

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE D563/2005

CATCHWORDS

Domestic Building, interest, "fair" to award interest, interest rate, costs, *Victorian Civil and Administrative Tribunal Act 1998* s109(3)(a) "unnecessarily disadvantages" and conduct before the proceeding, s109(3)(c) relative strengths of claims, s109(3) nature and complexity of the proceeding.

APPLICANT	Raymond John Caldwell
RESPONDENT	Andrew Waiyoung Cheung
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	20 August 2008
DATE OF ORDER	1 September 2008
CITATION	Caldwell v Cheung (Domestic Building) [2008] VCAT 1794

ORDERS

1. The Applicant must pay the Respondent interest of \$12,520.33 forthwith.
2. The Applicant must pay the Respondent's costs to be agreed, but failing agreement, the Applicant must pay two thirds of the Respondent's costs (except as provided in order 3 below), to be assessed by the Principal Registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act 1998* on a party-party basis on County Court Scale D.
3. Each party must continue to bear the cost of half the fees of the Special Referee, Mr Rod Lawrence.

SENIOR MEMBER M LOTHIAN

APPEARANCES:

For Applicant	Mr D. Pumpa of Counsel
For Respondent	Mr G. Hellyer of Counsel

REASONS

- 1 On 7 May 2008 I ordered that the Applicant-Builder pay the Respondent-Owner \$65,518.59 and reserved interest and costs, for which the Owner has applied.
- 2 Both the claim and counter-claim were substantial. By the date of the hearing the Builder sought \$139,278.00 (\$141,788.00 at the date of application) and the Owner's counter-claim was \$168,422.17 (\$172,902.09 at the date of counter claim). The Owner seeks interest at the rate fixed under the *Penalty Interest Rates Act* 1983 ("PIR Act") of \$17,725.98, being interest up to and including the date of the decision on 7 May 2008. The counter claim was lodged on 19 October 2005. The Owner also seeks costs on a party-party basis, to be agreed, but failing agreement, to be assessed by the Principal Registrar. I said during the costs hearing that if costs were awarded, the appropriate scale would be County Court Scale D.

INTEREST

- 3 Section 53 of the *Domestic Building Contracts Act* 1996 ("DBC Act") provides in part:
 - (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
 - (2) Without limiting this power, the Tribunal may ...
 - (b) ...order the payment of a sum of money-
...
 - (ii) by way of damages (including ... damages in the nature of interest);
...
 - (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act* 1983 or on any lesser rate it thinks appropriate.
- 4 It is a rule of economy that money now is worth more than the same amount of money paid at some time in the future. However the DBC Act does not provide that interest is always paid. It does not even provide, like section 60(1) of the *Supreme Court Act* 1986 that the Tribunal:

...must, unless good cause is shown to the contrary, give damages in the nature of interest...
- 5 Parliament could have chosen to have the Tribunal assume that interest would be awarded where money is awarded, but it did not do so. The test for entitlement to interest is whether it is "fair", then the rate of interest is the PIR Act rate or any lesser rate I consider "appropriate".

- 6 An issue I raised at the hearing was whether some or all of the money awarded had been spent or was yet to be spent. For example, if a substantial proportion of the amount ordered had been for future work not yet paid for, I would be disinclined to award interest. I am satisfied that most of the amounts awarded to the Owner are for overpayments to the Builder, amounts paid to other trades and delay costs - I do not characterise them as amounts which are yet to be spent. The Owner is out of pocket for those amounts and has not had the use of the money.
- 7 Another consideration, which is also relevant to the award of costs, is the relative strengths of the claims of each party. This is not a dispute where a party has made a claim for an amount that has been awarded without deduction, or without substantial deduction. It is not a case where there is evidence that one party has done everything in its power to delay the inevitable day when it will have to pay the other. It occurs to me that such a case would be more deserving of interest at a penalty rate (as indicated by the title of the PIR Act) than the case in hand.
- 8 This is also not a dispute where, either before or after lodging the application, one party has obviously acted fairly and reasonably whereas the other has not. In particular I consider each party acted unfairly and to some degree dishonestly towards the other. In this respect I refer to paragraphs 19 to 23 of my reasons of 7 May 2008.
- 9 Nevertheless, a substantial sum has been awarded to the Owner, the whole amount payable was due when the counter claim was lodged and it is reasonable that it should not be eroded by the passage of time. I have no evidence before me as to the source of the Owner's funds - whether it was derived from his own savings or was sourced from a loan. Section 97 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") requires the Tribunal to "act fairly and according to the substantial merits of the case ..." and section 98(1)(c) entitles it to "inform itself on any matter as it sees fit", subject, of course, to being bound by the rules of natural justice.
- 10 I consider in this case it would not be fair to award penalty interest, and also unfair to award no interest. Having regard to the rate I consider "appropriate" under s53(3) of the DBC Act, I allow interest on the lowest reasonable interest rate, which I find is a fixed term deposit rate. The current fixed term deposit rate at the Commonwealth Bank for amounts between \$10,000.00 and \$500,000.00 is 7.5%. I apply that rate.
- 11 The period between filing the counter claim and 7 May 2008 is two years and 200 days. 7.5% interest for that period on \$65,518.59 is \$12,520.33, which the Builder must pay the Owner.

COSTS

- 12 Section 109 of the VCAT Act states in part:

s.109:

- (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.

13 The Owner bases his claim for costs on one or more of s.109(3)(a)(b)(c),(d) and (e) of the Act. It is regrettable that there was no offer to which s112 of the VCAT Act applied. It reverses the assumption that parties will bear their own costs and is also a potent means of putting commercial pressure on opponents.

14 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

- (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 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.

s.109(3)(a) - Conducting the proceeding in a way that unnecessarily disadvantages [the other] party

15 There is no evidence that the Builder conducted the proceeding in a way that disadvantaged the Owner, much less that the Owner was unnecessarily disadvantaged. I accept the suggestion of the learned author, Jason Pizer (*Pizer's annotated VCAT Act*, 3rd edition, [4039.1A]) that conduct before commencement of the proceeding is irrelevant. I do not find s109(3)(a) relevant.

s.109(3)(b) – Prolonging unreasonably the time taken to complete the proceeding

16 There is no evidence that the Builder prolonged completion of the proceeding.

s.109(3)(c) – The relative strengths of the claims made by each of the parties

17 Although the outcome of the proceeding was that the Builder was ordered to pay a substantial amount to the Owner, it is not accurate to say that one party's claim was very strong and the other's very weak. Having regard to arithmetic alone applied to the claim and counter-claim as finally formulated, the Owner was successful in obtaining an order for \$65,518.59 and defending a claim for \$139,278.00; a total of \$204,796.59. The Builder was successful in defending \$102,903.58 of the claim against him, being \$168,422.17 less \$65,518.59. Seen in these terms, the Owner was two thirds successful and the Builder one third successful. I am not satisfied that the relative strengths of the claims between the Owner and Builder were sufficient to justify an order for costs under this provision.

s.109(3)(d) – The nature and complexity of the proceeding

18 I am satisfied that the amounts in dispute and the complexity of the proceeding justified the need for experienced counsel and also justify the award of costs. As Mr Hellyer of Counsel for the Owner said in his submissions regarding costs, the hearing was for seventeen days and the issues included the scope of works, variations, credits, defects, incomplete works, delays and consideration of whether the building contract had been determined by the Owner.

s.109(3)(e) – Any other matter the tribunal considers relevant

19 It has been submitted for the Owner that the possibility that costs actually incurred might strip him of the fruits of the amount ordered. While this is regrettable, having regard to *Gombac*, but for the nature and complexity of the proceeding I would not consider it relevant.

“All or a specified part of the costs”

20 Under s109(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.

21 I consider that it is fair in this case for the Owner to receive costs in the same proportion as his success. The Builder must therefore pay the Owner costs to be agreed, and failing agreement, two thirds of costs on County Court Scale D, to be assessed by the Principal Registrar pursuant to s111 of the VCAT Act.

Assessment of Mr Lawrence

22 In the course of the hearing Mr Rod Lawrence was appointed as a special referee to determine whether certain doors were solid core doors. The parties paid half each of his costs and the Owner has sought to be repaid his share of the amount paid to Mr Lawrence. All the doors originally referred to Mr Lawrence were proven to be solid core as asserted by the Builder, although a number of other doors referred to him on site proved not to be in accordance with the contract. It is fair that no further allowance should be made in favour of either party for the amount paid to Mr Lawrence.

SENIOR MEMBER M LOTHIAN