

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP532/2014

CATCHWORDS

RETAIL TENANCY: applications for costs, interest and the reimbursement of fees.

APPLICANT BAC International Pty Ltd (ACN 084 908 501)

FIRST RESPONDENT Cook's Corner Kallista Pty Ltd

SECOND RESPONDENT Mr Issy Arieli

WHERE HELD Melbourne

BEFORE Member C Edquist

HEARING TYPE Hearing

DATE OF HEARING 22 July 2015

DATE OF FILING OF APPLICANTS SUBMISSIONS 23 July, 29 July, and 30 July 2015,

DATE OF FILING OF RESPONDENTS SUBMISSIONS 17 August 2015

DATE OF ORDER 15 December 2015

CITATION BAC International Pty Ltd v Cook's Corner Kallilsta Pty Ltd (Building and Property) [2015] VCAT 2021

ORDERS

- 1 The Respondents must pay to the Applicant costs fixed at \$3,000.00.
- 2 The Respondents must pay to the Applicant damages in the nature of interest of \$528.84.
- 3 The Applicant's application for reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

MEMBER C EDQUIST

APPEARANCES:

For Applicant

Mr Y Ong, solicitor

For Respondents

Mr I Arieli, as director, and in person

REASONS

Nature of this determination

- 1 On 22 July 2015, there was a Reinstatement Hearing in this proceeding. At the conclusion of this Hearing it was ordered that the Respondents were to pay to the Applicant the sum of \$17,500. The Tribunal found that it was appropriate to award to the Applicant its reasonable costs of having the proceeding reinstated, and also that it was appropriate that the Applicant be paid interest on the sum of \$17,500 for the period between the date it should have been paid and the date of payment.
- 2 This determination relates to the quantum of the costs to which the Applicant is entitled, the Applicant's entitlement to interest, and the issue of whether the Respondent is to reimburse to the Applicant the whole or any part of the fee paid by the Applicant in the proceeding.
- 3 The Tribunal received the following submissions from the Applicant:
 - (a) regarding interest, on 23 July 2015;
 - (b) regarding costs, on 29 July 2015; and
 - (c) regarding reimbursement of fees, on 30 July 2015.
- 4 The Tribunal has received submissions in response from the Respondents on 17 August 2015.

Background

- 5 The Proceeding had been commenced on 22 October 2014 and had been settled by Terms of Settlement executed by the parties on 3 February 2015.
- 6 Pursuant to clause 1 of the Terms of Settlement, the Respondents agreed to pay the Applicant the sum of \$35,000 in full satisfaction of the Applicant's claim, interest and costs, to be effected by an initial instalment of \$17,500 within 30 days of signing, and a second instalment of \$17,500 within 60 days of signing.
- 7 The Applicant says that it treated a letter received from the Respondents on 2 March 2015 as evidence that the Respondents no longer intended to be bound by the Terms of Settlement and immediately instructed its solicitors regarding reinstatement.
- 8 The Respondents did not pay the second instalment by the due date.

The Applicant's submissions regarding costs

- 9 The Applicant seeks to recover the amount of the invoice from its solicitors which was exhibited to its Outline of Submissions filed on 21 July 2015 as 'BAC-3'. Reference to this invoice indicates it is for \$4,568 inclusive of GST for legal fees, plus disbursements of \$72.20 inclusive of GST

(including parking fees of \$39.14 and sundries including photocopying, telephone and postage of \$26.50). The total amount inclusive of GST is \$4,640.20. The invoice covers a range of itemised attendances starting with 'email from Issy, 2 March 2015-\$12.40' through to 'Appearance at Reinstatement Hearing on 22 July 2015 (anticipated preparation, attendance, journey) \$754.40'.

- 10 The Applicant's solicitors say in the submissions that they charged at an hourly rate, billed at six minute intervals. They say the amount charged to the Applicant on this basis has been conservative in comparison to other scales or costs agreements upon which the Applicant's costs could have been charged.

Respondents' submissions regarding the Applicant's quantification of costs

- 11 The Respondents submit that the bill of costs is unfair and unreasonable, for a range of reasons including:
- (a) the scale being used;
 - (b) there is virtually no detail provided in regard to emails, letters, telephone calls and other attendances, including 11 telephone calls for which a charge has been made of \$50.40 each;
 - (c) 18 emails have been sent by the Applicant's solicitors that have differing charges, being \$16.20, \$32.90, \$48 and \$60 and \$72. No explanation is given;
 - (d) charges for perusing and scanning documents have not been broken down;
 - (e) disbursements have not been broken down;
 - (f) the charge of \$880 for preparing the Applicant's outline of submissions for the Reinstatement Hearing is unfair and unreasonable having regard to the modest amount of work that would have been involved;
 - (g) the appearance at the Reinstatement Hearing is charged at \$754.40. This has not been broken down and is not fair and reasonable; and
 - (h) not all of the emails and telephone calls appear to be justified.

Ruling as to costs

- 12 Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008* provides:

Unless the Tribunal otherwise orders, if the Tribunal makes an order as to costs, the applicable scale of costs is the Scale of Costs in Appendix A Chapter 1 of the Rules of the County Court.

- 13 Reference to the Rules of the County Court indicates that 'County Court costs scale' means a fee, charge or amount that is 80 percent of the

applicable rate set out in Appendix A to Chapter I of the Rules of the Supreme Court.

- 14 Reference to Appendix A of the Supreme Court Scale of Costs indicates that the rate for an attendance requiring legal skill or knowledge by a legal practitioner for each unit of six minutes or part thereof is \$38 exclusive of GST. This, of course, equates with a rate of \$380 per hour exclusive of GST. The rate for any attendance, requiring legal skill or knowledge, by an employee of a legal practice who is not a legal practitioner, is \$29 for each unit of six minutes or part thereof, exclusive of GST. The relevant rate accordingly is \$290 per hour exclusive of GST.
- 15 The allowable rate on the County Court scale for an attendance by a legal practitioner is accordingly \$304 per hour exclusive of GST, and the rate for an attendance by an employee of a legal practice who is not a legal practitioner is \$232 per hour exclusive of GST.
- 16 Reference to the solicitor's account in question indicates that the preparation of the Applicant's Outline of Submissions took four hours and that the charge was \$880 inclusive of GST. This implies that the Applicant was being charged \$200 per hour plus GST.
- 17 If the rate of \$200 per hour plus GST has been applied consistently by the Applicant's solicitors, then it is likely that their charges are indeed, in some respects, conservative.
- 18 It is not possible for the Tribunal to scientifically assess the reasonableness of the costs charged to the Applicant without inspecting the file. One of the key reasons for this is that the time taken for each itemised activity is not stated. The appropriateness of the charge made is accordingly not readily apparent.
- 19 Accordingly, the Respondents would ordinarily be entitled to an order that the costs be assessed by the Costs Court using the Scale of Costs in Appendix A Chapter 1 of the Rules of the County Court.
- 20 However, in the present case, the Respondents state:

In conclusion, without wishing to put either the Tribunal or the applicants solicitors to any further trouble or inconvenience, we would be prepared to accept the sum of \$3000 for the applicants solicitors costs as being fair and reasonable for the work involved.
- 21 It is clear to the Tribunal that the costs charged to the Applicant by its solicitors in their tax invoice dated 21 July 2015 are not recoverable in full pursuant to clause 2.2 of the Terms of Settlement. Clause 2.2 limits the recoverable costs to all reasonable costs incurred in having the proceeding reinstated and obtaining a determination for the sum then outstanding.
- 21 The Tribunal notes that there are four individual items set out in the tax invoice to which a charge of more than \$400 has been assigned. They are:

- (a) Appearance at VCAT Reinstatement Hearing (attendance and journeys) - \$504.20.
- (b) Perusing and scanning Respondents' List of Documents - \$448.
- (c) Preparing Applicant's Outline of Submissions for reinstatement hearing (4 hours) - \$880.
- (d) Appearance at Reinstatement Hearing on 22 July 2015 (anticipated preparation, attendance, journeys) \$754.40.

- 22 Several points can be made. First of all, there would appear to be a duplication in connection with the two items relating to appearance at the Reinstatement Hearing. On the face of it, one of the charges should be set aside. In the event, Mr Ong appeared at the Reinstatement Hearing. He is identified on the letterhead of the Applicant's solicitors Armstrong Ross as an associate. If his time was being charged to the Applicant at the rate of \$200 plus GST per hour, the lower figure of \$504.40 would appear more appropriate than the anticipated appearance fee of \$754.40. Accordingly, the Tribunal will disallow the second appearance fee claimed of \$754.40.
- 23 The second observation is that the Applicant's solicitors appear to have prepared for the Reinstatement Hearing as if it was going to entail a rehearing of the original claim. This is apparent from the Outline of Submissions filed on behalf of the Applicant dated 21 July 2015, which traverse numerous topics including an offer made prior to the execution of the Terms of Settlement on 3 February 2015; the proposition that the Respondents' tax invoice provided on 15 March 2014 did not include all that was purchased by the Applicant; the execution and termination of the lease for the premises at 2 Kallista Emerald Road, Kallista; the damages and relief sought by the Applicant as contained in paragraph 29 of the Points of Claim; the condition of the chattels, which are the subject of paragraphs 20 to 22 of the Points of Claim; and the need for the provision of a tax invoice.
- 24 The reality is that all that was required at the Reinstatement Hearing was the production of the original Terms of Settlement and evidence that the Terms of Settlement had not been complied with in full. This conclusion follows from clause 2 of the Terms of Settlement, which provides that:
- Should the settlement sum (or any part thereof) not be paid by the due date, the Respondent and the Applicant irrevocably consent to the following:
- 2.1 the whole of the settlement sum, less any payments previously made, will immediately become due and payable,
 - 2.2 the Applicant will be at liberty to apply to have the proceeding reinstated and to obtain a determination for the sum then outstanding plus all reasonable costs incurred in so doing...
- 25 In these circumstances, the Respondents' contention that four hours preparation of the Applicant's Outline of Submissions is not justified, must

be sustained. The Tribunal finds that one hour should have been sufficient, and accordingly the fee charged for preparation of \$880 should be discounted to \$220.

- 26 The fee charged for perusal and scanning of documents of \$448 should also be substantially discounted, if not written down to 'nil', as it is hard to envisage what documents needed to be perused for the reinstatement hearing that had not already been read.
- 27 Looking at the Applicant's solicitor's account globally, the Tribunal finds that it is not reasonable for the Applicant to recover the whole of the \$4,568 inclusive of GST which have been charged for legal costs. For the reasons given at paragraphs 21-26 above, the Applicant's costs are to be reduced by at least \$1,568. They will not be reduced below \$3,000 inclusive of GST because the Respondents have conceded this sum is appropriate. The claimed disbursements plus GST are \$72.20. The disbursement include parking of \$39.14 and a global figure for photocopying, telephone and postage of \$26.50. I disallow these items. The upshot is that the Tribunal will order that the Respondents must pay to the Applicant the sum of \$3,000.00 inclusive of GST in respect of costs.

Applicant's submissions regarding interest

- 28 The Applicant seeks interest in the sum of \$528.84 for the period 4 April 2015-22 July 2015. The printed calculation performed by the NetLaw Debt Collection Interest Rate Calculator using the applicable rates under the *Penalty Interest Rates Act 1993* (Vic) is essentially the submission.
- 29 The Applicant notes that this amount is less than the amount set out in the Applicant's Outline of Submissions (which was \$553.30) but explains this is due to a change in the applicable penalty interest rate from 10.5% to 9.5%.

Ruling regarding interest

- 30 Pursuant to the Terms of Settlement, the second payment of \$17,500 should have been made within 60 days of signing. As the Terms of Settlement were signed on 3 February 2015, 4 April 2015 is the due date for payment.
- 31 As the second instalment of \$17,500 was not paid on time, there has been a breach of the Terms of Settlement. Pursuant to clause 2 of the Terms of Settlement, it was agreed that should the settlement sum, or any part of it, not be paid by the due date, the parties irrevocably consent to certain outcomes. The first of these is that the whole of the settlement sum, less any payments previously made, will immediately become due and payable. The second outcome is that the Applicant will be at liberty to apply to have the proceeding reinstated and to obtain a determination for the sum then outstanding plus all reasonable costs incurred in so doing. This is of course precisely what the Applicant has done.

- 32 Clause 2.4 provides that the party seeking a default determination must either file and serve an affidavit setting out details of the alleged default including details of the payments made and the orders sought (including calculation of the outstanding balance and *any interest* and costs) or may write to the Tribunal and the other party giving notice of their intention to seek a default termination setting out the above details and be prepared to give sworn evidence in any hearing of their application. I find that this implies that a breach of the Terms of Settlement will carry with it an obligation on the part of the defaulting party to pay interest.
- 33 Interest is claimed up to and including the date of the application for reinstatement. This claim is conservative, as interest is, in the Tribunal's view, claimable up to the date of payment. However, there is no evidence as to when the payment was actually made, and the Tribunal is prepared to allow interest to 22 July 2015.
- 34 The Applicant submits, as its assessment of the interest due, a calculation based on the rates applicable from time to time pursuant to the *Penalty Interest Rates Act 1983*. I find that this is appropriate. The Tribunal confirms the calculation of interest submitted by the Applicant and orders that the Respondents must pay to the Applicant interest in the sum of \$528.84.

Applicant's Submissions regarding reimbursement of fees

- 35 In its submissions of the July 2015, the Applicant urged the Tribunal to exercise its discretion under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* to order the Respondents to pay the costs of the Applicant's solicitor's invoice of 21 July 2015 to the extent that any such fees are determined by the Tribunal not to be payable pursuant to clause 2.2 of the Terms of Settlement.
- 36 The Tribunal considers that this application is misconceived. Section 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is concerned with reimbursement or payment of fees, and relevantly provides:
- (1) At any time, the Tribunal may make any of the following orders—
 - (a) an order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding, within a specified time;
 - (b) an order as to which party must pay the whole or any part of a fee in future in the proceeding;
 - (c) an order that a party to a proceeding pay, on behalf of another party, the whole or any part of any fee that may be required to be paid in the future by that other party in the proceeding;
 - (d) an order that a party to a proceeding reimburse another party the whole or any part of any fee that may be paid in

the future by that other party in the proceeding, within a specified time after the fee is paid.

- 37 The Applicant made no submission regarding reimbursement or payment of fees as contemplated by s 115B.
- 38 If the Applicant had made a submission that the filing fee of \$986.40, which it paid on the institution of the proceeding, should be reimbursed to it, it would have faced an argument that that fee was paid in relation to the proceeding which had been settled by the execution of the Terms of Settlement. Thus, the argument would go, any entitlement the Applicant had to reimbursement of that fee had been extinguished by the settlement.
- 39 However, no such submission was made, and I do not need to determine the issue.
- 40 The Tribunal notes the Applicant's submissions relating to the exercise of the Tribunal's discretion under s 115B are effectively submissions as to why the Tribunal should exercise its discretion to award costs in connection with the reinstatement application under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').
- 41 The Applicant's entitlement to costs in connection with the application to reinstate the proceeding and obtain a determination, arises pursuant to clause 2.2 of the Terms of Settlement. This entitlement has been assessed above.
- 42 The Applicant made no application for costs under s 109 of the VCAT Act at the hearing on 22 July 2015. The Tribunal accordingly made no directions regarding the filing of submissions concerning s 109. The Respondents will be denied natural justice if the Tribunal now entertains such an application without notice to the Respondents.
- 43 The Tribunal accordingly dismisses the Applicant's application for reimbursement or payment of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998*.

Conclusion

- 44 The Tribunal orders that:
- 1 The Respondents must pay to the Applicant costs pursuant to clause 2.2 of the Terms of settlement fixed at \$3,000.00.
 - 2 The Respondents must pay to the Applicant damages in the nature of interest of \$528.84.
 - 3 The Applicant's application for re-imburement or payment of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

MEMBER C EDQUIST