VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP153/2018

CATCHWORDS

Domestic building contract – claim for costs – s.109, s.112 *Victorian Civil & Administrative Tribunal Act* 1998 – claim for interest – s.53 *Domestic Building Contracts Act* 1995.

FIRST APPLICANT	Jing Wei Cao
SECOND APPLICANT	Zin Zhang
FIRST RESPONDENT	Al Bahjeh Pty Ltd ACN 084 143 019 t/as Ultimate Creative Designers
SECOND RESPONDENT	Jamal Nahas
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	28 June 2019
DATE OF ORDER	2 July 2019
CITATION	Cao v Al Bahjeh Pty Ltd (Building and Property) (Costs) [2019] VCAT 998

ORDERS

1. The first 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. The first respondent must pay damages in the nature of interest of $1968.76.

3. The first respondent must reimburse the applicants for the fees paid, in the amount of $1828.70.

4. **I direct the principal registrar to send a copy of this decision, together with a copy of the Applicant's Submissions on Interest and Costs dated 27 June 2019 to the respondents.**

5. Any application by the respondents under s.120 of the *Victorian Civil and Administrative Tribunal Act* 1998 that this order be reopened must be accompanied by the following:

   (i) a medical certificate explaining the reason for the non-attendance on 28 June 2019;

   (ii) a written submission in which they respond to the matters set out in the Applicant's Submissions on Interest and Costs dated 27 June 2019.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr M. Hoyne of Counsel.
For the Respondents	No appearance.

REASONS

1. This is an application brought by the applicant owners for their costs of this proceeding and interest.

2. The proceeding involved a claim by the owners following the first respondent builder's failure to complete the building of their home. The matter was heard in January 2019 and final orders were made on 19 March 2019. The builder was ordered to pay the owners the sum of $244,259.25.[1] The question of costs, interest and reimbursement of fees was reserved.

3. This application came before me for hearing on 28 June 2019. Mr M. Hoyne of Counsel appeared for the owners and provided a written submission. The respondents did not attend. The director of the builder sent an application to the Tribunal late on 27 June applying for an adjournment, on the grounds that "In the days preceding the upcoming costs hearing, a sudden, overbearing illness overcame me. I apologise for any inconvenience regarding this request, however I have been recommended by my doctor to stay indoors until my situation improves. I hope that you will consider my request and reschedule the hearing if it is found appropriate to do so".

4. At the commencement of the hearing I decided to refuse the application for an adjournment, on the following grounds:

   a the application was made late;

   b no medical evidence was provided;

   c the applicants had incurred the costs of briefing Counsel to attend and had not been notified of any request for an adjournment; and

   d the respondent has the opportunity to make an application under s.120 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) that the order be reopened. I will address this further in my orders.

5. The hearing proceeded and I heard Mr Hoyne's submissions. I reserved my decision and indicated I would provide written reasons for the benefit of the parties, particularly the respondents.

6. For the reasons set out below, I allow the application for costs and reimbursement of fees and a limited amount of interest.

COSTS

7. The owners seek an order that the first respondent pay their costs on an indemnity basis, alternatively on the standard basis on the County Court Scale until 30 October 2018 and an indemnity basis from that time.

[1] *Cao v Al Bahjeh Pty Ltd* [2019] VCAT 367.

Costs following the settlement offer made 30 October 2018

8. On 30 October 2018 the owners made an offer to accept payment of $175,000 in full and final settlement of all matters in the proceeding, including costs. The offer complies with ss.113 and 114 of the VCAT Act, and as a result, there is a presumption set out in s.112(2) that the owners are entitled to an order for their costs from that date.

9. Section 112 provides relevantly as follows:

> (1) This section applies if
>
> (a) a party to a proceeding… gives another party an offer in writing to settle the proceeding; and
>
> (b) the other party does not accept the offer within the time the offer is open; and
>
> (c) the offer complies with sections 113 and 114; and
>
> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
>
> (2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in subsection (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

10. It is unarguable that the orders made in the proceeding are not more favourable to the builder than the offer. Accordingly, by reason of ss.112(2), the owners are entitled to an order that the builder pay their costs, unless there are any other relevant factors.

11. As the builder was not present at the hearing, Mr Hoyne quite properly suggested that one such factor I should consider is that the claim against the second respondent failed. Having raised this issue, Mr Hoyne then submitted that this should not be a reason to deny an order against the first respondent, because:

    a the claim against the first respondent succeeded,

    b the claim against the second respondent did not increase the length of trial,

    c the respondents were always represented by the same lawyers (until they ceased to act),

    d no additional costs were incurred by the second respondent, and

    e it was the second respondent's instructions and behaviour which caused to the applicants to incur substantially more costs than they ought to have been forced to incur in pursuing the costs against the first respondent.

12. I agree with Mr Hoyne's submission. The owners do not seek any order against the second respondent. The failure of the claim against the second respondent is not a basis for refusing an order that the builder is liable for their costs, particularly in light of the presumption contained in s.112(2). Accordingly, I am satisfied that the owners are entitled to an order that the builder pay their costs from the date of the offer.

Costs prior to the settlement offer

13. Prior to 30 October 2018, the owners seek their costs under s.109(3) of the VCAT Act. Section 109 provides relevantly:

> 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.

14. As emphasized by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group*,[2] the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

[2] [2007] VSC 117 at [20].

(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.

15. The owners especially rely on s.109(3)(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*. They refer to the following factors:

a The builder had no defence, or the defence was so weak it was effectively no defence.

b In its notice of defence, the builder pleaded that it had suspended the works, due to the owners' failure to demonstrate a capacity to pay. This defence was abandoned during the hearing. Further, this allegation should never have been raised, given the evidence of Mr Nahas that the builder had not actually suspended the works.

c The second ground of defence was that the builder had under quoted owing to difficulties on site. The Tribunal rejected this defence.

d The third ground of defence was that bad weather caused the delays. The Tribunal found that even if bad weather had been a factor, and the builder's evidence was taken at its highest, this did not explain the builder's failure to complete the works within the building period. If the builder was allowed the claimed 72 days of inclement weather, the completion date for the works would be extended to June 2017. However, the works had not even reached base stage by the date of termination in September 2017.

16. Weighing up the matters put by the owners, I am satisfied that it is fair to order the builder to pay the owners' costs incurred prior to 30 October 2018 pursuant to s.109(2). I am persuaded by the submissions made by the owners, as set out above. In particular, I accept that the builder's defence was very weak compared with the owners', and that in light of the concession by Mr Nahas that the works had never been actually suspended, the defence had no tenable basis in fact or law. The builder and Mr Nahas were represented by lawyers up until the hearing. He had the benefit of legal advice when preparing the defence.

17. Accordingly, by reason of s.112(2) of the VCAT Act, the owners are entitled to their costs from 30 October 2018, and by reason of s.109(2), the owners are also entitled to their costs of the proceeding incurred prior to that date.

COSTS ON AN INDEMNITY BASIS

18. The owners submit that costs should be ordered on an indemnity basis. They refer to the decision of the Court of Appeal in *Velardo v Andonov*, [3] which held that "all costs" would ordinarily mean standard costs, but that it would be open to the Tribunal in an appropriate case to award costs on a more favourable basis.

19. They submit that this is a matter where such an order would be appropriate, as the builder, properly advised, ought to have known there was no sound basis for the defence it ran. They contend that the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law.[4]

20. The occasions on which the Tribunal has awarded costs on a full indemnity basis indicate that this is a "most unusual award" that is made only in "exceptional circumstances", it should be exercised only in the "rarest of circumstances" and where the conduct of a party "has been so extreme as to be quite vexatious or bloody-minded."[5]

21. In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd & Anor*,[6] Ormiston JA held at 33:

> "It should further be noted that under s.111 of the Act, if the Tribunal makes a costs order, then the Tribunal "may fix the amount of costs itself or order that costs be assessed or settled by the principal registrar". Unlike the rules applicable in the Supreme Court and other courts the Act contains no provision whereby scales of costs are or can be laid down, so that the quantum is clearly left to the Tribunal's discretion. For present purposes what is significant is that there is no suggestion that such an order for costs would ordinarily be by way of full indemnity in proceedings such as the present, or indeed, would be other than in accordance with the usual practice that costs are awarded on a party- party basis, unless a specific reason exists for giving a greater right to costs."

Per Nettle JA at 92:

> "Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in Domestic Building List proceedings on an indemnity basis. But those occasions will be exceptional and, broadly

[3] [2010] 24 VR; [2010] VSCA 38 at [47(2)].
[4] *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants Pty Ltd* (1988) 81 ALR 397, 401; *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 223, 224.
[5] See the summary of decisions at paragraph [VCAT.111.80] of *Pizer's Annotated VCAT Act*, 6th edition
[6] [2005] VSCA 165.

> speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the Supreme Court (General Civil Procedure) Rules 1996."

22. In *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[7] the Court of Appeal made the following observations about the making of "special costs orders":

> "Ordinarily, where costs are awarded they are awarded on a standard basis. However, in some circumstances, it is appropriate to make a special costs order. In *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 ('Ugly Tribe'), Harper J identified the following circumstances as warranting a special costs order, noting that the categories of circumstances are not closed:
>
> (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
>
> (b) the making of an irrelevant allegation of fraud;
>
> (c) conduct which causes loss of time to the court and to other parties;
>
> (d) the commencement or continuation of proceedings for an ulterior motive;
>
> (e) conduct which amounts to a contempt of court;
>
> (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and
>
> (g) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which would have considerably shortened, and very possibly avoided, the trial."

23. The grounds relied on by the owners for indemnity costs fall particularly within subparagraphs (d) and (f) above. These circumstances were described more fully in *Munday v Bowman*,[8] where Holden CJ gave examples of circumstances which would warrant the ordering of indemnity costs, which included where it appears that an action has been commenced or continued in circumstances where a party properly advised should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive or because of some wilful disregard of the known facts.

24. In the present case, I am not prepared to make that presumption. While I have found that the builder's position was very weak compared with the owners, it would be a step too far to presume the action was commenced or continued for some ulterior motive or because of some wilful disregard of

[7] [2015] VSCA 216 at [9].
[8] (1997) FLC 92-784.

the known facts or law. In the absence of such a finding, I do not consider that costs on an indemnity basis are appropriate.

25. Accordingly, I will order that the builder must pay the owners' 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 FEES

26. As the owners have been substantially successful in their claim, they are entitled under s 115B of the VCAT Act to an order that they be reimbursed by the builder the fees paid, in the sum of $1828.70.

INTEREST

27. The owners seek an order for interest, pursuant to s.53 of the *Domestic Building Contracts Act* 1995 (DBC Act).

28. They rely on the decision of Senior Member Walker in *Quinlan v Sinclair*,[9] where he held:

> "10. … There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be "fair" to do so.
>
> 11. It cannot be "fair" to make any order that is not in accordance with the evidence and established legal principles. The tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is "fair" must be determined in each case."

29. I note the comments of Gillard J in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No.3)*[10] about the main objectives of interest:

> "There are three main objectives of the award of interest. First, as compensation to the judgement creditor for being out of the funds from the date of commencement of the proceeding until judgement; secondly, to deter judgement debtors from delaying proceedings and thereby having the use of the money for a longer period; and finally, to encourage defendants to make realistic assessments of their liability in a case and to take bone fide steps to compromise the claim."

[9] [2006] VCAT 1063 at [10] - [11].
[10] [2003] VSC 244 at [60].

30. In *Khan v Kimitsis trading as Quest Building*[11] Senior Member Walker considered this question further and held as follows:

> "41… Interest is awarded to compensate the aggrieved party for having been deprived of the amount awarded from the date that it should have been paid until the date of judgement.
>
> 42. It must be borne in mind that it is not a liquidated claim to enforce a contract to pay interest but a head of damages and, apart from punitive or exemplary damages, damages are compensatory. Here what the Builder ought to have done is finish the house within a reasonable time but I have already assessed damages for that. The cost of fixing the defects and completing the house has not been expended yet by the Owner so he is not out of pocket for those sums. However he is out of pocket for the rent and rates that he has paid so I will allow interest on that."

31. In the present case, the owners' claim is for the difference between what they have paid the builder and what they will have to pay UDCON1 Pty Ltd to rectify and complete their property. This amount is $233,305. Their evidence was that they have not yet spent that money.[12] Accordingly, they are not "out of funds" (per Gillard J) or "out of pocket" (per SM Walker) in respect of the amount they will have to pay to UDCON1 Pty Ltd.

32. I am not satisfied that it would be fair within the meaning of s.53 of the DBC Act to order interest on the amount of $233,305. Applying the objectives set out by Gillard J, the applicant is not yet out of pocket for these rectification costs. The sum was not monies wrongly paid to the builder and so this is not a case where a judgement debtor had the use of that sum for a longer period by delaying proceedings. The objective of encouraging defendants to take bone fide steps to compromise the claim has been met by the fact that a costs order is being made, when the starting point in the Tribunal is that each party should bear their own costs. Accordingly, I do not award interest on the amount of $233,305.

33. On the other hand, I am satisfied that it is fair to order the builder to pay interest on the other three amounts making up the owners' claim. The re-establishment survey and the building permit fees have already been expended by them. The liquidated damages fall into the example given by Gillard J of a case where a judgement debtor had the use of money it was not entitled to for a period of time, as the liquidated damages should have been taken into account by the builder on completion of the contract. The three items total $10,954.25.

34. I allow interest at the penalty interest rate[13] from the date the contract was terminated, being 15 September 2017 (as this is notionally the date when

[11] [2009] VCAT 912 at [41] – [42].
[12] Reasons paragraphs 42-43.
[13] In accordance with s.53(3) of the DBC Act.

the contract reconciliation should have occurred and these amounts been repaid) to today, which is $1968.76.

CONCLUSION

35. I will make the following orders:

1. Pursuant to ss.109(2) and (112)(2) VCAT Act the first 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. Pursuant to s.53 of the DBC Act the first respondent must pay damages in the nature of interest of $1968.76.

3. Having regard to section 115B(1) of the VCAT Act 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 $1828.70.

4. I direct the principal registrar to send a copy of this decision, together with a copy of the Applicant's Submissions on Interest and Costs dated 27 June 2019 to the respondents.

5. Any application by the respondents under s.120 of the *Victorian Civil and Administrative Tribunal Act* 1998 that the order be reopened must be accompanied by the following:

(i) a medical certificate explaining the reason for the non-attendance on 28 June 2019;

(ii) a written submission in which they respond to the matters set out in the Applicant's Submissions on Interest and Costs dated 27 June 2019.

SENIOR MEMBER S. KIRTON