VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST VCAT REFERENCE NO. D546/2004

CATCHWORDS

Damages in the nature of interest – when awarded – "reasonable" costs – meaning of

[2006] VCAT 1063

APPLICANTS	Christine Quinlan, Patrick Quinlan
FIRST RESPONDENT	RW Sinclair
SECOND RESPONDENT	DJ Sinclair
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	5 June 2006
DATE OF ORDER	8 June 2006

ORDER

1. The proceeding is reinstated;

2. Order the Second Respondent pay to the Applicants the sum of $37,464.00.

3. Further order the Second Respondent pay the Applicants' costs and disbursements associated with or connected with the proceeding on a party/party basis according to County Court Scale of Costs "D" to be agreed between the parties failing which to be assessed by the Registrar.

4. Further order the Second Respondent pay the Applicants' costs of this application on a party/party basis according to County Court Scale of Costs "C" to be agreed between the parties failing which to be assessed by the Registrar.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr Laird of Counsel
For the First Respondent	No appearance
For the Second Respondent	In person

REASONS FOR DECISION

The proceeding

1. By this proceeding the Applicants sought damages for defective renovation and extension work that was carried out for them by the Respondent builders. The matter came on for hearing on 15 August 2005 and was settled by the parties in accordance with hand written terms of settlement bearing that date ("the Terms").

The Terms

2. In essence, the Terms required the Respondents (referred to as "the Builder" in the Terms) to carry out remedial work at the subject premises to the satisfaction of the Applicants' expert, Mr Lees. The clauses of the Terms relevant to this application before me are 7, 8 and 12. They are as follows:

   Paragraph 7:

   "In the event that the Builder fails to complete the outstanding items of work to the reasonable satisfaction of Rob Lees then Rob Lees shall assess the reasonable cost to complete the remaining outstanding items of work and that assessment shall become a debt due and payable by the Builder to the Owners ("the Assessed Amount").

   Paragraph 8:

   "In the event that the Builder fails to complete the outstanding items of work, then the parties consent to:

   (a) The proceedings being reinstated;

   (b) An order being made against the Builder in favour of the Owners for the Assessed Amount, together with the reasonable costs associated with the making of such an order".

   Paragraph 12:

   "The Builder will pay the Owners' costs and disbursements associated with or connected with the Proceeding on a party/party basis according to the County Court Scale of Costs "D" to be agreed between the parties failing which to be taxed by the Tribunal".

Default

3. None of the agreed work was done and on 16 March 2006, on the application of the Applicants, the proceeding was reinstated. In the meantime Mr Sinclair had become bankrupt and so enforcement was sought only against Mrs Sinclair. Her solicitors claimed that the Terms were unenforceable upon grounds set out in correspondence and this question was set down for preliminary determination. Directions were given for the filing of affidavit material and submissions and a number of affidavits were filed, principally on behalf of the Applicants. Before any submissions were filed the argument that the Terms were unenforceable was abandoned by Mrs Sinclair.

4. The matter came before me on 5 June 2006. Mr Laird of Counsel appeared for the Applicants and the Second Respondent represented herself. Mr Sinclair was not present and I was told that he was in very poor health.

The dispute

5. Mrs Sinclair indicated that she was content for there to be judgement for the Assessed Amount in accordance with the Terms but said the costs should only be allowed on Scale "C", that being the scale appropriate to a judgment for $37,464.00. She resisted the applications for interest and solicitor/client costs.

6. Mr Laird submitted that the Applicants were entitled to judgment for the Assessed Amount plus costs as described in the Terms. I accept this submission. Although the amount of the judgment falls within Scale "C" of the County Court Scale, it is given pursuant to the agreement contained in the Terms and that provides for Scale "D". He also asked for interest on the amount of the judgment.

Interest

7. Mr Laird relied upon s.53 (2)(b)(ii) of the ***Domestic Building Contracts Act 1995*** which is as follows:

"*53. Settlement of building disputes*

(1) *The Tribunal may make any order it considers fair to resolve a domestic building dispute.*

(2) *Without limiting this power, the Tribunal may do one or more of the following-*

(a) refer a dispute to a mediator appointed by the Tribunal;

(b) order the payment of a sum of money-

(i) *found to be owing by one party to another party;*

(ii) *by way of damages (including exemplary damages and damages in the nature of interest);*

……

(c) 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."

8. Mr Laird submitted that, by s.60(1) of the ***Supreme Court Act 1986***, damages in the nature of interest must generally be awarded from the commencement of the proceeding to the date of judgment. He said the same practice applies in this Tribunal and referred to comments I made in the case of ***Vuka Homes v Couty*** [2005] VCAT 1301. However that case concerned a contested claim for damages which proceeded to judgment and interest was claimed in the prayer for relief. It was open to me to award damages, including damages in the nature of interest. This case has been settled and the parties' rights are now set out in the Terms. There is no provision in the Terms for payment of interest.

9. There is nothing in the ***Victorian Civil and Administrative Tribunal Act 1998*** that empowers this Tribunal to award interest or damages in the nature of interest. In domestic building disputes there is the power in s.53(2)(b)(ii)]of the ***Domestic Building Contracts Act 1995*** referred to and there is a similar power in s.108(2)(b)(ii) of the ***Fair Trading Act 1999*** in regard to claims brought under that Act. In the presence case I can only have recourse to the former section and that allows the award of damages in the nature of interest.

10. In the Supreme Court there is a statutory entitlement to interest "*unless good cause is shown to the contrary'* (see ***Supreme Court Act 1986*** s.58(1), s.59(2) and s.60(1)) and the sum awarded becomes part of the damages awarded. It is an additional head of damages (see ***Williams v Volta*** [1982] V.R.739 at p.746). In domestic building disputes the Tribunal "may" award damages in the nature of interest (s.53(1) &(2)). There is no requirement for the unsuccessful party to show

"good cause" why they should not be awarded but the use of the permissive "*may'* would suggest that they will not necessarily be awarded in all cases. There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be *"fair"* to do so.

11. It cannot be *"fair"* to make any order that is not in accordance with the evidence and established legal principles. The Tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is *"fair"* must be determined in each case.

12. It is also important to bear in mind that the section is concerned with damages in the nature of interest, not interest that has fallen due pursuant to some provision of the contract. The latter is a claim for a debt or liquidated sum and is qualitatively quite different from a claim for unliquidated damages (as to the difference between liquidated and unliquidated demands, see ***Alexander v Ajax Insurance*** [1956] VLR 436 per Scholl J.)

13. In the present case I am not concerned with assessing damages for breach of contract. Rather, I am dealing with a motion for summary judgment to enforce terms of settlement. Since the Terms do not provide for interest I cannot award it.

Costs

14. As to the period up to and including 15 August 2005, Mr Laird seeks an order for the costs and disbursements set out in paragraph 12 of the Terms. I agree the Applicants are entitled to that. As I pointed out at the hearing, the wording is a little unusual but that was what the parties agreed upon and there is no reason to suppose the Registrar will not be able to assess the costs and disbursements referred to.

15. As to the period after 15 August, Mr Laird seeks an order for solicitor/client costs assessed on Scale "C", that being the scale referable to an award of $37,490.00. This is sought pursuant to paragraph 8(b), but that paragraph only provides for "reasonable costs".

16. Mr Laird referred to the Tribunal's decision in ***White v Secretary to Department of Justice*** [2001] VCAT 1615 where Deputy President McNamara said at para 26:

> *"…the balance of authority in litigious matters is that "reasonable legal costs" means costs fixed as between solicitor and client rather than upon a full indemnity basis."*

17. This passage appears in the judgment immediately after the learned Deputy President had reviewed a number of authorities, notably the decision in ***Reid v FAI General Insurance Co Limited*** (unreported 28 May 1999). The approach taken in ***Reid*** was rejected by the Victorian Court of Appeal in ***Pacific Development Underwriting Agency Pty Ltd v Maclaw*** [2005] VSCA 165. In the leading judgment in that case, Ormiston J. said (at para 44):

> *"One may first start with the fact, noted in the preceding paragraph, that the expression "reasonable legal costs and expenses" is here found in two documents intended to bring an end to legal proceedings, being proceedings brought in the Tribunal. Prima facie, if one sees in such documents references to "costs", then ordinarily one should assume that the term refers to the kind of costs which courts and tribunals are accustomed to order.*
> ……
> *Consequently the meaning of the expression "reasonable legal costs and expenses" must be considered in the context of both the policy and the compromises, to see what the parties meant when they sought to settle these two proceedings. The appellant's case, as already noted, is that all that was meant by the expression was party and party costs, which itself would connote a test of reasonableness, just as much as such a test is relevant to any other form of taxation, albeit that in the case of indemnity costs the reverse onus applies. But for what has been said by the Tribunal both earlier in Reid and other cases and in the present decision, as well as by the learned trial judge, I would have thought that the word "reasonable" is of general application in the taxation of costs. As Winneke, P. said in Spencer v. Dowling the expression "reasonably incurred" is "apt to describe costs on a party and party basis, as much as they are to describe costs on a solicitor/client basis, because such costs have always been regarded as the costs which are reasonably incurred in the attainment of justice between the parties.*
> ……..
> *Finally, it must be asked and resolved what was the agreed basis of costs which the parties intended should be assessed by the Tribunal if they could not come to agreement on the quantum. I was first inclined to the opinion that the*

question should be left to the Tribunal, in the sense that it would know best what in the circumstances of this kind of litigation would be a reasonable basis for the assessment of costs. It certainly should not have been on a full indemnity basis, with the onus resting on the appellant to show that particular items were unreasonable. It is possible that, left to its own devices and in the absence of any compromises, the Tribunal may have reached a conclusion that solicitor/client costs should be paid, …….. Consequently, unless it had been thought appropriate in building cases between domestic building owners and builders brought pursuant to the jurisdiction vested in the Tribunal under the Domestic Building Contracts Act that costs should ordinarily be assessed on a solicitor/client basis, then no such order should be assumed to have been open in the present case. In other words, one ought here to assume only that the Tribunal, in effect by agreement, would exercise its discretion to award costs but would award them on a party/party basis.

……

I would therefore conclude that the parties intended only that costs should be paid by the appellant insurer to Maclaw as building owner, that the discretion should be exercised in favour of the payment of such costs under s.109 and that the costs should be assessed or determined in the conventional way, upon a party/party basis applicable to the sums agreed to be paid in each case. The appeal should be allowed, the determinations overturned and the matter remitted to the Tribunal so that the costs and expenses may be assessed or determined by it in accordance with these reasons."

18. It would seem from these passages that the expression *"…the reasonable costs associated with the making of such an order"* are as applicable to an assessment on a party/party basis as they are to any other basis and I should not therefore conclude from the mere use of those words that anything other than party/party costs was intended.

19. Mr Laird submitted that the value of the Assessed Amount has been "much diminished" by the costs the Applicants have incurred in this application for reinstatement and judgment. He said that it took a whole day for counsel to settle the affidavit material. That may be so but the parties anticipated that, if an application such as this was made, the Applicants would incur costs and they provided in the Terms that the Respondents should pay them. The mere fact that the costs have been incurred is not a reason to read into the Terms a provision that they are to be assessed on a solicitor/client basis. Also, the fact that a great deal of work has been done will be reflected in the number of items in the bill of costs. It is not relevant to the basis of assessment.

20. In the case of ***Paleka v Suvak*** [2000] VCAT 58, after reviewing the authorities concerning special orders for costs, I reached the following conclusion, which is still my view:

> *"Generally, party/party costs should be awarded. Access to Courts and Tribunals is a fundamental right enjoyed by everyone and persons bona fide pursuing that right and not acting improperly should not generally face orders more onerous than party/party costs if they are unsuccessful. Solicitor/client costs are ordered when the party against whom the order for costs is being made has somehow acted improperly in the conduct of the litigation so as to cause the other party unnecessary expense. Indemnity costs are ordered where the party's conduct is particularly blameworthy. That is, the circumstances justify a harsher order than even solicitor\client costs".*

21. Mr Laird said the argument that the Terms were unenforceable was "untenable". I agree that it did not impress me at first sight but it was raised and argued in correspondence by Mrs Sinclair's solicitors and so she presumably adopted it on legal advice. It has not been argued before me so I have not been able to rule upon it or even assess its strength. She is now a litigant in person and has chosen to abandon the argument and allow judgment to be given against her which might have saved some costs. I do not think this is a sufficient ground to order solicitor/client costs.

SENIOR MEMBER R. WALKER