

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1689/2015

CATCHWORDS

Application by successful party for a costs order; matters to be considered – Section 109 Victorian Civil and Administrative Tribunal Act 1998.

FIRST APPLICANT	Ms Anna Watson
SECOND APPLICANT	Dr Peter Larkins
RESPONDENT	Concrete Services Group Pty Ltd. (ACN 147 025 670) t/as Ecofloor
WHERE HELD	Melbourne
BEFORE	Member H. Davies
HEARING TYPE	Costs Hearing
DATE OF HEARING	9 February 2017
DATE OF ORDER	9 March 2017
CITATION	Watson v Concrete Services Group Pty Ltd (Building and Property) [2017] VCAT 325

ORDER

The application by the respondent for an order as to costs is dismissed.

MEMBER H. DAVIES

APPEARANCES:

For the Applicant	Ms A. Watson in person
For the Second Applicant:	Dr P. Larkins in person
For the Respondent	Mr F. Aurnia, Director

REASONS

- 1 On 29 June 2016 the Tribunal dismissed the original application. Neither party was legally represented at the hearing, the Tribunal having refused the respondent leave to be represented.
- 2 The respondent had sought assistance from a lawyer to prepare its defence of the application and to deal with the dispute prior to the application being filed. At that hearing there was no application for costs and there was no order for costs.
- 3 On 15 November 2016, the respondent made application for an order for costs paid to Mr Molnar, its solicitor, in connection with the application. The Tribunal notes that in a letter dated 2 April 2015 Mr Molnar stated to the applicants' then lawyers, Rigby Cooke that "the jurisdiction in VCAT is not normally one in which costs are ordered against a party".
- 4 To give the applicants the opportunity to respond to the respondent's claim, the matter was listed for a costs hearing on 9 February 2017 which all parties attended in person; again the respondent was not legally represented; Mr Molnar was present in the hearing room but did not announce an appearance.
- 5 At the hearing the respondent filed an Affidavit sworn by Mr Molnar whose account for fees now claimed was exhibited. The total claim was for \$2687.50, \$1025.00 of which was incurred prior to the original application being filed in December 2015 and \$750.00 for Mr Molnar's attendance at the hearing when he was refused leave to appear.
- 6 The applicants were given the opportunity to file submissions opposing the costs application and they did so on 24 February 2017.
- 7 The Tribunal has carefully considered the submissions of both parties and the content of Mr Molnar's Affidavit and the exhibits thereto.
- 8 In essence the respondent claims that the applicants conducted the proceeding vexatiously and their claim lacked merit or substance.
- 9 The applicants maintain that no costs should be awarded having regard to the provisions of 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act").
- 10 Section 109 of the Act provides-
 - (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) *If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3) (a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.*
- (5) *Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.*
- (6) *If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.*

11 “Costs” is not defined in the Act but clearly includes legal costs. The Tribunal is satisfied that the respondent did incur legal costs in connection with the application.

12 As the Act provides, the Tribunal may only make an order for costs if it thinks it is fair to do so, taking into account all of the circumstances of the case.

13 Obviously the applicants were not successful in this proceeding. However in the finding of the Tribunal none of their conduct would fall within the provisions of Section 109 (3) (a) or (b) of the Act. The hearing was

conducted over s single day and in particular the applicants did not cause any adjournment or fail to comply with any Tribunal order

- 14 The fact that an applicant fails in its claim does not necessarily mean that the claim had no tenable basis in fact or law so as to attract the provisions of Section 109 (3) (c).
- 15 In *Dennis Family Corporation Pty. Ltd. v Casey CC [2008] VCAT 691* the Tribunal observed at [14] that it is “probably seldom” that an order for costs would be made having regard to Section 109(3) (c) alone where there was a real issue to be tried and real justification for the claims being made on either side and that it is only where there is a “very weak case for one side or none at all”, that this consideration is likely to lead to an order for costs. (*See Pizer’s Annotated Act 4th Edition at 109.200.*)
- 16 *As stated in Gresham v Bass SC, [2004] VCAT 1537*, costs are not to be awarded automatically just because the case may be weak or untenable. In the view of the Tribunal in this case there was a real issue to be tried; the applicants failed when the Tribunal applied the test of the balance of probabilities to the matters of fact the Tribunal was required to decide.
- 17 What constitutes a complex matter for the purposes of Section (109) (3) (d) will vary from case to case. This application involved a reasonably straight forward claim by the applicants that the respondent had failed to carry out concrete floor resurfacing works at their property in Brighton, Victoria in a proper and workmanlike manner. The claim failed on its merits. Neither the claim nor the hearing involved what, in this context of this List and the facts of the particular case, constituted complex issues.
- 18 This was not a “large matter of a commercial type”, an issue the Tribunal dealt with in *Sixty-Fifth Eternity Pty. Ltd v Boroondara CC [2009] VCAT 284*.
- 19 Furthermore, in numerous decisions of the Tribunal, including *Solid Investments Pty. Ltd v Greater Geelong CC [2005] VCAT*, it has been stated that “complexity” by itself would rarely be enough to justify a costs order and that it is just one of the issues to be considered.
- 20 In the view of the Tribunal the cumulative effect of all relevant issues to which Section 109(3) of the Act refers, in this case, should not result in a costs order.
- 21 There are no other matters the Tribunal considers relevant in determining whether this costs application should be granted.
- 22 For the above reasons the application for costs is dismissed.

MEMBER H. DAVIES