VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP837/2014

CATCHWORDS

Victorian Civil and Administrative Tribunal's Act 1998 – s.109 - Costs - factors to be considered - substantial award in favour of the Applicant - substantial part of the claim unsuccessful - a number of issues decided in favour of the respondent - whether costs should be awarded to the Applicant - whether costs should be awarded on an issue-by-issue basis - common evidence leading to successes and failures on both sides - impossibility of dividing costs between issues - whether costs awarded to the Applicant should be reduced to take account of the failure of part of the claim and the success of issues raised in the counterclaim - what reduction should be made

APPLICANT	Allmore Constructions Pty Ltd (ACN 006 368 896)
RESPONDENT	K7 Property Group Pty Ltd (ACN 153 217 933)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for Costs
DATE OF HEARING	7 March 2017
DATE OF ORDER	12 May 2017
CITATION	Allmore Constructions Pty Ltd v K7 Property Group Pty Ltd (Building and Property) [2017] VCAT 671

ORDERS

1. Pursuant to section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, on the application of the Applicant and being satisfied that it is necessary to do so in order to correct an arithmetical error, order that the tribunal's order of 20 October 2016 be corrected by:

   (a) substituting the figure of $220,478.73 for the figure of $210,209.50; and

   (b) substituting the figure of $39,697.46 for the figure of $37,892.42.

   (c) substituting the figure of $260,176.19 for the figure of $248,101.90.

2. Order the Respondent to pay three quarters of the Applicant's costs of this proceeding, including any reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court on the standard basis in accordance with County Court scale.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J. Twigg QC with Miss F. Cameron of Counsel
For the Respondent	Mr K. Oliver of Counsel

REASONS

Background

1. This proceeding concerned a claim by the Applicant builder ("the Builder") and a counterclaim by the Respondent developer ("the Developer") for monies claimed by each from the other pursuant to a building contract they entered into for the construction of 37 apartments in West Brunswick.

2. After a lengthy hearing involving the consideration of a great deal of material including highly technical expert evidence and the provision of written submissions by both counsel, a decision was handed down on 20 October 2016 that the Developer pay to the Builder $220,478.73 plus interest pursuant to s.53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*, calculated at $39,697.46, making together the sum of $260,176.19. Costs were reserved for further argument.

3. On 10 November 2016, the Builder's solicitors filed an application with the tribunal for an order for the costs of the proceeding. Following some consent directions, written submissions were filed by both sides and the application for costs came before me for hearing on 7 March 2017. Mr J. Twigg of Her Majesty's counsel appeared for the Builder and Mr K. Oliver of counsel appeared for the Developer. After hearing submissions I informed the parties that I would provide a written decision.

Costs where a party is only partially successful

4. The substantive point raised by this application for costs is, how should the tribunal deal with an application for costs where the party seeking them was not wholly successful on its own claim and was also partly unsuccessful in regard to the matters raised in the other party's counterclaim?

Power to award costs

5. Power to award costs is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998. Where relevant, that section is as follows:

> "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 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.

……"

6. It was not suggested that either party had conducted the proceeding in a way that unnecessarily disadvantaged the other, but Mr Twigg submitted that the Builder was responsible for prolonging unreasonably the time taken to complete the proceeding. Most of the argument concerned the relative strengths of the claims made by each of the parties and the nature and complexity of the proceeding.

7. Mr Oliver referred me to the following passage from the judgment of Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 (at para 20 et seq.) for guidance as to how a claim for an order for costs under the section should be dealt with:

"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."

8. His Honour added (at para 22):

"22. Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all

the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule."

Unreasonably prolonging the time taken to complete the proceeding

9. Mr Twigg submitted that the grounds upon which the Developer disputed the existence and value of the variations claimed by the Builder had no basis in the evidence or in law. He also said that the Developer had raised "technical points" concerning the existence of instructions to carry out the claimed variations. He said that by doing this, the Developer had unreasonably prolonged the resolution of the matter.

10. I do not accept that submission. I cannot say from the mere fact that a party puts an unsuccessful argument that it has unreasonably prolonged the hearing. To arrive at that conclusion I would need to be satisfied that it was unreasonable in the circumstances for the party to have put the argument. In this case, although I found in favour of the Builder in regard to most of the variations claimed, the Developer's opposition to each claim was not so lacking in substance that I can say that it ought not to have been put.

11. As to the suggestion that the Developer raised technical points concerning the instructions to carry out the variations, there is nothing wrong with counsel making a "technical" point. Indeed, it adds nothing to describe an argument as technical. It is either right or wrong. Mr Oliver's legal arguments in regard to the extensions of time, the notice requirements set out in the contract and the prevention principle were all ably put.

The nature and complexity of the proceeding

12. For guidance as to when the nature and complexity of a proceeding would warrant an order for costs, Mr Twigg referred me to the following passage from the judgment of Morris J in *Sweetvale v. Minister for Planning* [2004] VCAT 2000. The learned judge said (at para 19):

> "19 What can be said is this. It is more likely that the nature and complexity of a proceeding will make it fair to make an order as to costs if:
>
> - the proceeding was in the tribunal's original jurisdiction, not its review jurisdiction;
> - the proceeding involved a large number of issues, or a small number of particularly complex issues;
> - the proceeding involved a large sum of money or a major issue affecting the welfare of a party or the community;
> - the proceeding succeeded and was a type which was required to be brought, either by reason of a statutory duty or by reason of some unlawful or improper conduct by another party which warranted redress;

- the proceeding failed and was a type where a party has asserted a right which it knew, or ought to have known, was tenuous;
- a practice has developed that costs are routinely awarded in a particular type of proceeding, thus making an award of costs more predictable for the proceeding in question."

The learned judge said that he did not intend this to be an exhaustive list.

13. In the Court of Appeal decision of *Pacific Indemnity Underwriting v. Maclaw* Ormiston J. said (at para 35):

> "Now it does not follow that particular factors in building disputes, especially building insurance disputes of this kind, cannot activate the Tribunal's power to award costs as laid down by s.109, such as the "nature and complexity" of some building disputes or the unreasonableness of a Builder's or insurer's conduct, but it should be borne in mind at all times that the scheme of the VCAT legislation is that prima facie each party is to "bear their own costs in the proceeding". Why Parliament saw this to be appropriate in cases such as the present and why it chose not to vary s.109 so far as domestic building disputes, or at least claims against insurers, are concerned, may, to some eyes, be hard to fathom. If the same disputes were still able to be litigated in one of the ordinary courts of this State, there would be the conventional "bias" in favour of the conclusion that costs should follow the event, even if only on a party/party basis. But that is not the presumption of the present legislative scheme, as represented in particular by s.109."

14. In the end, I think that it is a question for the Tribunal in each case to assess what weight should be given to the nature and complexity of the case before it in determining whether or not to make an order for costs.

15. I accept Mr Twigg's submission that this proceeding was particularly complex and difficult in regard to both matters of fact and law. The Tribunal book was 18 volumes and the hearing extended over eight sitting days with detailed written submissions from counsel at both the beginning and the end. The determination of the dispute involved the interpretation of a highly complex building contract comprising several documents and a vast amount of material.

16. The determination of the matter involved consideration of claims for variations, extensions of time, arguments about the architectural and engineering designs and details of the project as well as a number of difficult legal questions including the possible application of what is known as the prevention principle. The expert evidence in regard to scheduling was particularly complex.

17. It is hard to imagine a more complex case than this. The costs incurred by both parties must have been very high indeed and the difference between their respective positions was substantial.

Relative strengths of the claims made

18. Both counsel made submissions as to the degree of success enjoyed by each party in regard to various issues as being indicative of the relative strengths of each party's case in regard to each such issue.

19. The difference between the respective parties' positions on the pleadings was stark. In its points of claim, the Builder claimed $531,496.38. In its counterclaim, the Developer claimed $210,156.19.

20. In his closing submissions, Mr Oliver invited me to find that the amount due to the Developer from the Builder was $189,179.87. The final result was that the Developer was ordered to pay the Builder (including interest) $260,176.19, a difference of a little over $450,000.00 from the Developer's final position.

21. Mr Oliver's primary submission was that, given that neither party was wholly successful, there should be no order as to costs. In the alternative he said that, if I were to award costs, they should be awarded so as to reflect the relative success of the parties on an issue-by-issue basis, which would involve orders that each party pay the other party's costs on the issues upon which that party was successful.

22. Quite obviously, to ascertain the degree of success of a party in a proceeding, one must first have regard to what that party's claim was and compare that with the result. Some care should be taken in this regard because each party will seek to claim the maximum possible even though the prospect of recovery of some part of the amount sought may be remote. The mere fact that recovery has fallen short of the maximum claimed does not necessarily indicate that the unsuccessful balance was an ambit claim. On the other hand, if the other party has incurred costs in defending a claim that has failed, it may well be fair that those costs should be visited upon the unsuccessful party if, in the circumstances, the claim should not have been made. Indeed, where a claim is vexatious, costs might be awarded on an indemnity basis.

Costs on an issue by issue basis.

23. Section 109 empowers the tribunal to make an order for payment of a specified part of another party's costs if it is fair in the circumstances to do so.

24. Mr Oliver referred me to the case of *GT Corporation Ltd v. Amare Safety Pty Ltd* [2008] VSC 296 where Robson J examined the authorities in regard to the making of costs on an issue by issue basis. He said (at para. 31):

> "The following authorities establish that costs are a matter for the discretion of the judge but that discretion must be exercised judicially. Although it is said that costs follow the event, where a successful party has failed with respect to an issue of law or fact, any costs order in favour of the successful party may be adjusted to reflect that fact, particularly where the issue of law or fact can be regarded as discrete. In substance, the court may, in its discretion, order costs on an issue by issue basis and should, in exercising its discretion on costs, bear in mind these general principles."

25. I respectfully adopt this passage as being an accurate summary of the principles set out in the authorities to which the learned judge referred. Those authorities raise two matters in particular which I think must be borne in mind for the purpose of the present case.

26. As to the first, in the case of *Cretazzo v Lombardi* (1975) 13 SASR 4, a decision of the Full Court of the Supreme Court of South Australia in which the costs awarded to a successful personal injury plaintiff were reduced because he exaggerated his symptoms, Jacobs J, while agreeing with the result, said (at para. 16):

> "But trials occur daily in which the party, who in the end is wholly or substantially successful, nevertheless fails along the way on particular issues of fact or law. The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely on his success in those particular issues."

27. A number of other cases of interest in this context are referred to by Robson J in *GT Corporation.* In *Mickleburg v. Western Australia* [2007] WASC 140, Newnes J suggested that disallowing costs for discrete issues that parties unsuccessfully raise might cause them to be more careful about the issues they raise. However in *Mock v. Minister for Immigration* (No. 2) (1993) 47 FCR 81 at 84, Keely J said that a successful Applicant who has failed on an issue that he has raised should only be ordered to pay the costs in regard to that issue if it is found that, in all the circumstances, raising it was so unreasonable that it is just and fair to make the order.

28. The second matter to be borne in mind is the fundamental difference between dealing with an application for costs in the courts and in this tribunal. Whereas in the courts, the successful party is prima facie entitled to an order for costs, by s.109(1), the prima facie position is that parties pay their own costs and it is for any party seeking costs to demonstrate that it is fair in the circumstances for such an order to be made, whether with respect to a particular issue or the proceeding as a whole.

29. There are practical difficulties in attempting to divide the costs of the proceeding between various issues because they are all interlinked and to try and tease them out and divide the costs between them would be a formidable task. I will return to the practicability of that proposed course after considering the issues raised. Even if the whole of the costs of the proceeding are dealt with together instead of on an issue-by-issue basis, I think that I need to look at each of the issues and then, as directed by the learned judge in *Vero Insurance Ltd v The Gombac Group Pty Ltd* (above), consider all the matters together and determine what order for costs it would be fair to make.

The claimed successes

30. Mr Oliver submitted that the Developer succeeded on the following issues:

    (a) The Builder's claim for an extension of time for additional drenchers. Not only did this give rise to an obligation on the part of the Builder to pay $66,600 for liquidated damages but it also defeated the Builder's claim for $101,090.04 for delay costs. That is so, but there was a substantial argument on both sides on this issue.

    (b) The Builder's claim for an extension of time for delay due to the certification by the fire brigade. This resulted in $42,550 in liquidated damages and defeated a claim for $47,337.25 in delay costs.

    (c) The Builder's claim for an extension of time in regard to fire rating was reduced by 8.1 days due to wet weather. It was, but the Developer had denied any entitlement at all.

    (d) The Developer succeeded in its claim for liquidated damages in the sum of $148,000.00. That is so, but it had claimed $259,000.01.

    (e) Whereas the Builder had claimed $58,972.48 for the variation in regard to the insulation of the soffits it recovered only the amount conceded by the Developer, which was $25,570.43.

    (f) Whereas the Builder had claimed for both labour and materials for the wall drenchers, it recovered for the materials only;

    (g) The Builder claimed a variation for changes to the joinery which turned out to be unjustified. That is so, but it was a minor item.

    (h) The Builder abandoned its claim for an extension of time for the additional insulation of the soffit. Very little time was spent on this issue.

31. Mr Oliver submitted that the Developer was forced to litigate by reason of what he described as the ambit claim of the Builder and what he said was the uncompromising amount of its offer of compromise. Mr Twigg submitted that the Builder was forced to litigate because of the guarantee it had given and the demands made by the Developer.

32. Quite obviously, any disputed claim brought by either side must be defended and in this sense the respondent to such a claim is forced to litigate. However it has the opportunity to make an offer in accordance with the provisions of the *Victorian Civil and Administrative Tribunal Act* 1998 or an offer of compromise outside the Act protect itself in regard to costs in that way.

33. Apart from the substantial balance that was found in favour of the Builder, Mr Twigg pointed out that it was successful in regard to the major claims, which were:

    (a) Variation 7, for $20,000 plus GST, in regard to the blade walls. In addition, by succeeding on the blade walls claim it became entitled to an extension of time of 7 working days.

(b) Variation 19, for $23,245.95 plus GST, in regard to the soffit insulation. Since this did not affect the critical flow of work, it had no implications with respect to extension of time claims or liquidated damages.

(c) Variations 28, 29, 30 and 38, totalling $62,183.10 plus GST, in regard to fire rated walls and associated works. In addition, by succeeding on the fire rated walls claim it became entitled to an extension of time of 34.9 days.

He said that the Builder did not press one of the claimed variations at the hearing and so was unsuccessful in relation to only two of the claims out of eight variations that were made, representing a total value of $115,971.85.

34. He said that the Builder's arguments in regard to the supply of the additional drenchers, which failed, could not be considered to be weak. He also pointed out the Developer's contractual argument based upon the tender letter failed and, he said, had no chance of success.

35. The substantial success of the Developer lay in the claimed extensions of time. There were 88 days claimed of which I allowed 41.9. This was because of the variations that were not allowed and the concession made by the Builder's programming expert concerning double counting of wet days.

Should costs be determined on an issue by issue basis?

36. The allowance or disallowance of a variation had a threefold effect. First, there was the amount claimed for the variation itself, secondly, there was the amount to be allowed to the Builder by way of an extension of time claim payment and thirdly, if an extension of time was allowed, the Developer's claim for liquidated damages was reduced accordingly. For complex reasons to do with the manner in which an extension of time claim is calculated, not every variation resulted in an extension of time.

37. There is no substantial evidence or hearing time that I can identify as being solely referable to a discrete point upon which one or other of the parties succeeded or failed. The expert evidence was heard concurrently and resulted in wins for both sides. Because of the degree to which the various claims are interlocked, I cannot see how the costs incurred in this proceeding can be allocated to one issue or another with anything approaching accuracy. Evidence on one issue was also evidence on other issues. The only practical differentiation is the overall result. Accordingly, I find myself unable to assess costs on an issue by issue basis.

What order should be made?

38. In its application the Applicant sought an order for $531,496.38. In its counterclaim, the Developer sought an order for $210,156.19. Those figures varied during the openings and as the case progressed.

39. Mr Oliver said that the result was almost exactly halfway between the opening positions of the respective parties. However in his closing address Mr Oliver submitted that the Builder should pay the Developer $214,750.30 and instead,

the Builder has recovered a little over $260,000.00. That is a very substantial difference.

40. In virtually all building cases, the final outcome following a contested hearing will be somewhere between the best case scenarios that are pressed on both sides. That does not mean that the party that succeeds in obtaining an order has not succeeded in its claim. It has obtained an order for payment of money and it is generally entitled to say that that sum should have been paid to it without the necessity for legal action.

41. I do not find that any part of the claim made by either party can be said to have been speculative in the sense that it should not have been brought. It was a very difficult and complex case that was ably argued on both sides.

42. As previously stated, I think that having regard to:

    (a) the nature and complexity of these proceedings and the considerable costs that must have been incurred by the Builder to prosecute its claim;

    (b) the relative strengths of the cases of the parties, demonstrated by the fact that the Builder has recovered an order for payment of a substantial sum from the Developer;

    (c) the fact that the Builder has defeated a claim by the Developer for $214,750.30;

    it is fair to make an order for the Builder's costs. The question then becomes whether those costs should be reduced having regard to the relative success of the Developer.

43. I think that the success of the Developer goes beyond the mere reduction of an opposing party's claim that one so commonly finds in a building case. I think that the order for costs should recognise that the defence of the Builder's claim by the Developer was successful to a substantial degree.

44. Assessing the allowance that should be made in this regard is not a precise matter. Doing the best I can I shall allow reduction of one quarter of the costs.

Orders to be made

45. It was agreed that there was an arithmetical error in the original order that is to be corrected. Apart from that, there will be an order that the Respondent pay three quarters of the Applicant's costs, including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court on the standard basis in accordance with the County Court scale.

SENIOR MEMBER R. WALKER