VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D272/2007

CATCHWORDS

Domestic building, quantification of damages where proceeding determined under self executing order, interest, costs

FIRST APPLICANT	Anton Bianco
SECOND APPLICANT	Sharon Bianco (Removed from proceeding dated 19/9/08)
FIRST RESPONDENT	Rad Dinovic
THIRD RESPONDENT TO COUNTERCLAIM	Sharanton Pty Ltd (ACN 074 264 378)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	15 July 2009
DATE OF ORDER	15 July 2009
DATE OF REASONS	9 September 2009
CITATION	Bianco v Dinovic & Anor (Domestic Building) [2009] VCAT 1871

REASONS

1 Third Respondent to Counterclaim ("Sharanton") has sought reasons for my orders of 15 July 2009, which I now provide.

2 On 15 July 2009 I made orders to give effect to my orders of 3 July 2009, the most significant of which was:

> The proceeding, being the claim and counterclaim, stands determined in favour of the Respondent

3 The orders of 15 July 2009 were to the effect that Sharanton was to pay the Respondent, Mr Dinovic, the nett sum of $147,972.60, plus interest from the date Sharanton was joined to the proceeding on 29 April 2008 of $19,553.23. I also made certain orders as to costs. I ordered that the Applicant, Mr Bianco, pay Mr Dinovic's costs of and associated with Mr Bianco's claim against Mr Dinovic on a party-party basis on County Court Scale D and that Sharanton pay Mr Dinovic's costs of and associated with

the counterclaim from 28 April 2008 on a party-party basis. I made no order as to costs on the counterclaim up to 28 April 2008.

4 Subsequently, on 6 August 2009 I made certain orders at the request of Sharanton to enable it to give comfort to its bank, which was disinclined to allow dealing with Sharanton's assets in the light of the freezing order of 29 January 2009 which had been made by Deputy President Macnamara. These reasons do not deal with the orders of 6 August 2009.

5 Mr Dickenson of Counsel for Sharanton also advised me on 6 August 2009 that my decision of 3 July 2009 is subject to appeal to the Supreme Court. Mr Ritchie of Counsel appeared for Mr Dinovic.

THE PRIMARY SUM

6 Order 1 of 15 July 2009 is:

> In accordance with order 1 of 3 July 2009 I quantify the amount that the Third Respondent to Counterclaim must pay the Respondent, and order it to pay him $147,972.60 being:
>
> | | |
> |---|---|
> | Costs incurred by the Respondent | $53,601.00 |
> | Costs to rectify remaining defects | $114,172.60 |
> | Liquidated damages | $15,250.00 |
> | | $183,023.60 |
> | Less contract balance | $35,051.00 |
>
> (All in accordance with the Amended Points of Counterclaim of 15 December 2008 with the exception that the Respondent sought less for the costs to rectify remaining defects).
>
> And the Tribunal notes that the Respondent has abandoned his claim for general damages in circumstances where further delay to the proceeding might have been necessary to prove that sum.

7 Order 1 and the relevant parts of order 2 of 3 July 2009 are:

> 1. The proceedings, being the claim and counterclaim, stands determined in favour of the Respondent.
>
> 2. The proceeding is listed for further hearing before me on 15 July 2009 … to make orders regarding … quantification of the Respondent's damages, including interest and costs.

8 The "costs" referred to in order 1 of 15 July are not legal costs but the amount already expended by Mr Dinovic to rectify his home, and the amount claimed by Mr Dinovic to complete the work.

Quantification and "stand determined"

9 Mr Dickenson asked whether the effect of the self-executing order is that it is akin to a default judgement. I said during the hearing on 15 July 2009 that I would treat it as such, but that I was willing to reduce amounts otherwise payable by Sharanton in accordance with Mr Dinovic's

admission that the cost to rectify remaining defects of $114,172.60 will be less than the amount claimed in the Amended Points of Counterclaim of $114,672.48.

10 Mr Dickenson submitted that "stand determined" in the order of 3 July 2009 could only mean in accordance with damages to be assessed, upon presentation of evidence by the parties as to what amounts, if any, should be allowed - Mr Dinovic should still have to prove every element of his loss. Mr Ritchie submitted that if Mr Dickenson's contention were correct, the proceeding would have advanced no further than it was nine months previously.

11 I preferred the approach suggested by Mr Ritchie in this proceeding. Mr Dinovic's claim for damages has been pleaded out in the form in which they were ordered since 15 December 2008 and Sharanton has not filed a defence to them. Further, as I said at paragraph 29 of the reasons of 3 July 2009, it was at the hearing of 19 May 2009 that Sharanton finally sought further time to file and serve points of defence to Mr Dinovic's claim.

Manner of pleading quantified damages

12 Mr Dickenson also submitted that as, with the exception of liquidated damages, the amounts sought by Mr Dinovic do not appear in the prayer for relief, there was no obvious sum to which he is entitled. I responded that the other two amounts do appear in the pleadings - they are in the particulars to paragraph 28 - and that under sections 97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998, the Tribunal must conduct itself with as little formality and technicality as a proper consideration of the matters before it permits. Mr Dinovic's claim had been clearly quantified for a substantial period before the self-executing order was made, with the exception of the claim for general damages, which Mr Dinovic abandoned on 15 July 2009.

Quantification and reconstitution of the Tribunal

13 Mr Dickenson submitted that the self-executing order which was the subject of the orders of 3 July 2009 could not have any meaning as it arose out of a partially completed hearing of the merits of the case on 15 December 2008. He added that it was not now proper for a differently constituted tribunal to make the orders of 3 July 2009.

14 The background to this submission regarding reconstitution of the Tribunal is that the hearing of 15 December 2008 was before the then Senior Member Cremean. Professor Cremean is no longer a member of the Tribunal, so the proceeding could not return to him for further hearing. The hearing had been listed as the merits hearing in the proceeding, and there was no appearance for Mr Bianco or Sharanton. Senior Member Cremean reserved his decision and then on 21 January 2009 made orders which described the hearing of 15 December 2008 as a directions hearing and referred the proceeding to a further directions hearing on 10 March 2009.

On 10 March 2009 Deputy President Aird adjourned the directions hearing to a further hearing before Senior Member Cremean on 19 March 2009. Again, neither Mr Bianco nor Sharanton appeared or were represented on 10 March 2009. Deputy President Aird ordered that if they did not appear on 19 March the proceeding could be determined against them under s76 and/or s78 of the VCAT Act. At the directions hearing of 19 March 2009, Senior Member Cremean made the self-executing order.

15 I responded to Mr Dickenson that I did not understand the point concerning reconstitution of the Tribunal to have been part of his submissions during the hearing of 19 May 2009, from which the orders of 3 July arose, and I declined to permit re-agitation of the matters that had been before me on 19 May 2009. I also note that the self-executing order arises out of the directions hearing of 19 March 2009, not out of the hearing originally listed as a merits hearing on 15 December 2008.

INTEREST

16 Order 2 of 15 July 2009 is:

> The Third Respondent to Counterclaim must pay the Respondent interest from the date of joinder of the Third Respondent to Counterclaim at the rates fixed under the *Penalty Interest Rates Act* being $19,553.23.

17 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.

18 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…

19 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".

20 The history of this proceeding is described in more detail commencing at paragraph of the reasons of 3 July 2009. Suffice to say that there had been repeated failures to comply with directions and many failures to attend directions and other hearings by Mr Bianco and Sharanton. On this basis I found it fair to order interest upon the principal sum and determined that the rate provided for in the PIR Act was the appropriate rate.

COSTS

21 Orders 3 to 5 of 15 July 2009 are:

> 3. The Applicant must pay the Respondent's costs of and associated with the claim on a party-party basis on County Court Scale D.
>
> 4. The Third Respondent to Counterclaim must pay the Respondent's costs of and associated with the counterclaim for 28 April 2008 on a party-party basis on County Court Scale D.
>
> 5. There is no order as to costs of the counterclaim up to 28 April 2008.

22 On 1 September 2009 I corrected the word "for" in order 4 to read "from". The correction was made under s119 of the VCAT Act.

23 Section 109 of the VCAT Act says 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.

24 Mr Dinovic based his claim for costs on s109(3)(a), (b) (c) and (e) of the Act.

25 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.

s109(3)(a) conducting the proceeding unnecessarily disadvantageously to the other party

26 I was satisfied that Mr Bianco's and Sharanton's repeated and usually unexplained failures to comply with directions of the Tribunal including failures to attend hearings, asking for and causing adjournments were a sufficient reason to order costs in this substantial proceeding. I considered that Mr Bianco's behaviour concerning the counter-claim is as the agent or representative of Sharanton, and as Sharanton was the proper respondent to the counterclaim, I ordered costs against it alone, since the date it was joined to the proceeding.

s.109(3)(b) – Prolonging Unreasonably the Time Taken to Complete the Proceeding

27 A result of Mr Bianco's and Sharanton's tardy behaviour, described above, was to unreasonably delay the completion of the proceeding. This is also a ground justifying an order for costs.

s109(3)(c)the relative strengths of the claims

28 Mr Bianco had commenced the proceeding against Mr Dinovic in circumstances where he was found not to be the builder in a preliminary

hearing on 19 September 2008. The claim by him was doomed to fail and therefore he was ordered to pay the costs of the claim.

SENIOR MEMBER M LOTHIAN