VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1357/2015

CATCHWORDS

DOMESTIC BUILDING – Damages – Costs – whether legal costs can be ordered pursuant to s 115 of the *Victorian Civil and Administrative Tribunal Act 1998* – meaning of 'fees' in s 115A of the *Victorian Civil and Administrative Tribunal Act 1998* – whether costs pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* should follow the event in undefended proceedings.

FIRST APPLICANT	Belinda Allen
SECOND APPLICANT	Stuart Allen
RESPONDENT	Travis Dalton t/as AFD Fencing
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
LAST DATE FOR WRITTEN SUBMISSIONS	18 December 2015
DATE OF ORDER	15 January 2016
CITATION	Allen v Dalton (Building and Property) [2016] VCAT 135

ORDER

1. Further to Order 2 of the Tribunal's orders dated 10 December 2015, the Respondent must pay the Applicants $4,650 on the Applicants' claim.
2. The Respondent must pay the Applicants $174.10, being reimbursement of the Tribunal application filing fee.
3. For the avoidance of any doubt the total amount payable by the Respondent to the Applicants pursuant to Order 2 of the Tribunal's orders dated 10 December 2015 and pursuant to these orders is $8,388.10.
4. The Applicants' claim for costs is dismissed.

SENIOR MEMBER E. RIEGLER

REASONS

INTRODUCTION

1. The Applicants are the owners of a residential property located in Greenvale. They contracted with the Respondent for him to supply and erect timber fencing and galvanised gates on the boundary of their property.

2. The proceeding was listed for hearing on 10 December. Although both parties were served with a notice of hearing, the Respondent did not appear on that day. Nevertheless, the hearing proceeded and sworn evidence was given by the First Applicant in support of the Applicants' claim. At the conclusion of that hearing, I made a number of findings, which are set out in my orders dated 10 December 2015 as follows:

    A. Having heard sworn evidence from the First Applicant and having further considered documents relied upon by the Applicants, I find that the parties entered into a contract whereby the Respondent was to supply and install a timber paling fence and gate. I find that the contract comprised two written quotations and that one of those quotations had mistakenly included a reference to the provision of timber decking at a cost of $3,564. I find that the parties had never contemplated that decking was to form part of the scope of works under the contract; nor was any decking work ever undertaken by the Respondent for the Applicants. Consequently, I find the Applicants have overpaid the Respondent in the amount $3,564.

    B. I further find that the as-constructed fence was 100 mm shorter [lower] than what was required under the contract and that in lieu of making good that deficiency, the parties agreed to vary the contract by reducing the height of the fence to the as-constructed height in consideration that the contract price was correspondingly reduced by $1,144.52.

    C. I further find, based on the expert opinion expressed in a building inspection report prepared by *Buy Wise Building Inspection Services Pty Ltd*, that the work undertaken by the Respondent was defective in that:

        (a) the posts are not adequately set into the ground;
        (b) there were insufficient or improper fixing methods adopted;
        (c) the gate has been poorly constructed and does not close properly; and
        (d) the gate hinges are undersized.

3. However, the proceeding was unable to be concluded on that day because the Applicants were not in a position to provide evidence as to the cost to repair the defective fencing. Consequently, the proceeding was adjourned to allow the parties to file submissions as to the cost of making good the defective fencing work. Orders were made to that effect.

APPLICANTS' CLAIM

4. The Applicants have filed written submissions going to the question of quantum, together with copies of two quotations in support of their claim. No written submissions have been filed by the Respondent. Further, my orders of 10 December 2015 also gave liberty to the Respondent to be heard on the question of damages (in lieu of filing and serving written submissions), subject to him exercising that liberty by 18 December 2015. Again, no communication has been received from the Respondent requesting that the matter be relisted for hearing. Accordingly, I will proceed to determine the reasonable cost of making good the defective fencing work based on the written submissions and supporting documents filed by the Applicants.

5. The two quotations filed by the Applicants in support of their claim are:

   (a) Gamcon Developments in the amount of $9,600 inclusive of GST; and

   (b) D & E Homes quotation in the amount of $4,650 inclusive of GST.

6. The Applicants state that they are willing to engage D & E Homes to carry out the rectification works. They submit that they would be adequately compensated if an order were made commensurate with the amount D & E Homes have quoted to make good the defective fencing works.

7. Given that there is no contrary evidence or submissions suggesting that the amount quoted by D & E Homes is excessive or not reasonable and having further regard to the fact that the quotation from Gamcon Developments is for a much higher figure, I accept that the amount of $4,650 represents a fair and reasonable price to carry out rectification work. Consequently, I will order that the Respondent pay the Applicants $4,650 as compensation to repair the defective fencing work.

COSTS

8. The Applicants further claim reimbursement of the application filing fee paid by them ($174.10), plus payment of their legal costs and disbursements ($4,063.50).

Reimbursement of fees under s 115 of the Act

9. Section 115C of the Act states, in part:

> (1) This section applies to the following proceedings –
>
> …
>
> (b) a proceeding under the **Domestic Building Contracts Act 1995**;
>
> …
>
> (2) Subject to subsection (3), a party who has substantially succeeded against another party in a proceeding to which this section applies is entitled to an order under section 115B that the other party reimburses the successful party the whole of any fees paid by the successful party in the proceeding.

10. The Applicants contend, correctly in my view, that under s 115C of the Act, there is a presumption that the Tribunal will order that a respondent reimburse a successful applicant in respect of fees paid by that applicant. However, the Applicants further submit that those *fees* not only include the application filing fee or daily hearing fee but also an amount of $2,128.50 representing their solicitor-client costs invoiced to date, $395 in respect of obtaining a building report and $1,540 representing unbilled solicitor-client costs to date.

11. I do not accept that solicitor costs or disbursements representing the costs of an expert report fall within the ambit of s 115 of the Act. Section 115A of the Act defines a 'fee' as:

> *Fee* means a fee payable in a proceeding under this Act, the rules, the regulations or an enabling enactment

12. Solicitor costs or the costs associated with obtaining an expert report are not, in my view, fees payable in a proceeding under the Act, the rules, the regulations or an enabling enactment. They are party own *costs* incurred as a result of a party choosing to engage legal representation or expert opinion. By contrast, the term *fees payable* connotes a charge which is required to be paid in relation to a proceeding under the Act, the rules, the regulations or an enabling enactment. It is not voluntary but a requirement if such a proceeding is to be initiated and prosecuted.

13. Moreover, if the meaning of the word *fees* were broadened to include legal costs, s 115 of the Act would conflict with s 109 of the Act, which regulates the Tribunal's power to award *costs* (see below). In particular, s 109 of the Act expressly states that an order for costs is not to be presumed (see below). In my view, it could not have been the intention of the legislature to override the effect of s 109 of the Act, without clear expression to that effect. Indeed, this proposition is consistent with s 115D of the Act, which states:

> Nothing in this Division affects any power of the Tribunal under this Act or an enabling enactment to make an order for costs.

14. Accordingly, I am of the view that any application for payment of legal costs, expert reports and the like is to be determined pursuant to s 109 of the Act, rather than pursuant s 115 of the Act.

15. Turning then to consider the Applicants' claim for payment of the application filing fee, I find that this is a fee within the meaning of that word as defined under s 115A of the Act. I further find that the Applicants have substantially succeeded in the proceeding and as such, are entitled to reimbursement of that fee. Accordingly, I will order that the Respondent reimburse the Applicants in the amount of $174.10.

Costs under s 109 of the Act

16. As I have already indicated, the Applicant's claim for their legal costs and disbursements falls to be determined under s 109 of the Act. That provision states, in part:

> **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 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;
>
> (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.

17. It is apparent from the terms of s 109(1) of the Act that the general rule is that costs do not follow the event and that each party is to bear their own costs in a proceeding. By s 109(2) of the Act, the Tribunal is empowered to depart from the general rule but it is not bound to do so and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in s 109(3).

18. In the often cited passage of Gillard J in *Vero Insurance Ltd v The Gombac Group Ltd*,[1] his Honour stated:

> [20] In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis as follows:
>
> (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. 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 paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

19. In *Fasham Johnson Pty Ltd v Ware*,[2] the Tribunal stated:

> [12] Costs are discretionary and it is in the nature of an exercise of discretion that its exercise one way or another cannot be compelled. And under s 109 success in a proceeding does not by itself justify an order for costs. Something further must be shown.

20. I accept what was said by the Tribunal in *Fasham Johnson*. The mere fact that a party succeeds in a proceeding does not, in itself, mean that costs will

[1] [2007] VSC 117.
[2] [2004] VCAT 1708.

follow the event. In the present case, the proceeding was undefended, with the First Applicant's evidence being in the form of what was largely unprompted narrative. In those circumstances, the way in which the hearing was conducted effectively diluted the utility of, and need for, legal representation. Moreover, the proceeding itself occupied less than one hour of hearing time with no interlocutory steps being ordered prior to the matter being heard.

21. I further note that written submissions were ordered subsequent to the hearing of the matter. This was primarily because the Applicants had failed to present evidence during the course of the hearing on 10 December 2015 as to the reasonable cost of rectification. Accordingly, an opportunity was afforded to the Applicants (and the Respondent) to present further material going to the question of quantum.

22. In my view, the present case is not one which justifies an order that the Respondent pay the costs of the Applicants, notwithstanding that no defence was advanced by the Respondent. In that regard, I do not consider that any of the factors set out under s 109(3) of the Act have been enlivened to a point where I am satisfied that it would be fair to dispel the presumption against making an order for costs. Accordingly, I decline to order costs in this proceeding.

SENIOR MEMBER E. RIEGLER