VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1357/2017

CATCHWORDS

Domestic building work – claim for costs – s.109(3)(c) and (d) *Victorian Civil & Administrative Tribunal Act* 1998

FIRST APPLICANT	Gregory Bird
SECOND APPLICANT	Silvana Bird
RESPONDENT	Expo Constructions Pty Ltd (ACN: 074 932 595)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Costs hearing
DATE OF HEARING	14 September 2018
DATE OF ORDER	24 September 2018
CITATION	Bird v Expo Constructions Pty Ltd (Building and Property) [2018] VCAT 1485

ORDERS

1 The respondent must pay the applicants' costs of the proceeding, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

2 Having regard to section 115B(1) of the *Victorian Civil And Administrative Tribunal Act* 1998 and being satisfied that the applicants have substantially succeeded in their claim, the Tribunal orders the respondent to reimburse the applicants for the fees paid, in the amount of $1,463.20.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Ms J. Johnston, solicitor
For the Respondent	Mr B.J. McCullagh of counsel

REASONS

1 This is an application brought by the applicants for the costs of this proceeding.

2 The dispute concerned a claim for compensation for the cost of rectifying water damage and consequential repairs which occurred to the applicants' home. The matter was heard on 7 and 8 June 2018, and final orders were made on 9 July 2018. The respondent was ordered to pay the applicant the sum of $93,441.98[1]. The question of costs and reimbursement of fees was reserved.

3 This application for costs came before me for hearing on 14 September 2018. Ms. Johnston, solicitor, appeared for the applicants and Mr. McCullagh of Counsel appeared for the respondent. Each party relied on written submissions they had prepared. I reserved my decision.

4 For the reasons set out below, I allow the application for costs.

5 The applicants rely on sections 109(3)(c) and (d) of the *Victorian Civil And Administrative Tribunal Act* 1998 ('the VCAT Act'). The respondent opposes the application, saying there is no reason to depart from the presumption in section 109(1) that each party should bear their own costs.

6 Section 109 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;

[1] Bird v Expo Constructions Pty Ltd [2018] VCAT 1000

(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.

7 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.

8 In relying on subsection 109(3)(c), the applicants refer to the following factors:

a the defects- the subject of this proceeding were notified to the respondent in or about December 2016;

b in May 2017 the applicants issued an application at DBDRV;

c the matter did not resolve, and in or about October 2017 this application was issued in the Tribunal;

d in its defence the respondent denied all allegations and relied on the expert opinion of Sam Mamone;

e as a result of the respondent's denial of all allegations of defective work, which was maintained until the first day of the proceeding, it was necessary for the applicants to obtain a number of expert reports and ongoing legal advice;

f on the first day of the hearing, the respondent advised that its expert had changed his opinion in relation to liability. The respondent did not lead any evidence in opposition to the claim that there existed defective works;

g the respondents' change of position as a result of their expert's change of opinion provides evidence that the applicants' position was strong; and

h the applicants were successful in the majority of their claim, with the consequential claim relating to ground floor tiles being the only item of note upon which the applicants were not successful. The time taken for this item in the hearing was minimal.

9 In relying on subsection 109(3)(d), the applicants refer to the following factors:

a although the proceeding was essentially about defective works, the proving of the cause of the defects and the required rectification works was a complex task in that specialist experts were required to inspect and report;

b it was necessary to obtain a total of 12 reports and quotes, including reports in respect of plumbing, mould and general building. Specialist testing was also required;

c it was only after the applicants had provided all this material to the respondent that its expert changed his opinion;

d prior to the hearing, the respondent did not concede liability, and accordingly the applicants and the experts and solicitors had to prepare for a hearing where all matters were in dispute;

e the respondent did not formally concede liability at the hearing, but noted that its expert had changed his opinion;

f the result of the hearing was that the applicants were awarded $93,441.98. Of that amount, $80,631.98 was for the cost of rectification of works caused by the builder's bad workmanship. The respondent's negligence or breach of warranties has resulted in substantial damage;

g the witness statements show that the applicants provided ample opportunity for the respondent to rectify, which it did not do, leaving the applicants with no choice but to bring the matter before the Tribunal; and

h the construction of the dwelling was a commercial transaction for the respondent, and the respondent chose not to accept liability until the first day of the hearing.

10 The respondent opposes the application for costs and says that:

a the respondent was not notified of the defects in December 2016, but instead only of damage to a door jam;

b it was not until the commencement of this proceeding in October 2017 that the respondent became aware of the list of defects asserted to have been caused by its workmanship;

c given the length of time between the occupancy permit (22 December 2010) and the issue of the proceeding, combined with Mr Mamone's first report dated 24 February 2018, causation was the key issue;

d the majority of the applicants' expert reports were obtained prior to the proceeding being issued;

e the respondent relied on two expert reports from Mr Mamone and two from Dr Wesley Black of Biotopia, all obtained following the commencement of this proceeding;

f in May 2018 Mr Mamone changed his opinion as to the causation issue. It is noteworthy that the respondent served Mr Mamone's second report as soon as it received it;

g the hearing took place over two days, both of which were short hearing days; and

h the applicants' task of proving causation, the need for rectification and the cost of rectification are standard, everyday issues in domestic building cases and are not complex issues.

11 The respondent also referred me to a number of well-known and accepted authorities, which stand for the proposition that there is no presumption that costs ought to be ordered in favour of successful claimants in domestic building disputes, even in proceedings of a commercial nature.

12 Weighing up the matters put by each party, I am satisfied that it is fair to exercise the Tribunal's discretion under section 109(2) and make an order for costs.

13 I accept that:

a all the damage to the dwelling was the result of faulty waterproofing;

b as conceded by the respondent above, the issue of causation was complex, and required extensive expert opinion, including obtaining testing and multiple specialist reports;

c as the issue of causation was in dispute until the first day of the hearing, the applicants were put to the cost of obtaining such reports;

d further, one of the consequences of the extensive water damage was the risk of mould and applicants were required to obtain detailed reports about mould for their own health and safety;

e although the respondent served Mr Mamone's second report as soon as it was received, this was nevertheless at the commencement of the hearing, which meant the applicants had incurred significant costs to prepare for a contested hearing; and

f the owners were overwhelmingly successful in their claim.

14 I disagree with the respondent's contention that this proceeding did not involve complex issues, as the task of proving causation, the need for

rectification and the cost of rectification are standard, everyday issues in domestic building cases. The distinguishing factor in this case is that had the respondent conceded liability at an earlier stage, the applicants would not have been put to the expense of proving causation or the need for rectification.

15 I mention here the efficient manner in which the proceeding was run and note the respondent's submission that this is a reason why costs ought not be ordered. I accept that in some cases that may be a relevant factor in the exercise of discretion; however, in the present case it is not, because the efficiencies came about following the last-minute concession on liability. Nevertheless, the respondent does gain benefit from the efficiencies, in that they have presumably reduced the total amount of each parties' costs.

16 Accordingly I will order that the respondent must pay the applicants' costs of the proceeding, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

Finding regarding reimbursement of filing fee

17 As the applicants have been substantially successful in their claim, they are entitled under section 115B(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 to an order that they be reimbursed by the respondents for the fees paid, in the sum of $766.40 (fees paid on issuing $467.80 and $298.60) and $696.80 (2 x daily hearing fees of $348.40 each).

SENIOR MEMBER S. KIRTON