VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D190/2007

CATCHWORDS

Domestic Building, slip rule - s119 of the *Victorian Civil and Administrative Tribunal Act* 1998, interest

APPLICANT	RF Construction Management Pty Ltd (ACN: 074 490 958)
FIRST RESPONDENT	Castlemar Investments Pty Ltd (ACN: 105 053 469)
SECOND RESPONDENT	Dalil Pty Ltd
THIRD RESPONDENT	Avi Rauchberger
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	28 April 2009
DATE OF ORDER	18 August 2009
CITATION	RF Construction Management Pty Ltd v Castlemar Investments Pty Ltd & Ors (Domestic Building) [2009] VCAT 1629

ORDER

1 I dismiss the Applicant's application under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 to amend order 1 of 26 November 2008.

2 The First Respondent must pay the Applicant interest on the retention sum of $5,218.43.

3 The First Respondent must pay the Applicant interest from the commencement of this proceeding to 20 June 2007 of $1,731.95

4 There is a stay to pay the amounts owing by the First Respondent to the Applicant until after determination of costs.

5 By 1 September 2009 the parties must file and serve written submissions regarding costs.

6 By 8 September 2009 the Applicant or First Respondent may seek a hearing regarding costs, in which case the Principal Registrar is directed to arrange for a costs hearing before Senior Member Lothian with an estimated hearing time of one day.

7 If a costs hearing has not already been arranged, the Principal Registrar is directed to refer the file to Senior Member Lothian on 11 September 2009 who may either order a further costs hearing or determine the question of costs on the papers.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr J. Kenny, Solicitor
For First Respondent	Mr M. Robins of Counsel
For Second Respondent	No appearance
For Third Respondent	No appearance

REASONS

1 On 26 November 2008 I made a decision ordering that the first respondent, Castlemar, pay the applicant Builder $55,869.64 forthwith. I reserved interest and costs with liberty to apply.

2 On 4 December 2008 solicitors for Castlemar applied to make submissions regarding interest and costs. The matter was set down for hearing on 28 January 2009 and adjourned by consent the day before. On 16 February 2009 the Tribunal received submissions from solicitors for the Builder which included an application that the orders of 26 November 2008 be corrected under the slip rule, but as this was not obvious on the face of the document it was not referred to me, and did not come to my attention until the hearing, which due to the ill-health of one of the representatives, was adjourned to 28 April 2009.

3 At the end of the hearing I said that once I had made the decision about the alleged errors, I would deal with issues concerning interest and 14 days after the publication of this decision the parties would provide written submissions regarding costs. I added that any party could seek a hearing regarding costs, or the Tribunal might order that there be a hearing on costs, otherwise the decision will be made on the papers.

APPLICATION UNDER THE SLIP RULE

4 The written submissions for the Builder filed on 16 February 2009 are not easy to follow. It appears that the Builder is submitting that instead of $55,869.64 which I ordered Castlemar pay it, it is entitled to $93,271.84 before any interest is added. The areas where the Builder submits I have erred concern variations, prime costs items and carpet. The alleged errors are failures to take certain items into account concerning variations and prime cost items, and treating carpet as if it were a prime cost item, although I have acknowledged that it was not included in the list of prime cost items in the specifications.

5 Section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides:

> (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.
>
> (2) The correction may be made—
>
> (a) on the Tribunal's own initiative; or

(b) on the application of a party in accordance with the rules.

6 At the commencement of the hearing on 28 April I said that while I am empowered to correct any inconsistencies within the decision, I was unable to otherwise revisit the decision. Mr Robins of Counsel for Castlemar submitted that I had not erred in my calculations and that s119 only applies to clerical and similar errors, except in exceptional circumstances.

7 Mr Kenny, solicitor for the Builder, drew my attention to *Scott v Evia Pty Ltd* [2008] VSC 324. Although Hansen J quoted with approval *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 133 ALR 206 at 212, saying that the reason to exercise power under the slip rule "is ultimately to avoid injustice", at paragraph 24 he said:

> The fundamental premise of an amendment under the slip rule is that the judgement or order contains an error arising from an accidental slip or omission. In this case, however, the Taxing Master intended to make the order as expressed. Thus no question of accidental slip or omission arose.

8 I have regard to the comments of Senior Member Walker in *Riga v Peninsula Home Improvements* [2005] VCAT 56:

> 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.
>
> 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?" [quoting Williams *Civil Procedure of Victoria*]

9 As Deputy President Cremean said in *Body Corporate Strata Plan (No 334479D) v Scolaro's Concrete Constructions Pty Ltd* [2000] VCAT 45, s119 cannot be used as a backdoor method by which unsuccessful litigants could seek to re-argue their cases. He quoted *Autodesk Inc v Dyason (No 2)*[1993] HCA 6 where at paragraph 4 Mason CJ said:

> … the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law. As this Court is a final court of appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment. However, it must be emphasized that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts

> or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cases.

10 In the reasons the allowances to the Builder and Castlemar conclude with a financial reconciliation:

	To Castlemar	**To Builder**
Contract sum		$1,804,000.00
Agreed credits to Castlemar	$6,011.24	
Unspent contingency	$477.76	
Undisputed variations		$27,813.04
Disputed variations		$25,703.30
Completion and rectification	$9,230.80	
Prime cost adjustments:		
stainless steel balustrades		$3,141.00
carpet	$4,490.00	
Liquidated damages	$11,428.60	
Paid to Builder	$1,773,149.30	
Total	$1,804,787.70	$1,860,657.34
Less due to the Owner		$1,804,787.70
Due to the Builder		$55,869.64

11 The approach I took to the final reconciliation of sums owing by each party to the other was to take the original contract sum then to add all the sums to which the Builder is entitled and deduct all amounts to which Castlemar is entitled. This should have produced the correct contract sum, as adjusted. I then deducted the amount paid by Castlemar, and the nett sum should have been the amount due to the Builder. This is a logical way to approach such a case, but it was not the approach taken by the Builder or Castlemar.

Variations

12 As summarised in the reasons and reproduced above, I allowed $27,813.04 for undisputed variations and $25,703.30 for disputed variations, a total of $53,516.34. On the second page of the Builder's submission Mr Kenny wrote:

> However, the total of the undisputed and disputed variations should be $82,604.29 (see Reasons para 51)

Paragraph 51 of the reasons commences:

> The total variations claimed in the Builder's "Final claim (reconciled)" of 1 March 2007 … was $82,604.29, not including the amounts for variations claimed as contingencies. [Emphasis added]

13 Mr Kenny's approach to calculating the amount that should be allowed for variations was different to mine. He wrote of three variations which he said I had not allowed, totalling $11,921.70, then deducted that sum from the total claimed by the Builder of $82,604.29 to reach a total of $70,682.59. I considered each variation and made allowances for them. I did not start with the assumption that the amount of $82,604.29 was a valid sum - it was not a decision that I made.

14 The Builder has failed to demonstrate that I have made an error as contemplated by s119, and I decline to reconsider the amount allowed for variations.

Prime cost items

15 Both the Builder and Castlemar made scant reference to prime cost items in the course of the hearing. In consequence I allowed only $3,141.00 as an additional sum for stainless steel balustrades to the Builder, whereas it is possible that both Castlemar and the Builder were working on the assumption that most of the sums claimed by the Builder for prime cost items were uncontentious and that only a three items were in dispute.

16 Toward the end of the hearing, when the possibility of submissions was under discussion, I requested that the parties provide reconciliations of entitlement. Neither party did quite what I requested. The Builder's submission started not with the contract sum, but with "balance due, not including retention money" of $91,309.24. This sum appears to be derived from the Builder's "Final Claim (Reconciled)" of 1 March 2007. When the retention money is added back into the claim, the sum is $137,199.83.

17 The conclusion to Castlemar's closing submissions commences:

> 125. Looking at this matter before interest is added it is submitted that the following conclusions arise:
>
> (a) at best RFCM's pre-interest final entitlement under the Contract was $137,199.83 for the first six items.

18 It appears that the Builder and Castlemar commenced at the same point in their calculations, that is, the Builder's final claim of 1 March 2007. This final claim is at page 619 of the Respondents' Tribunal Book. At the bottom of the page "Total of this claim" is $91,309 (and the cents have been cut off in copying) which, it is assumed is the $91,309.24 referred to in the Builder's submission.

19 Considering page 619, the $91,309.24 is calculated thus:

The original contract sum -	$1,804,000.00
Variations -	$82,604.29
"Total PC extra variation" -	$23,376.95
	$1,909,981.24 [sic]
Less previously certified	$1,818,672.00

20 The Builder's submission is that an additional $17,952.22 should be added to the amount allowed for prime cost items, as follows:

(a)	Total pc claim		$23,376.95[1]
(b)	less deductions		
	light fittings	$763.22	
	bathroom fixtures	$1,312.90	
	Subtotal	$2,076.12	
	Add 10% margin	$207.61	
	Total	$2,283.73[2]	
(c)	Less balustrades	$3141.00	$5,424.73
			$17,952.22

[1] Tribunal Book page 621

[2] See para 46 of reasons

21 However it is far from clear how prime cost or provisional sum adjustments were taken into account by the architect and Castlemar. There is a reference to prime cost adjustments in the architect's letter to Mr Rauchberger of Castlemar of 20 March 2007. That letter was the basis of Castlemar's claim against the Builder. The reference was:

> PC/PS adjustments
>
> SS balustrades $3,141 overcharge
>
> Light fittings $1,656.33 overcharge
>
> Bathroom fixtures $2,157 over charge

22 As mentioned above, I allowed the stainless steel balustrade amount. The other two items had been taken into account by the parties in agreed credits.

23 No specific mention of prime cost or provisional sums was made in the architect's "Statement 14" (progress certificate) of 9 January 2007 to which I was referred in hearing. The only contract sum adjustment is for "variations" of $47,332.56.

24 Statement 14A of 20 March 2007, to which I was not referred in the course of the hearing, although it was mentioned in Castlemar's final submission, allowed "variations" of $59,219.97. No list of variations was attached to either statement, so I am unable to say what they were for. Further, as I mentioned in the reasons at paragraph 135, the documented approach to prime cost and provisional sum items was slap dash. The only list of prime cost items in evidence was in the specifications and for many items gave rates rather than amounts – for example, an amount per square meter of tiles, without an indication of how many square meters of tiles would be provided. I was not referred to any complete list of prime cost and provisional sum adjustments and I do not know for which items the Builder claims the additional $17,952.22.

25 Although it is possible that the Builder and Castlemar both assumed that most of the sums claimed by the Builder for prime cost items were uncontentious and that only three items were in dispute, there is neither a demonstrable meeting of minds between the Builder and Castlemar, nor evidence, which demonstrates an error as contemplated by s119. I decline to reconsider the amount allowed for prime cost items, which could not be undertaken without re-opening the case.

Carpet

26 As shown above I allowed Castlemar $4,490.00 as a contract sum adjustment for carpet. At paragraph 139 of the reasons on 26 November 2008 I said that carpet was not listed in the contract documents as a prime cost item and at paragraph 140 I said:

> The parties seem to have treated carpet as a prime cost item, so I will also.

27 As in *Scott v Evia* this is not a slip but a deliberate decision which I decline to revisit.

Conclusion regarding the slip rule

28 I decline to amend order 1 of 26 November 2008.

INTEREST

Interest on retention

29 I reserved my decision regarding interest on the retention sum as it was possible that the Builder might have been entitled to less than the whole of the retention sum of $45,522.71. Both parties agree that interest is payable on the retention sum and that the days for interest are as calculated in Note 1 to the Builder's submissions of 11 February 2009. In accordance with that note, interest is payable up to 20 March 2007. The difference between the parties is that Castlemar says the rate is 6% whereas the Builder says it is 10%.

30 The Builder claims 10% on the basis that schedule 1, item 22 of the contract allows interest at the rate of 10% on overdue payments. I find that it is an overdue payment because as I said at paragraph 230 of the reasons, Castlemar never paid the retention sum into an account designated as a trust account, as it was obliged to do under the contract.

31 Castlemar claims that it is obliged to pay 6%, based on paragraph 70(b) of Mr Feldman's witness statement of 18 January 2008. He said in part:

> … the Owner was obliged to hold those funds in an interest bearing account, and pay it to the applicant with that interest.
>
> Castlemar has not advised me what interest has been earned on the retention sum to date.

Mr Feldman, managing director of the Builder, applied 6% to the retention sum and as Mr Robins said, there was never any suggestion at the hearing that any rate other than 6% should be paid. I do not consider these matters are fatal to the Builder's claim at the rate is 10%

32 It is uncontentious that the contract allowed 10% on late payments. The sum was not paid into an account. I accept the Builder's submission that it was "not paid" and the calculation of interest is $5,218.43. Castlemar must pay the Builder this sum.

Interest from commencement of the proceedings

33 The Builder claims interest from 20 March 2007 up to the date of an offer of compromise of 20 June 2007 on the whole sum that it claimed was owing to it, including interest on the retention sum. I have not been informed of the value of the offer of compromise.

34 There is a substantial sum owing to the Builder and Castlemar has had the use of this money, and the Builder has not, since at least the commencement of the proceedings on 26 March 2007 to the date of the offer of compromise of 20 June 2007. Pursuant to section 53(2)(b)(ii) and (3) of the *Domestic Building Contracts Act 1995* I allow the Builder interest at the rates set under the *Penalty Interest Rates Act 1983* of 12% on $61,088.07, being $55,869.64 ordered under order 1 of 26 November 2008 plus $5,218.43 interest on retention. Interest to the date of these orders and reasons is $1,731.95.

FURTHER RESERVATION OF COSTS

35 I further reserve costs in accordance orders 4, 5 and 6.

STAY TO PAY

36 Castlemar has sought a stay to pay until after determination of costs. I allow that stay.

SENIOR MEMBER M. LOTHIAN