VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO D776/2009

CATCHWORDS

BUILDING DISPUTE – re-opening of proceeding on ground that written submissions were mistakenly filed out of time.

APPLICANT	Charterarm Investments Pty Ltd (ACN 054 052 934) (in external administration)
FIRST RESPONDENT	Clynton Roberts
RESPONDENT BY COUNTERCLAIM	George Bougioukas (excused from attending)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
DATE OF ORDER	26 August 2015
CITATION	Charterarm Investments Pty Ltd v Roberts (Building and Property) [2015] VCAT 1305

ORDER

1. The proceeding is re-opened for the purpose of allowing the Tribunal to consider the First Respondent's written submissions dated 9 June 2015.
2. Having regard to the First Respondent's written submissions dated 9 June 2015, the Tribunal's orders and reasons dated 9 June 2015 are confirmed.

SENIOR MEMBER E. RIEGLER

REASONS

Introduction

1. On 9 June 2015, I made orders and published *Reasons* wherein I determined two applications made by the parties following my determination on 22 April 2015 of the substantive issues in the proceeding. In particular, the First Respondent (**'the Owner'**) filed an application seeking orders pursuant to s 119 of the *Victorian Civil and Administrative Tribunal Act 1998* that I correct my orders and *Reasons* dated 22 April 2015 on the ground that they contained an arithmetic miscalculation. The Applicant (**'the Builder'**) also made an application that its costs of and associated with the substantive proceeding be paid by the Owner.

2. The applications were heard on 26 May 2015, following which orders were made giving the parties an opportunity to file and serve any written submissions and written submissions in reply, in order to supplement oral submissions made at the hearing. The date by which written submissions in reply were to be filed and served was 5 June 2015.

3. No written submissions were filed by the Owner on or prior to 5 June 2015, nor was any request made to extend the date for the filing of submissions. Consequently, on 9 June 2015, I determined both applications based upon the oral submissions made by the parties on 26 May 2015 and written submissions filed by the Builder in accordance with the orders made on 26 May 2015.

4. I determined that the Owner's application for an order pursuant to s119 of the *Victorian Civil and Administrative Tribunal Act 1998* was dismissed. That order was made on the basis that I was not persuaded that my orders and *Reasons* dated 22 April 2015 contained any arithmetic error or miscalculation.

5. I further ordered that the Owner pay the Builder's costs of the proceeding. My *Reasons* dated 9 June 2015 set out the basis upon which that order was made.

6. Subsequent to the making of my orders dated 9 June 2015, the Tribunal received written submissions from the Owner. These written submissions were dated 9 June 2015 and were not taken into account in my determination of the two applications.

7. On 11 June 2015, solicitors for the Owner wrote to the Tribunal stating, in part:

> Upon reading the reasons for decision, it does not appear Senior Member Reigler [sic] has taken into account the above-mentioned submissions. We enclose a copy of the correspondence between the parties respective Solicitors whereby the Applicant has granted a short

indulgence to the Respondent to file and serve the written submission by close of business on 9 June 2015.

8. Regrettably, the Tribunal was not advised of any agreement between the parties to extend the date by which the Owner was to file his written submissions. Consequently, I proceeded to determine the applications on the basis that no written submissions had been or were intended to be filed by the Owner and that the Owner was to rely entirely on the oral submissions made by his legal representative on 26 May 2015.

9. On 19 June 2010, solicitors for the Owner wrote to the Tribunal and requested that I re-open the proceeding for the purpose of considering the written submissions belatedly filed by the Owner. Attached to that correspondence was a copy of a letter from the Builder's solicitors which stated, in part:

> 1. Further to our recent discussions regarding your clients further written submissions, we have sought and obtained instructions and our client consents to those being considered by Senior Member Riegler. This correspondence may be forwarded to the Tribunal in relation to that.

10. Although I was not taken to any authorities, I am of the view that the Tribunal has discretion to re-open proceedings in certain circumstances. In *Smith v New South Wales Bar Assn (No 2)*, the High Court of Australia made the following comments in relation to re-opening a proceeding on the basis of fresh evidence:

> It is again necessary to distinguish between the considerations which may bear on a decision to re-open and the processes involved in reconsideration once a case has been re-opened. If an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing. If there was a deliberate decision not to call it, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending on whether the case is simply one in which the hearing is complete, or one in which reasons for judgment have been delivered. It is difficult to see why, in the former situation, the primary consideration should not be that of embarrassment or prejudice to the other side. In the latter situation the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to re-open should be exercised. But those considerations bearing on re-opening are not decisive of the question whether, a matter having been re-opened by reason of error, further evidence can be called.
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> Not every case involving error will invite further evidence: it will depend entirely on the issue that is opened up. If the issue is one that invites further evidence, then, prima facie and subject to the ordinary rules of evidence, that evidence should be allowed. We say prima

> facie because there may be situations in which the particular evidence involved would cause embarrassment or prejudice such that, in the circumstances, it would be unfair to allow it.[1]

11. In the present case, I find that the failure to file written submissions by the due date arose as a result of an oversight on the part of the Owner's legal representatives, in failing to advise the Tribunal that agreement had been reached between the parties to give the Owner an extension of time to file and serve that document.

12. Given the Builder's consent and having regard to ss 97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998*, I consider that it is appropriate that the proceeding be re-opened for the purpose of allowing me to consider the written submissions of the Owner dated 9 June 2015.

Was there a miscalculation?

13. The written submissions of the Owner differ slightly from the oral submissions made on 26 May 2015. Nevertheless, after having considered the written submissions, and for the reasons that follow, I am not persuaded that my orders and *Reasons* dated 22 April 2015 contain an arithmetic miscalculation.

14. In paragraph 2 of the Owner's written submissions dated 9 June 2015, it is submitted that the figure of $1,419,561.56 referred to in paragraph 18 of my *Reasons* dated 22 April 2015, is incorrect because that amount is derived by taking into account assessments by each parties' quantity surveyor of the value of the completed works, rather than only that portion of the building works undertaken by the Builder.

15. I do not accept that proposition. Paragraph 15 of the my *Reasons* dated 22 April 2015 makes it clear that $129,283.60, being the amount that the Owner spent to complete the building works after the Builder left the site, was deducted from what the Tribunal had previously found to be Mr Shah's assessment of the total building costs – in order to arrive at a figure which then only related to the value of the work that the Builder completed ($1,397,550.02).

16. The amount of $1,397,550.02 was then reconciled with the aggregate amount of the Builder's invoices of $1,441,573.12, to arrive at a middle figure of $1,419,561.56, being the amount that I found was the reasonable cost of the Builder carrying out the building work, excluding profit.

17. Contrary to what the Owner submits in paragraph 5 of his written submissions, the figure of $1,441,573.12 represents the aggregate amount of the Builder's invoices. That figure does not include what the Owner spent after the Builder left the building site. Therefore, the

[1] (1992) 176 CLR 256 at 266–267.

assumptions made in paragraphs 2 to 10 of the Owner's written submissions are incorrect as they rely on a false premise that the figures used to calculate the reasonable cost of the Builder carrying out the building work ($1,419,561.56) also include the amount that the Owner spent to complete the building works after the Builder left the site, when in fact, that is not the case.

Costs

18. Having considered the Owner's written submissions on the question of costs, I am not persuaded that my orders and *Reasons* dated 9 June 2015 should be disturbed.

19. In particular, I maintain that it would be fair in the circumstances that the Owner pay the Builder's costs of the remitted proceeding from 27 March 2014 on a *standard basis*, having regard to the offer made by the Builder dated 17 July 2014 and for the reasons set out in paragraphs 24 to 30 on my *Reasons* dated 2015.

SENIOR MEMBER E. RIEGLER