

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1368/2017

CATCHWORDS

Domestic building contract: claim for costs: s.109, s.112 *Victorian Civil and Administrative Tribunal Act 1998*

APPLICANT	Sherridon Pty Ltd (ACN: 127 439 132)
FIRST RESPONDENT	Nesrin Bayraktar
SECOND RESPONDENT	Vedat Bayraktar
WHERE HELD	Melbourne
BEFORE	Member F Marks
HEARING TYPE	Hearing
DATE OF HEARING	30 August 2019
DATE OF ORDER	3 September 2019
CITATION	Sherridon Pty Ltd v Bayraktar (Building and Property) [2019] VCAT 1352

ORDER

The applicant must pay the respondents' costs 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.

MEMBER F MARKS

APPEARANCES:

For the Applicant	Mr J Silver of Counsel
For the Respondents	Mrs Bayraktar

REASONS

- 1 The respondents (owners) have applied for an order for their costs of the proceeding. The proceeding involved a claim by the applicant builder (Builder) against the owners for monies owed on its last invoice issued under a building contract between the parties. The owners then issued a claim against the builder for incomplete and defective building work arising out of the building contract. Subsequently, the builder withdrew its claim against the owners.
- 2 On 15 May 2019 the proceedings were consolidated into this proceeding. On 16 May 2019 the Tribunal made orders that the builder pay \$71,054 to the owners. The question of costs was reserved. On 30 August 2019 I heard the owners' application for costs, and I reserved my decision.
- 3 For the reasons set out below, I will allow the owners' application for costs.

APPLICATION FOR COSTS

- 4 The owners seek an order that the builder pay their costs of \$58,200. They rely on an offer of settlement made on 15 June 2018 on the question of costs.

Costs following the settlement offer made on 15 June 2018

- 5 On 15 June 2018 the owners made an offer to accept payment of \$90,000 plus costs in full and final settlement of the proceeding. The issue I must determine is whether from 15 June 2018, the owners are entitled to an order for their costs under s112 of the VCAT Act.
- 6 Section 112 relevantly provides:
 - (1) This section applies if:
 - (a) a party to a proceeding... 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.
- 7 The owners' offer complies with s112 (1)(a), (b) and (c) of the VCAT Act. However, their offer does not comply with s 112(1)(d) of the VCAT Act

because the orders made in the proceeding are more favourable to the builder than the offer.

- 8 The owners say that the orders made by the Tribunal in the proceeding are not more favourable to the builder, than the offer. They say their offer was for \$90,000 plus costs and that the Tribunal awarded damages of \$93,016 against the builder.
- 9 I reject the owners' submission because the Tribunal did not award the owners \$93,016, nor make an order to that effect. The owners have not taken into account the set off against the owners' claim of \$21,961.93, for monies owed to the builder.
- 10 On 16 May 2019 I ordered that the builder pay the owners \$71,054. I found that the owners established their claim against the builder in the sum of \$93,016. However, I also found that the builder was entitled to the balance of its final invoice dated 17 March 2017, in the amount of \$21,961.93. Consequently, the order set off the amount of \$21,961.93 against the sum of \$93,016.
- 11 The owners admitted that their offer did not take into account the amount that they owed the builder. This was because they did not know the exact amount that they would be required to pay the builder on its last invoice, in the light of the builder's defective building work. They submitted that their offer should be interpreted as an offer to settle their claim against the builder.
- 12 I do not accept the owners' submission. Their offer to the builder is made in this proceeding, which was issued by the builder against them for the balance of the builder's final invoice. The owners issued a claim against the builder which was taken to be a counterclaim in this proceeding. The offer is stated to be in full and final settlement of this proceeding.
- 13 I must therefore dismiss the owners' claim for an award of costs under s112 of the VCAT Act.

The Tribunal's power to award costs

- 14 There is no presumption in the VCAT Act that a successful party should be awarded costs. The power of the Tribunal to award costs is set out in section 109 of the VCAT Act, which relevantly provides:

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 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.

15 The Tribunal should approach the question of entitlement to costs on a step-by-step basis as follows: (*Vero Insurance Ltd v Gombac Group Pty Ltd* at [20]):¹

- (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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

16 The Tribunal should consider all the matters together and determine whether it is fair to make an order for costs. As relevantly stated in *Vero Insurance* (supra):²

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

¹ [2007] VSC 117 at [20] per Gillard J.

² Gillard J in *Vero Insurance Ltd v Gombac Group* (supra) at [22]:

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

- 17 It is more likely that the nature and complexity of a proceeding will make it fair to make an order as to costs where the proceeding involved a large number of issues, or a small number of particularly complex issues and a large sum of money.³ The Tribunal must assess the nature and complexity of the proceeding before it in each case.
- 18 The owners submitted that they needed both experts and lawyers to assist them with the conduct of the case. They say the proceeding was originally listed for hearing over 5 days but did not conclude in that time. The hearing had to be adjourned and a further 2 days were allocated to the adjourned hearing, however, the hearing finished in 6 days.
- 19 The owners submitted that this was a case requiring experts who dealt with most of the issues. They submitted that there were also legal and factual issues in which the owners needed legal advice and assistance. They submitted that most of the expenses were legal expenses which were required because the nature and complexity of the case. I accept the owners' submissions.
- 20 Mr Silver, Counsel for the builder, submitted that the Tribunal should not award costs in this case because it was not fair to do so. However, he conceded that experts were needed in this case to assist the owners in the conduct of their case and that the case was basically run on expert evidence.
- 21 Mr Silver submitted that the owners' case did not warrant representation by lawyers and that lawyers were not needed. He questioned what the owners' lawyers had added to the conduct of the case and submitted that the owners' lay evidence amounted to letting the owners have their say. He submitted that most of the evidence in the owners' witness statements was irrelevant, with the exception of evidence given about the water tank.
- 22 However, Mr Silver submitted that in this case, the builder required lawyers to defend itself against the owners' counterclaim for defective and incomplete building work. He said lawyers were required to retain experts and needed to advise the builder on its contractual obligations including liquidated damages. He said also issues of reasonableness arose. When asked, Mr Silver was unable to explain why the builder required legal assistance and representation, but the owners did not. I do not accept Mr Silver submissions.

³ *Sweetvale v Minister for Planning* [2004] VCAT at [19].

- 23 In their application the owners claimed \$80,000. By amended points of claim the owners increased their claim to \$129,479. Their claim covered numerous matters. The hearing and determination of these issues turned largely on the expert evidence given concurrently over some days. There was also extensive cross-examination. The proceeding could not have been conducted without each of the parties spending substantial amounts of money on experts and legal representation.
- 24 The nature and complexity of the factual and expert issues raised by the owners' counterclaim, the time taken for the hearing and the expert evidence called, in my opinion support an application for an order for costs in favour of the owners as the successful parties.

The relative strengths of the parties' claims

- 25 The owners submitted that they were successful on most of their claims. In contrast, Mr Silver submitted that many of the issues were agreed and that Mr Mladicheck's estimate of \$133,624 far exceeded the amount of \$93,016 that the Tribunal found to be made out by the owners. He also submitted that the owners were not successful on all points and that the lay evidence did not go anywhere. I do not accept Mr Silver's submissions.
- 26 The owners' claim was largely successful, in that they established their claim for \$93,016. The builder claimed the balance owing on its final invoice of \$20,731.93 and the Tribunal allowed the builder \$21,961.93 on its final invoice. It was not disputed that the builder's final invoice was not paid in full. The owners submitted they did not know what was owing in the light of the builder's conduct.
- 27 I find in this case that the relative strengths of the parties' cases support the owners' application for costs. The owners were put to considerable expense in successfully proving their case.

Unreasonable prolonging the proceeding

- 28 It was not disputed that the expert evidence was delayed because of issues with Mr Miller giving evidence from New Zealand via videoconference. The problems with videoconferencing resulted in the experts being unable to complete their evidence within the allocated time. Consequently, they were required to appear and give evidence concurrently at the adjourned hearing.
- 29 Mr Silver submitted that the owners had not made the necessary arrangements for Mr Miller to give concurrent evidence by video conference. I accept that the problems with videoconferencing resulted in the proceeding not finishing within the allocated 5 days however I am not satisfied that the owners caused the problem. No evidence was provided to me on this issue.
- 30 Mr Silver also submitted that the owners' Counsel took a great deal of time taking Mrs Bayraktar through her witness statement and correcting errors

and that this prolonged the hearing. I accept that a good deal of time was taken by the owners' Counsel to correct the errors in the witness statement however Mr Silver also took a good deal of time to cross-examine Mrs Bayraktar. Further, the builder required time to give oral evidence on various issues because they had not been included in witness statements as required by the Tribunal's orders made many months prior to the hearing.

Fairness

- 31 The Tribunal can only make an order for costs where it is fair to do so. The issue of fairness is determined by having regard to the relevant considerations.

Conclusion

- 32 I am satisfied that in this case, given the nature and complexity of the proceeding and the relative strengths of the parties' cases, it would be fair in the circumstances to order the builder to pay the owners' costs of this proceeding.
- 33 The owners are entitled to an order under section 109 of the VCAT Act for payment of the costs of the proceeding. I am satisfied that these costs should be assessed on the Standard Basis in accordance with the County Court Scale.

Orders

- 34 I will order that the applicant must pay the respondents' costs 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.

MEMBER F MARKS