been accepted the proceeding would have come to an end, the Owners would have been obliged to pay the Builder $12,000 and no more and that both they and the Builder would have been far better off by not incurring the significant costs and disbursements of the proceeding.

45. That is so, but the basis of an application for costs based upon a Calderbank offer of settlement is that there has been an imprudent refusal of an offer to compromise (see *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 at para 17 et seq). Since the offer was more than what would have been awarded to the Builder at that time, even after adding the issuing fee and interest, I cannot find that the Owners' failure to accept it was imprudent. They could have said, quite legitimately: "We do not owe you that much money".

Claim for indemnity costs

46. The Builder seeks an order for costs on an indemnity basis. Mr Noble said that the Owners had maintained and pursued an unmeritorious counterclaim, that the drainage and sewer pipe claims were hopeless that Mr Ryan's evidence lacked credibility.

47. In *Fountain Selected Meats (Pty Ltd) - v.- International Produce Merchants Pty Ltd* [1988] FCA 202; (1988) 81 ALR 397, Woodward J said (at p.401):

> "I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. When they occur, the court will need to consider how it should exercise its unfettered discretion."

48. The Owners submitted that orders for indemnity costs are reserved for special circumstances, such as where a party's conduct has been unreasonable, with consistent non-compliance, prolonging the proceedings or by having caused serious disadvantage to the other party. They said that their conduct of the hearing was exemplary throughout, that their case was strong and they complied with the Tribunal's orders and directions. They said that they did not cause disadvantage or detriment to the Builder.

49. Although I did not accept the evidence of Mr Ryan I do not find that the Owners' case was so baseless that it ought not to have been presented. As I said in *Paleka v Suvak* [2000] VCAT 58 (at paragraph 29 et seq.):

> "Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party-party costs if they are unsuccessful. Solicitor / client costs are ordered when the party against whom the order for costs has been made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy."

Assessment of costs

50. The Owners seek an order for the costs of the directions hearing held on 22 September 2016, which was to review the directions following the failure of the Builder to file Points of Claim as ordered. It was a compliance hearing necessitated by the failure of the Builder to file and serve Points of Claim by 18 August 2016 as directed by the Tribunal. According to the order, the Owners were represented at the hearing by a Ms Paten who described herself as their advocate. They did not engage a solicitor until a month later.

51. Costs were reserved. It is not known what costs the Owners would have incurred, since they were not legally represented, but I think that, in the circumstances of the directions hearing, I should make an order for their costs in case they have incurred any that would be allowed by the Costs Court on an assessment.

Conclusion as to the applications for costs

52. The Owners are entitled to an order for their costs of the directions hearing of 22 September 2016.

53. Otherwise, I am satisfied that the Builder is entitled to an order under s.109 for payment of its costs of the proceeding but I am not satisfied that these costs should be assessed otherwise than on the standard basis.

The application to correct the order

54. The Owners have made an application under s.119 of the Act to correct what they say is an accidental slip or omission in the order. That section (where relevant) provides as follows:

> "(1) The Tribunal may correct an order made by it if the order contains-
>
> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
>
> (d) a defect of form."

55. I considered how the power conferred by this section ought to be exercised in the case of *Riga v Peninsula Home Improvements* [2000] VCAT 56 (at para.20 et seq.):

> "20 When a proceeding is determined by a court or tribunal the court or tribunal is then functus officio and generally has no power to revisit the matter or undo what it has done in the absence of some provision in the statute or rules authorising it to do so. Section 119 sets out what it is commonly called the "Slip Rule" and a similar provision is to be found in the Rules of Civil Procedure, Chapter 1 36.07, which provides:-
>
> > 'The court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from an accidental slip or omission.'
>
> 21 The extent of the jurisdiction conferred by this rule is extensively discussed in "Williams Civil Procedure Victoria" I. 36.07.55. A reading of the authorities gathered in that reference shows that the operation of the rule is very wide indeed. The learned authors refer to the case of *R. -v.- Cripps ex parte Muldoon* [1984] QB 686 at p. 695 where Donaldson MR said (citations omitted):-

> ‘It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely, to allow the court to amend the formal order which by accident or error does not reflect the actual decision of the Judge. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of Counsel to ask for it. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended.’
>
> 22 The test as to whether a mistake or omission is accidental is, in my view: " If the matter had been drawn to the court's attention, would the correction at once have been made?" (see Williams 1.36.07.65 and the cases there cited).

56. This is still my own view as to the extent of the power and the manner in which it ought to be applied.

The mistake alleged

57. The Owners allege that they paid to the Builder a total of $101,001.30 whereas the Builder’s evidence was that it had been paid only $99,983.40. They say they have overpaid one of the Builder’s invoices by $1,037.90. The payments made to the Builder by the Owners were not dealt with in any detail in the reasons for decision. The amount of the final award was calculated on the basis that the balance of the contract price was $15,001.60, plus an amount of $750.00 for digging a dam.

58. This figure of $15,001.60 was pleaded throughout the amended points of claim. It represents the amount of the Builder’s invoice of 6 November 2015, which was $16,151.60, less a credit for not having repaired an internal plasterboard wall of $1,150.00 which the Owners had requested it not to repair.

59. In paragraph 12 of their Points of Counterclaim, the Owners set out what they said were the five payments they made, totalling $101,021.30. In the defence to counterclaim the Builder maintained that the Owners paid only $99,983.40.

60. Mr Ryan said in his witness statement that the additional amount of $1,037.90 was an overpayment of an invoice dated 3 August 2015, where he said he paid $13,341.10 instead of $12,303.26. He said that the invoice in question was the first progress payment of $36,341.10 which the Owners paid in two instalments, the overpayment being of the second instalment. A copy of the invoice was exhibited to Mr Raniti’s witness statement. The amount of the invoice is $36,341.10 and the copy has been stamped “PAID”. There is nothing on the document to suggest that anything more than $36,341.10 was “PAID”.

61. Mr Ryan’s explanation for the overpayment was that Mr Raniti produced an invoice for the second instalment for the extra amount of money, which was

$1,037.90 more than the balance of the second instalment that was unpaid. It does not appear why two invoices would have been sent for the same amount of money. Although a discovery number is given for this second invoice it does not appear to have been tendered.

62. It is not obvious to me from the reasons for decision or even from the pleadings and the witness statements that there has been an overpayment of this invoice. It is simply assertion and counter assertion. The onus of proving payment is upon the person who owes the money. Moreover, the onus of proving that a payment was made by mistake in circumstances where an order can be made for its repayment is also on the party who made the allegedly mistaken payment. I do not recall that this dispute on the pleadings was argued before me.

63. I cannot now revisit the evidence and so this is not a situation in which I can find that there has been an accidental slip or omission which can be corrected under s.119 of the Act. If the finding as to the balance of the contract price due was not supported by the evidence, that would be a matter for an appeal.

Orders to be made

64. The orders to be made will be as follows:

1. Order that:

   (a) the Applicant pay the Respondents' costs of the directions hearing of 22 September 2016;

   (b) the Respondents pay the Applicant's costs of this proceeding, including reserved costs and the costs of this application for costs, but not the costs of the directions hearing of 22 September 2016;

   such costs, if not agreed, to be assessed by the Victorian Costs Court on the Standard Basis in accordance with the County Court Scale.

2. Order that the Respondents' application pursuant to s.119 of the Act to correct the Tribunal's order of 27 February 2018 is dismissed.

SENIOR MEMBER R. WALKER