VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP715/2018

CATCHWORDS

Domestic Building – application for costs – s109 – *Victorian Civil and Administrative Tribunal Act 1998* – application for special costs order - relevant considerations – whether costs should be taxed immediately

APPLICANTS:	David Thurin, Lisa Thurin
FIRST RESPONDENT:	Krongold Constructions (Aust) Pty Ltd (ACN: 103 839 149)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Costs hearing
DATE OF HEARING	25 September 2019
DATE OF ORDER	11 November 2019
CITATION	Thurin v Krongold Constructions (Aust) Pty Ltd (Costs) (Building and Property) [2019] VCAT 1773

ORDERS

1. The applicants must pay the first respondent's costs of and incidental to the proceeding up to and including 25 September 2019 but not including any costs of and associated with:
   a) the applicants' Amended Points of Claim filed on or about 20 July 2018,
   b) the applicants' Further Amended Points of Claim filed on or about 6 September 2018, and
   c) the first respondent's joinder applications

   with appearance fees limited to:
   (i) the hearing listed for 30 May 2018 which proceeded as a directions hearing by consent of the parties,
   (ii) the hearing listed for 27 June 2018 which proceeded as a directions hearing
   (iii) the hearing commencing on 15 October 2018;

(iv) the costs hearing held on 25 September 2019.

2. I certify for one senior counsel and junior counsel, including for the hearing commencing on 15 October 2019 and the hearing on 27 June 2018 when two senior counsel appeared on behalf of the first respondent.

3. In default of agreement such costs are to be taxed as soon as practicable by the Victorian Costs Court on a standard basis on the County Court Scale. Taxation of costs is not to be stayed pending the final determination of this proceeding.

4. Costs are otherwise reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants	Mr M Roberts QC with Mr L Stanistreet of Counsel.
For First Respondent	Mr J Twigg QC with Dr Weston-Schreuber of Counsel.

NOTE: The other respondents were excused from participating in this costs hearing.

REASONS

1 On 22 May 2018 the applicant owners ('the Owners') lodged an application in the Tribunal seeking a mandatory injunction requiring:

i. the respondent builder ('the Contractor') to comply with clause 15 of the building contract entered into in or about September 2006;

ii. the Contractor to pay them the sum of $3,583,427.88 in accordance with a Determination by Mr Manly QC plus $5,483.50 on account of the fee paid by them to the Resolution Institute and $36,556.67 on account of the Determiner's fees – both sums being 50% of the actual fees paid.[1]

2 The Contractor disputed the validity of the Determination and counterclaimed seeking orders and/or declarations to the effect that the dispute resolution process set out in clause 15 did not apply to the 'current' dispute between the parties, and the Determination was void and/or a nullity. Alternatively, that the Determination was not final and binding as it did not comply with the process set out in clause 15, and that any cause of action to enforce clause 15 was statute barred. The Contractor also sought an injunction restraining the Owners from taking any steps or action to give effect to the Determination, and restraining them from further proceeding with their applications.

3 On 27 June 2018, I listed a three day preliminary hearing, noting:

> The hearing will only concern the interpretation, application of and issues arising from clause 15 of the building contract and the expert determination process.

4 The preliminary hearing proceeded over three days in October 2018, with further submissions being made by the parties on 17 June 2019. On 9 August 2019[2] ('the Earlier Decision') I found and declared:

a clause 15 of the Construction Contract does not apply to the dispute the subject of the Notice of Dispute dated 12 December 2017,

b alternatively, if clause 15 of the Construction Contract does apply to the dispute the subject of the Notice of Dispute,

i the Determiner did not have jurisdiction to conduct the determination process;

ii the Determiner is not an industry expert as contemplated by clause 15.3 of the Construction Contract for the purposes of determining the dispute set out in the Notice;

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[1] The amendments to the Owners' claims as set out in their Further Amended Points of Claim dated 29 August 2018 are not relevant to these Reasons

[2] *Thurin v Krongold Constructions (Aust) Pty Ltd* [2019] VCAT 1206

iii the Determination is invalid as the Determiner did not carry out an expert determination as contemplated by clause 15.

5 I also reserved the question of costs with liberty to apply.

6 The Contractor now claims its costs of the proceeding to date on an indemnity basis (not including the costs of and incidental to the joinder application heard at the directions hearing on 29 August 2018).

7 Both parties filed written submissions in accordance with my orders dated 16 September 2019. The Contractor also relies on an affidavit by its General Counsel, Neslihan Dastan dated 19 September 2019 and the Owners rely on affidavits by its solicitor, Simon Kaufman dated 2 May 2018 (filed in support of its application for a mandatory injunction) and 23 September 2019.

8 The Owners oppose the application, contending that the preliminary hearing was, in effect, an interlocutory hearing of their application for summary judgement and, accordingly, it is appropriate that the question of costs be reserved until the final determination of the proceeding. Alternatively, if I am persuaded that an order for costs should be made, that such costs should only extend to the three days of the preliminary hearing and that I should certify for senior and junior counsel, but not for two senior counsel.

9 For the reasons which follow I am satisfied it is fair to order the applicants to pay the first respondent's costs of and incidental to the proceeding up to and including 25 September 2019 but not including any costs of and associated with:

a) the applicants' Amended Points of Claim filed on or about 20 July 2018,

b) the applicants' Further Amended Points of Claim filed on or about 6 September 2018, and

c) the first respondent's joinder applications

with appearance fees limited to:

(i) the hearing listed for 30 May 2018 which proceeded as a directions hearing by consent of the parties,

(ii) the hearing listed for 27 June 2018 which proceeded as a directions hearing

(iii) the hearing commencing on 15 October 2018;

(iv) the costs hearing held on 25 September 2019.

In default of agreement such costs are to be taxed by the Victorian Costs Court as soon as practicable on a standard basis on the County Court Scale.

10 Further, I will certify for one senior counsel and junior counsel, including for the hearing commencing on 15 October 2019 and the hearing on 27 June 2018 when two senior counsel appeared on behalf of the Contractor.

RELEVANT CONSIDERATIONS

11 Section 109 of the VCAT Act provides that each party must bear its own costs of a proceeding unless the Tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109(3) provides:

> 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;
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> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
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> (iii) asking for an adjournment as a result of (i) or (ii);
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> (iv) causing an adjournment;
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> (v) attempting to deceive another party or the Tribunal;
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> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
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> (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 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs under s109:

> 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 having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

THE CONTRACTOR'S POSITION

13 The Contractor submits that it is appropriate for me to exercise the Tribunal's discretion under s109(2) of the VCAT Act and, further that it is appropriate that a special order for costs be made, for the following reasons:

(i) the Owners have not provided any explanation as to why they engaged in the 'expert determination process' rather than simply

commencing proceedings in this Tribunal (having first been to DBDRV);

(ii) I determined that the referral of what was patently an *inter partes* dispute was a contrivance presumably to achieve a 'pay now, argue later' order from this Tribunal[3];

(iii) the Owners' lack of engagement during the negotiation process prior to the referral of the dispute to the determination process is a relevant consideration, in circumstances where the Contractor clearly enunciated its position in relation to the jurisdiction of the 'expert' prior to the referral[4];

(iv) my Orders of 9 August 2019 are a final determination of the rights of the parties in relation to the Owners' application for a mandatory injunction to enforce compliance with clause 15 of the Contract. Further, it is only now that I have determined that clause 15 of the Contract does not apply to the dispute, and that the 'Determination' is unenforceable, that the Owners' common law claim for damages can proceed.

14 The Contractor also sought orders that certain paragraphs of the Amended Points of Claim be struck out, and costs ordered in relation to those paragraphs. For the Reasons given at the directions hearing conducted immediately prior to the costs hearing I declined to consider the application in circumstances where this proceeding is to be heard concurrently with related Supreme Court proceedings by a Supreme Court Judge appointed as an acting judicial member of the Tribunal.

THE OWNERS' POSITION

15 The Owners oppose the application for costs submitting that:

(i) costs should be reserved until the final hearing and determination of the proceeding, as my Orders of 9 August 2019, in effect, determined an interlocutory application as they always maintained that clause 15 of the Contract anticipated a 'pay now, argue later' regime;

(ii) if I am minded to exercise the Tribunal's discretion under s109(2) of the VCAT Act

a. costs should be apportioned such that any costs order is limited to those issues which I determined;

b. whilst it would be appropriate to certify for counsel, such certification should be limited to one senior counsel and junior counsel.

[3] Paragraph 82 of my Reasons
[4] The Contractor's letter to the Owners dated 28 February 2018

(iii) any costs ordered should not be taxed until the final hearing and determination of the proceeding in accordance with Rule 63.20.1 of the *Supreme Court (General Procedure) Rules 2015* ('SCR').

DISCUSSION

Section109

16 Section 109(2) of the VCAT Act provides that the Tribunal can make an order for costs if it is satisfied it is fair to do so having regard to the matters set out in s109(3), all of which concern the conduct or merits of the proceeding.

17 The parties have made extensive submissions, and relied on affidavit material, about the parties' conduct prior to the commencement of this proceeding, including allegations by the Owners that the Contractor did not meaningfully engage with them about the alleged defects (about which I make no findings). The Contractor also makes submissions about the Owners' conduct in seeking to rely on the dispute resolution process set out in clause 15 of the Contract and their conduct of the determination process. I have not been assisted by any of these submissions, as they do not directly concern the respective party's conduct of this proceeding.

18 To the extent that submissions and the affidavits seek to reventilate issues raised at the preliminary hearing or determined in the Earlier Decision, I have not had regard to them as they are not relevant.

19 Having regard to the matters set out in s109(3), and in particular s109(3)(c) and (d) I am satisfied that it is fair to exercise the Tribunal's discretion in favour of the Contractor. Not only is the amount in dispute significant, the determination of the meaning and effect of clause 15 of the Contract, and thereby the enforceability of the Determination, involved a consideration of complex legal questions. It was entirely appropriate that both parties be represented by senior and junior counsel.

Should costs be apportioned?

20 The Owners contend that if I am minded to order costs that they should be apportioned so as to only apply to those issues which I determined. I reject this. The fact I determined it was unnecessary to decide five issues once I had decided the initial four, does not mean the other five issues should not have been raised and argued. It is prudent and appropriate for parties to raise all issues which they consider might be relevant. They cannot pre-empt the decision the Tribunal will make, and if I had decided the first four questions otherwise it may well have been necessary to consider the other issues raised by the Contractor.

Is it premature to make an order for costs?

21 The Owners contend that costs should be reserved, to be determined after the final hearing and determination of this proceeding, as the preliminary

hearing was to determine their application for summary judgement, and was therefore interlocutory. I reject this. The preliminary hearing determined the meaning and effect of clause 15 of the Contract, and the enforceability of the Determination. Accordingly, although orders were not made dismissing the Owners' application for a mandatory injunction to enforce the Determination as that was not the question before me, the effect of my Orders of 9 August 2019 is that that application has no prospect of success. The first respondent's counterclaim falls away, accordingly.

What costs should be ordered?

22 In the circumstances, I consider it fair, in exercising the Tribunal's discretion under s109(2) of the VCAT Act, to order the Owners to pay the Contractor's costs of and incidental to the proceeding until 25 September 2019, being the date on which the first respondent's costs application was heard but not including any costs of or associated with:

(i) the applicants' Amended Points of Claim filed on or about 20 July 2018,

(ii) the applicants' Further Amended Points of Claim filed on or about 6 September 2018, and

(iii) the first respondent's joinder applications

23 Further, appearance fees are limited to:

(i) the hearing listed for 30 May 2018 which proceeded as a directions by consent of the parties

(ii) the hearing listed for 27 June 2018 which proceeded as a directions hearing, and

(iii) the Contractor's costs of and incidental to its costs application including this costs hearing.

24 The hearings on 30 May and 27 June 2018, both of which proceeded as directions hearings, primarily concerned the Owners' application for a mandatory injunction compelling the Contractor to comply with clause 15 of the Contract, which as I have noted above, has been determined by my orders of 9 August 2019.

25 Although I have not made a special costs order as sought by the Contractor (for the reasons which follow), the Contractor has been successful in its application for costs, and I consider it fair that the order for costs also include the costs of and incidental to its costs application.

26 As indicated above, I will certify for one senior counsel and junior counsel. However, I am not persuaded that it is necessary to specify which member of senior counsel is certified for.

Should there be a special costs order?

27 The Contractor seeks a special costs order. This seems primarily predicated on my discussion at paragraphs 80 to 82 of my Earlier Reasons about the referral of what was essentially an *inter partes* dispute to a purported expert determination. However, for the Reasons set out above, I am not persuaded that this is a relevant consideration under s109. It must always be remembered that s109 starts with the presumption that each party bears their own costs of the proceeding. Once the Tribunal is satisfied it is fair to depart from that presumption, and make an order for costs, it is a very high hurdle for a successful party to demonstrate that a special order for costs should be made.

28 Insofar as the Contractor relies on the principles set out in *Ugly Tribe Company Pty Ltd v Silcola*,[5] not only does the Contractor fail to indicate which specific principle/s it relies on, I note that an order for indemnity costs was not made in *Ugly Tribe*. As Senior Member Dea observed in *Giurina v Deak (Costs)*[6]

> In *Ugly Tribe*, Harper J declined to make an indemnity costs order despite submissions the plaintiff had no arguable cause of action and that would have been *'so plain as to be obvious to the most incompetent of solicitors'*. There were allegations the commencement of the proceeding was, or was tantamount to, an abuse of process and that heavy-handed tactics were used. His Honour did not find sufficient evidence to support those submissions.[7] His Honour commented:
>
> > It seems to me that I could only accede to the first defendant's application for costs on an indemnity basis were I satisfied that the plaintiff in fact appreciated the hopelessness of its position. There is no direct evidence that it did. The first defendant asked me to draw the necessary inference. I do not think that I can do so, although I have some sympathy with the first defendant's position. The courts are daily faced with examples of surprising ignorance.[8]

29 Special costs orders are most unusual in the Tribunal and are only awarded in exceptional circumstances as noted by Nettle JA in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*[9]:

> … where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …'

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[5] [2001] VSC 189 at [7] – [8]
[6] [2018] VCAT 683
[7] At [5]
[8] At [18].
[9] [2005] VSCA 165 at [91-92]

30 Although after a three day hearing, the Contractor's interpretation of clause 15 was upheld, this is not a reason to make a special costs order. If the law was certain, there would be no need for courts and tribunals to resolve disputes which will often include the determination of questions of fact and law. That is the very role of courts and tribunals.

31 Insofar as the Contractor contends that the Owners have delayed the proceeding and/or the resolution of the dispute, by engaging in the clause 15 dispute resolution process, and then seeking to enforce the Determination in this Tribunal, I am not persuaded this is a relevant consideration. Even if I was satisfied it is relevant, it cannot be regarded as an exceptional circumstance that would warrant a special costs order. Further, any delay since the commencement of the proceeding in the Tribunal has not been the responsibility of the Owners. The hearing proceeded on 15 October 2018 being the first available date which could be accommodated by the Tribunal when the hearing scheduled to commence on 27 June 2018 was adjourned as the parties were clearly not ready to proceed. The delay in the decision being handed down was, primarily due to my period of extended sick leave, and other Tribunal commitments.

32 I am not persuaded there is anything so exceptional about the Owners' conduct of this proceeding in relation to their application for a mandatory injunction that merits a special costs order.

When should the costs be taxed?

33 The Owners rely on Rule 63.20.1 of the SCR in support of their submission that there should not be an immediate taxation of costs. The Rule provides:

> **63.20.1 Taxation of costs on an interlocutory application or hearing**
>
> If an order for costs is made on an interlocutory application or hearing, the party in whose favour the order is made shall not tax those costs until the proceeding in which the order is made is completed, unless the Court orders that the costs be taxed immediately.

34 First, as discussed above, I am not persuaded that the preliminary hearing should properly be described as an interlocutory hearing as it had the effect of determining the Owners' application for a mandatory injunction to enforce the Determination. However, if I am wrong, and it should properly be described as an interlocutory hearing, the costs should be taxed immediately. I accept that the Contractor incurred significant costs in relation to the preliminary hearing, which in effect were costs of defending the application for a mandatory injunction to enforce the Determination.

35 The Owners have a significant claim for approximately $3.6 million in respect of which the Contractor has joined a number of parties alleging they are concurrent wrongdoers for the purpose of defences under Part IVAA of the *Wrongs Act 1958*, alternatively seeking contribution under s23B of that

Act. Further, this proceeding is now to be heard concurrently with related Supreme Court proceedings by a judge of the Supreme Court who has been appointed as an acting judicial member of the Tribunal. It is highly likely that it will be some time before this proceeding is finalised, and having regard to the Tribunal's obligations under ss 97 and 98 of the VCAT Act I am not persuaded it would be fair to the Contractor to wait until then for its costs to be taxed. Accordingly, I will order they be taxed immediately. I consider it appropriate that the costs be taxed on the County Court Scale being the default scale for proceedings in this Tribunal.[10]

DEPUTY PRESIDENT C AIRD

[10] *Victorian Civil and Administrative Tribunal Rules 2018* r 1.07