

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D618/2008

**CATCHWORDS**

Domestic Building, claim and counterclaim arising out of contract between a tiling sub-contractor and a builder, interpretation of the contract, area of tiles laid, slip rule, s119 of the *Victorian Civil and Administrative Tribunal Act 1998*, GST

<b>APPLICANT</b>	Caesar The Tileman Pty Ltd (ACN 069 307 213)
<b>RESPONDENT</b>	I & Z Constructions Pty Ltd (ACN 078 386 222)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	31 October 2008 and 14 January 2009
<b>DATE OF ORDER</b>	14 January 2009
<b>DATE OF CORRECTING ORDER</b>	2 March 2009
<b>DATE OF REASONS</b>	2 March 2009
<b>CITATION</b>	Caesar The Tileman Pty Ltd v I & Z Constructions Pty Ltd (Domestic Building) [2009] VCAT 320

**ORDER**

Under s119 of the *Victorian Civil and Administrative Tribunal Act 1998*, I correct the order of 14 January 2009 to say that the Respondent must pay the Applicant \$2,133.77.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For Applicant

Mr C. Tavares, Director in person

For Respondent

Mr I. Salomonovitch, Director in person

## REASONS

- 1 This proceeding and proceeding D757/2008 concern a contract between Caesar the Tileman Pty Ltd (“Tiler”) and I&Z Constructions Pty Ltd (“Builder”). The proceedings were heard together and on 14 January 2009, I gave oral reasons and ordered that the Builder pay the Tiler \$190.70. The Tiler’s solicitors have written to the Tribunal seeking reasons and raising the possibility that the amount ordered might be erroneous because, they allege, it does not include an amount for GST.

### TILER’S CLAIM

- 2 The Tiler’s claim was for \$7,418.00. It is agreed by the parties that the Tiler sent “Zev” - Mr Salomonovitch senior of the Builder - a quote dated 6 February 2008. The quote gave rates to lay “porcelana” (porcelain) tiles of \$50.00 per square metre, ceramic tiles of \$40.00 per square metre and concrete bedding of \$35.00 per square metre. Against the item “borders” was written under “metres” - “1m”, which I understand means one lineal metre, and under “\$” was written “?”. Nothing was written in either column beside the note:

Price including glue, grout, sand, cement, exp metal, aluminium.

I assume these items were not charged separately and there was no argument to the contrary in the hearing.

- 3 If the quote had been extended to show the areas to be laid and the total price, there would have been much less to argue about. The final invoice (which was in part a statement as it incorporated previous invoices and new work) was dated 24 June 2008 and was for a total of \$26,658.00, inclusive of GST.
- 4 The claims under the invoice, exclusive of GST, were as follows:

### Bedding

- 5 The Tiler claimed \$5,200.00 for 130m<sup>2</sup> of bedding, being \$40.00 per m<sup>2</sup>. Mr Tavares of the Tiler gave evidence that Mr Zev Salomonovitch agreed that the rate for bedding would be increased. However, in circumstances where the quotation was in writing, there was no written amendment to the quotation and Mr Tavares gave no evidence about why Mr Salomonovitch might have agreed to the increase in price, I allowed \$4,550.00 for bedding, being \$35.00 per square metre.

### Porcelain floor tiles

- 6 The Tiler claimed \$3,600.00 for 72m<sup>2</sup> of porcelain tiles, being \$50.00 per m<sup>2</sup>. The Builder agreed that the rate was correct, but stated that the area was 62.5m<sup>2</sup>, which I accepted. I allowed \$3,127.50 for these tiles.

### Wall tiles

- 7 The Tiler claimed \$13,185.00 for 293m<sup>2</sup> of “rectified tiles”, being \$45/m<sup>2</sup>. I accepted Mr Salomonovitch’s evidence that the tiles are ceramic and should be charged at \$40/m<sup>2</sup>, and I also accepted his evidence that 252.58m<sup>2</sup> of these tiles were laid. I allowed \$10,103.20 for these tiles.

### Borders

- 8 The parties agreed that \$900.00 should be allowed for borders.

### Dwarf walls

- 9 I accepted Mr Tavares’ evidence that dwarf walls between the laundry areas and vanities did not appear on the drawings and were not built when he visited the site to inspect to prepare his quotation. I accepted that they added complication and therefore time to the job and that no allowance was made for them in the quotation. I allowed \$750.00 for them.

### Total

- 10 The total of these amounts was \$19,430.70. From this I deducted the amount the parties agree that Builder paid of \$19,240.00, to give a total payable to the Tiler of \$190.70. The amounts paid by the Builder were in response to invoices from the Tiler which included GST.

### GST AND CORRECTION UNDER S119

- 11 I did not add GST to my calculations, however it is clear that the parties did consider GST was payable and if it had been brought to my attention at the time of the hearing, I would have included it. In the Builder’s letter to the Tiler of 22 July 2008, each rate had GST added to it as did each of the Tiler’s invoices to the Builder.

- 12 As Senior Member Walker said in *Riga v Peninsula Home Improvements* [2000] VCAT 56:

When a proceeding is determined by a court or tribunal the court or tribunal is then functus officio and generally has no power to revisit the matter or undo what it has done in the absence of some provision in the statute or rules authorising it to do so.

- 13 S119 of the *Victorian Civil and Administrative Tribunal Act* 1998 is the means by which the Tribunal can correct slips. S119(1) provides:

- (1) The Tribunal may correct an order made by it if the order contains-
- (a) a clerical mistake; or
  - (b) an error arising from an accidental slip or omission; or
  - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or

(d) a defect of form.

14 Senior Member Walker continued:

The test as to whether a mistake or omission is accidental is, in my view: "If the matter had been drawn to the court's attention, would the correction at once have been made?" [quoting *Williams Civil Procedure of Victoria*]

15 Under s119 I correct the amount payable by the Builder to the Tiler as follows:

Total before GST	\$19,430.70
GST	<u>\$1,943.07</u>
	\$21,373.77
Less paid by the Builder	<u>\$19,240.00</u>
Amount due by the Builder to the Tiler	\$2,133.77

### **THE BUILDER'S CLAIM**

16 The Builder's counterclaim in proceeding D757/2008 was for \$9,258.00. The Builder claimed to have been delayed three weeks by the Tiler in circumstances where it was obliged to pay liquidated damages of \$3,500.00 per week to the owner of the project under the head contract. From \$10,500.00 the Builder deducted \$1,660.00 (inclusive of GST) which it considered remained payable to the Tiler under the contract.

17 As I said at the hearing:

I dismiss that application. I am concerned that there was no express term between the parties that any delays would cause the Tiler to bear the burden of liquidated damages in the head contract and I also accept the evidence of Mr Tavares that there were occasions when he was asked to discontinue his work and then to come back later.

I also note that there was no express term between the parties about the time by which the Tiler was to do the work.

**SENIOR MEMBER M. LOTHIAN**