

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP806/2016

### CATCHWORDS

Interest, costs and reimbursement of filing fee; application of s 184(2)(b)(ii) and s 184(4) of the *Australian Consumer Law and Fair Trading Act 2012*; application of s 109 and s 115B of *Victorian Civil and Administrative Tribunal Act 1998*.

<b>FIRST APPLICANT</b>	Mr Christopher Cataldo
<b>SECOND APPLICANT</b>	Ms Mary Cataldo
<b>RESPONDENT</b>	Mr Matteo Tardio
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	C Edquist, Member
<b>HEARING TYPE</b>	In Chambers
<b>DATE OF ORDER</b>	2 May 2017
<b>CITATION</b>	Cataldo v Tardio (Costs) (Building and Property) [2017] VCAT 561

### ORDERS

- 1 The respondent must pay to the applicants damages by way of interest in the sum of \$785.64.
- 2 The respondent must pay to the applicants the following costs of the proceeding:
  - (a) the cost of briefing Mr Tom Casamento of TMC & Associates to provide a report;
  - (b) TMC & Associates fee of \$990 for preparing the report;
  - (c) TMS & Associates fee in respect of Mr Casamento's attendance at the hearing on 31 August 2016;
  - (d) their legal costs relating to their written submissions dated 27 September 2016 (in the form of a letter from Constanzo Lawyers);
  - (e) their legal costs relating to their written submissions dated 3 October 2016 (in the form of a letter from Constanzo Lawyers);

- (f) their legal costs relating to the submission in respect of interest, costs and reimbursement of fees under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act).
- 3 In the absence of agreement between the parties, the costs to which the applicants are entitled under Order 2 are to be taxed by the Costs Court on the default Scale of Costs, namely, the *County Court costs scale* as defined in Rule 1.13 of Chapter 1 of the Rules of the County Court.
- 4 Under s115B of the *Victorian Civil and Administrative Tribunal Act 1998*, the respondent must reimburse to the applicants the filing fee paid by them of \$575.30.

**MEMBER C EDQUIST**

## REASONS

- 1 The hearing of this proceeding took place on 31 August 2016.
- 2 At the conclusion of the hearing the applicants were given leave to send to the respondent and to the Tribunal by 13 September 2016, brief submissions regarding the relevance of the *Domestic Building Contracts Act 1995* and/or the *Australian Consumer Law* to the proceeding, and the respondent was given leave to send to the applicants and the Tribunal any response submissions by 27 September 2016.
- 3 Orders were made on 23 December 2016, and reasons for the Orders were published on 31 January 2017.
- 4 The substantive Order made was that the respondent must pay to the applicants damages in the sum of \$16,450.
- 5 Other Orders made included an Order that the applicants had liberty within 60 days to send to the respondent and the Tribunal submissions in respect of interest, costs and as to whether, under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'), the respondent should be ordered to reimburse to the applicants the filing fee paid by them of \$575.30. Alternatively, the applicants were given liberty to apply within 60 days to the Tribunal for a hearing in respect of those matters.
- 6 The respondent was given 30 days after receipt of such submissions to respond.
- 7 The applicants filed submissions on 7 February 2017. The respondent has not filed any submissions in response.
- 8 The findings which underpin the orders set out above are as follows.

### Findings as to interest payable

- 9 As the proceeding involved a dispute or claim arising between a purchaser of goods or services and a supplier of goods or services in relation to a supply of goods or services, it was a *consumer and trader dispute* as defined in s 182 of the *Australian Consumer Law and Fair Trading Act 2012* ('the ACLFT Act').<sup>1</sup>
- 10 In a *consumer and trader dispute* the Tribunal has jurisdiction to award damages in the nature of interest under s 184(2)(b)(ii) of the ACLFT Act.
- 11 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 s 2 of the *Penalty Interest Rates Act 1983 (Vic)*, or on any lesser rate it thinks appropriate, under s 184(4) of the ACLFT Act.

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<sup>1</sup> See the Tribunal's Reasons for Decision dated 31 January 2017 ('the Tribunal's Reasons') at paragraph 45.

- 12 It is appropriate that the respondent be ordered to pay to the applicants, under s 184(4) of the ACLFT Act, damages in the nature of interest on the sum of \$16,450, based on the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983 (Vic)* calculated for the 184 days between the date the application was issued, namely, 23 June 2016, and 23 December 2016, being the date of the order under which the respondent must pay to the applicants the sum of \$16,450.
- 13 As the rate fixed under s 2 of the *Penalty Interest Rates Act 1983 (Vic)* between 23 June 2016 and 23 December 2016 was 9.5% per annum, the relevant calculation as to interest is 184 days at 9.5% per annum or \$4.2698 per day = \$785.64.

### **Findings as to costs**

- 14 Although the default position under s 109(1) of the VCAT Act is that each party is to bear their own costs of a proceeding, the Tribunal finds that its discretion to award costs under s 109(2) is enlivened in the present case as the Tribunal is satisfied that it is fair to do so because the respondent unnecessarily disadvantaged the applicants in their conduct of the proceeding in certain respects.
- 15 Firstly, the respondent engaged in conduct which is relevant to s 109(3)(c) which concerns the relative strengths of the claims made by each of the parties, when it contested the applicants' claim at the hearing in circumstances where:
- (a) it had not filed a defence or otherwise let the applicants know in writing why the respondent was disputing the claim;
  - (b) the applicants had engaged an expert witness, Mr Tom Casamento of TMC & Associates, and sent a copy of Mr Casamento's report dated 1 May 2016, which supported their claim, to the respondent before they instituted proceedings;
  - (c) at the hearing the respondent called no expert evidence to counter Mr Casamento's evidence;
  - (d) the observations made by the Tribunal at an inspection carried out during the course of the hearing substantially confirmed Mr Casamento's observations;<sup>2</sup>
- 16 By contesting the claim in circumstances where it had no independent evidence, and where the defects in the respondent's work was apparent, the respondent acted unreasonably. The applicants were unnecessarily disadvantaged and had no option but to call Mr Casamento as a witness. They are entitled to recover the costs of briefing Mr Casamento, and Mr Casamento's costs in preparing his report and in attending at the hearing. They are also entitled to their costs in preparing submissions on interest,

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<sup>2</sup> See the Tribunal's Reasons at paragraph 64 and 65.

costs, and reimbursement of fees under s 115B of the VCAT act and regarding interest.

- 17 However, there were no special circumstances which justified the applicants in briefing counsel for the hearing. The applicants' initial claim was for damages of \$18,190. They could well have presented their case themselves. The applicants accordingly are not entitled to recover their solicitors' costs in preparing for the hearing including preparing a brief for counsel, and the applicants are not entitled to recover their counsel's fee for the hearing.
- 18 After the hearing, the respondent engaged in conduct which is relevant to s 109(3)(a)(vi) which relates to vexatiously conducting the proceeding, and to s 109(3)(b) which relates to prolonging unreasonably the time taken to complete the proceeding, by filing submissions which were submissions other than those allowed pursuant to the Tribunal's order of 31 August 2016.
- 19 The applicants were unnecessarily disadvantaged by the respondent's submissions dated 26 September 2016 and by the respondent's further submissions dated 3 October 2016, and are entitled to their costs of having their solicitors respond in each instance, on 27 September 2016 and on 3 October 2016 respectively.

**Finding as to the exercise of discretion under s 115B of the VCAT Act**

- 20 Because the applicants have been substantially successful in their claim, it is appropriate that the Tribunal should order, under s 115B of the VCAT Act, that the respondent reimburse to the applicants the filing fee paid by the applicants of \$575.30.

**MEMBER C EDQUIST**