VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D104/2013

DOMESTIC BUILDING LIST

CATCHWORDS

Costs Hearing.

APPLICANT	Stellar Constructions Pty Ltd (ACN: 138 323 574)
RESPONDENTS	Mr Tim Ferguson, Mrs Tina Ferguson
WHERE HELD	Melbourne
BEFORE	Member M. Farrelly
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 April 2014
DATE OF ORDER	2 May 2014
CITATION	Stellar Constructions Pty Ltd v Ferguson (Domestic Building) [2014] VCAT 503

ORDER

The Applicant, Stellar Constructions Pty Ltd, must pay the Respondents' costs of the proceeding which, failing agreement, are to be assessed by the Victorian Costs Court on a party/party basis pursuant to the County Court Scale. Counsel's hearing fees certified at $3,000 per day.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr B. Murphy of Counsel
For the Respondents	Ms S. Kirton of Counsel

REASONS

1 The substantive proceeding in this matter was heard before me over 4 days from 25 to 28 November 2013, with written closing submissions filed on 6 December 2013. On 20 December 2013 I ordered the Respondents ("the Owners") to pay the Applicant ("the Builder") $3,744.38 with costs reserved. The Owners now make application for an order that the Builder pay the Owners' costs of the proceeding.

2 The costs application came before me on 14 April 2014. Ms S. Kirton of Counsel appeared for the Owners and Mr B. Murphy of Counsel appeared for the Builder.

3 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") provides that each party is to bear their own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> 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.

4 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* (2007) VSC 117 at (20), Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

(i) The prima facie rule is that each party should bear their own costs of the proceeding;

(ii) The Tribunal should 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 central 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 s109(3).

5 For the reasons discussed below, I accept the Owners' primary submission that, having regard to the nature and complexity of the proceeding, it is fair to depart from the prima facie rule and make a costs owner in favour of the Owners.

6 The substantive proceeding involved a claim brought by the Builder for payment owing in respect of the construction of a new home in Hampton in 2011/2012, and a Counterclaim by the Owners in respect of incomplete and defective building works.

7 In November 2012, at which stage the construction of the home was approaching completion, the Builder allowed the Owners to take occupation of the home. On 28 November 2012, the Builder issued a progress payment claim in the sum of $336,287. In December 2012, the Owners made part payment of $205,222, but refused to pay the balance of the progress claim, $131,065, until all of the building works were satisfactorily completed. Thereafter the parties fell into dispute and on 4 February 2013 the Builder commenced the legal proceeding claiming an entitlement to the balance of the progress claim. Later, on 21 March 2013, the Builder terminated the building contract. The Owners asserted that Builder's termination of the contract was wrongful and amounted to a repudiation of the contract and, on 25 March 2013, the Owner's "accepted" the repudiation.

8 As set out in my Reasons dated 20 December 2013, I found that:

(a) The Builder's progress payment claim issued 28 November 2012 was, under the building contract, a final payment claim.

(b) The builder was not entitled to issue the final progress claim in circumstances where the works under the building contract had not

reached completion.

(c) By demanding full payment of the final payment claim, with the threat of legal proceedings if it was not paid, the Builder repudiated the building contract. The Owners were entitled to "accept" the Builder's repudiation.

(d) I assessed the reasonable cost the Owners would incur in completing, and rectifying defects in, the building works under the contract as $127,320.62, and I found that the Owners were entitled to set this sum off against the unpaid balance of the building contract ($131,065), thereby leaving a balance of $3,744.38 to be paid by the Owners by the Builder.

9 In effect, the Builder's claim in the proceeding was not successful, and the Owners were largely successful in their defence and counterclaim.

10 I agree with the Owners' submission that the proceeding involved complex issues including:

- Whether the Builder's progress payment claim issued 28 November 2012 constituted, under the terms of the building contract, a final payment claim;
- Analysis of the parties' rights and obligations under the building contract in respect of the "final inspection" and the "defects liability period".
- Whether, having regard to the conduct of the parties and the numerous written communications between them, the building contract was "repudiated", and if it was, by whom.

11 The complexity of the issues is evident from the significant volume of correspondence, as detailed in my substantive reasons, between the parties' lawyers in the period January 2013 to 25 March 2013.

12 In my view the Owners acted sensibly in engaging experienced lawyers to assist them in defending their position.

13 Although the technical expert evidence – primarily opinion evidence as to whether building works were defective and the nature and cost of rectification works- was not particularly complex, it was appropriate in my view that each party engaged experienced building consultants to address these issues.

14 I do not accept the Builder's submission that the length of the hearing (four sitting days) and the relatively brief period between the filing of written closing submissions (6 December 2013) and the handing down of the decision on 20 December 2013 indicate that the proceeding involved little complexity.

15 That the hearing was conducted in four days was, in my view, in no small way due to the fact that the Owners elected not to challenge the quantum of

the final progress claim issued by the Builder. It was a significant concession in the circumstance where a large portion of the Builder's final progress claim was made up of variation charges for extra work. Had the Builder's entitlement to the claimed variation charges been challenged, the hearing would certainly have exceeded four days. As it was, much of the evidence over the four hearing days related to the contractual issues referred to above.

16 The handing down of the decision two weeks after the filing of written closing submissions indicates nothing, in my view, as to the complexity of the issues in the proceeding. It may well be indicative of the diligence of the decision maker.

17 I am satisfied, having regard to the nature and complexity of the proceeding, that it is fair to depart from the prima facie rule and order that the Builder pay the Owners' costs of the proceeding. I am also satisfied that it is fair, as the Owners submit, that the sum of costs, if not agreed, be assessed on a party/party basis pursuant to the County Court scale. I note also that, pursuant to Rule 1.07 of the *Victorian Civil and Administrative Rules* 2008 (Rule 1.07 operative from 1 July 2013), that the County Court scale is the applicable scale of costs for VCAT orders unless the Tribunal orders otherwise.

18 I consider it fair also to certify, as requested by the owner, Counsel's daily hearing fees at $3,000 per day. I am satisfied that the engagement of experienced Counsel was warranted and, having regard to the fee range provided in the County Court scale ($1,566 - $4,385 for Junior Counsel), I am satisfied that $3,000 per day is fair and reasonable in this case.

19 I will not, however, certify an hourly rate for Counsel's preparation and conferences. With no indication as to how many hours might be claimed, I consider it best left to the Costs Court, in the event it is called on, to assess any allowance for Counsel's preparation and conferences.

CONCLUSION

20 Accordingly, I will order that the Builder pay the Owner's costs of the proceeding, such costs if not agreed to be assessed by the Victorian Costs Court on a party/party basis pursuant to the County Court Scale, with Counsel's daily hearing fees certified at $3,000 per day.

MEMBER M. FARRELLY