VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D274/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – slip rule – costs.

APPLICANTS	Gilbert Clare t/as Gilron Services, Rhonda Clare t/as Gilron Services
RESPONDENT	Melford Constructions Pty Ltd (ACN 102 491 010)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	1 February 2007
DATE OF ORDER	15 February 2007
CITATION	Clare v Melford Constructions Pty Ltd (Domestic Building) [2007] VCAT 210

ORDER

1 Respondent's application under s119 is dismissed.

2 Applicants' application for costs of the proceeding is dismissed.

3 Order the Respondent to pay the costs of the Applicants in respect of the s119 hearing on 1 February 2007. In default of agreement by 13 March 2007 I refer the assessment of such costs under s111 to the Principal Registrar who shall assess the same according to County Court Scale "D". Allow costs of Counsel's appearance; preparation; affidavit.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr C. King of Counsel
For the Respondent	Mr D. Pumpa of Counsel

REASONS

Introduction

1 On 10 November 2006 I made orders as follows – that the Respondent pay the Applicants the sum of $10,384.46 on the claim and, on the counterclaim, that the Applicants pay the Respondent the sum of $1,143.92. I delivered Reasons for Decisions explaining the basis of my orders. I reserved costs. The hearing took place on 20 September and 31 October 2006.

2 The Respondent now applies for me to correct my orders under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998.

3 The Applicants also apply for costs of the proceeding.

4 Section 119 of the Act is as follows:

> (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.
>
> (2) The correction may be made—
>
> (a) on the Tribunal's own initiative; or
>
> (b) on the application of a party in accordance with the rules.

5 It is argued by the Respondent that the orders I made on 10 November are in error and may be corrected by me under s119. The Applicants oppose this course.

6 It is argued, on the other hand, by the Applicants that I should order costs of the proceeding in their favour having regard to s109 of the Act and to the matters submitted to me. The Respondent opposes this course.

Correction

7 The case being put forward by the Respondent, if I understand it correctly, is that my Reasons do not deal with the issue, and determine it, of what was the adjusted contract sum. In particular, it is alleged I overlooked a credit of $27,826.05. The Respondent argues, I think, I should have determined the adjusted contract sum as $110,000.76. I am not exactly certain, on the basis of the submissions made to me, how that figure is calculated or arrived at. For instance: $83,318.51 and $3,610.51 added together equal $86,929.01 but if I add to that $27,826.05 the figure I arrive at is $114,755.06 and not $110,000.76. Be that as it may, I propose to accept

that the Respondent's alleged adjusted contract price is correctly stated as $110,000.76.

8 The Tribunal is not a court of superior jurisdiction and doctrines applicable to the latter do not necessarily apply to the former. As regards applications to amend orders made, the courts have regard to the importance of the public interest in the finality of litigation. See *Autodesk Inc. v Dyason* (1993) 176 CLR 300 at 302 per Mason C J. As the Chief Justice points out there must be good reason to take the exceptional step of reviewing or rehearing a matter once an order has been made.

9 This is highlighted by s148 of the Act. A party dissatisfied with a decision can appeal to the Supreme Court on a question of law. The Tribunal cannot hear appeals from its own decisions.

10 Parliament has, however, allowed for a limited power of amendment or correction under s119. The matter was put this way by Balmford J in *Niebieski Zamek Pty Ltd v Victorian Civil and Administrative Tribunal* [2001] VSC 423 at [33]: "The power conferred on the Tribunal by section 119 of the VCAT Act is an exception to the principle that a matter once disposed of cannot be reopened, in that it enables, in any of the circumstances set out in that section, the correction of an order …". Her Honour also said: "The words in section 119(1)(b) [which was relied on in this case] are used in their natural and ordinary sense and their interpretation is thus a question of fact".

11 Section 119 is commonly called the "slip" rule dealing with accidental mistakes and as Morris J said in *Mitchell v Corangamite SC* (2004) 16 VPR 300 at 303 the test of whether a mistake or omission is accidental or not is this: "If the matter had been drawn to the tribunal's attention at the time, would the correction [have] been made at once?". It is plain that his Honour is referring to mistakes which must be plain and obvious. That is the purport of the authorities in the area and that, in my view, respectfully, is what his Honour had in mind.

12 I am not satisfied that any occasion has arisen for an exercise of discretion under s119. That is because I am not satisfied of any mistake or error on my part. But I do point out, I had difficulty in understanding quite what was being submitted to me under s119.

13 My decision, and the Reasons I gave for it, responded to the cases advanced by the parties. That includes the cases they advanced in their documentation; on the evidence; and in submissions. I am satisfied, upon analysis, and upon perusal of transcript, that I fully responded to the case advanced by the Respondent. In consequence, in my reasoning, and in my decision, there was no mistake or error on my part in dealing with what was submitted to me on behalf of either of the parties.

14 The crucial issue concerns the sum of $27,826.05. Yet that figure appears in the table set out in paragraph 4 of my Reasons. That table was supplied

to me by the Respondent and I have repeated exactly what I was given. At the bottom of the table is the sum claimed as the "Balance due to Melford", that is, the Respondent, of $1,143.92. That is the exact amount I ordered. And as I go to the Respondent's Counterclaim, the amount claimed is "Damages in the sum of $1,325.63". So the amount I was given in the table, and the amount I ordered, are in the vicinity of the amount claimed as damages in the Counterclaim. Nothing in the prayer for relief in the Counterclaim would alert me to an entitlement to damages in a higher sum. It is true that in the particulars there is set out in the table an item called "Less costs to Melford $27,857.88" but that is not necessarily the same as a "credit" or does not convey the same meaning and in any event that sum is not the same as the sum I am said to have overlooked, although it is in the vicinity of it.

15 But there was nothing in my view in the way in which the case was run which would indicate that the Respondent's claim was, in reality, nearer to $30,000.00. On p.2 of the transcript the Respondent's Counsel, in opening, does not mention a claim for that amount being made. In fact, nowhere in the transcript is any such amount mentioned. Indeed, to the contrary. On three separate occasions I allude to the Respondent claiming about $1,100.00. See transcript pp 95; 99-100; and 101. Yet Counsel for the Respondent does not record any protest. It is true (p78) that Counsel for the Applicant mentions a figure of $27,826.17 which I acknowledge as having seen (which I did) but it was he who was directing submissions to me about the unreliability or inaccuracy of the Respondent's accounting and it occurred in that context. Moreover, it was the Applicants' Counsel who mentioned it and not the Respondent's.

16 It was submitted to me by the Respondent that I failed to determine the adjusted contract sum of $110,000.76 claimed by the Respondent. If I followed out Counsel's opening remarks (transcript p2) I would have to determine that sum (it was submitted) because I could not do so without deciding the scope of works. That is not apparent to me at all. In any event (transcript p91) Counsel for the Respondent says the adjusted contract price is $83,318.51 and he repeats that figure twice more. That happens to be a figure about $27,000.00 less than what is claimed to be the figure now. It is a figure which is in accord with what I understood the Respondent was claiming, and with good reason.

17 I therefore reject a view that the figure of $27,826.05 was before me in a way that called for my determination meaning that I made a mistake or error if I failed to do so. Nor do I believe the Respondent should now be able to maintain it was claiming that figure in view of its Counsel's silence (in effect) on the matter or in view of the relief specifically claimed in the Counterclaim.

18 I am satisfied I applied myself to the matters raised for my consideration and that I responded to the case sought to be advanced by the Respondent.

Analysis of the concept of "adjusted contract sum" does not persuade me otherwise.

19 In any event to go into the matter again, to rework what was the "adjusted contract sum", I consider, goes beyond the range of allowable actions under s119. That would not be a matter of mistake or error or material miscalculation. That would be a matter of re-determining a substantive issue. Yet I am not able to do that, even if minded to do so, and I am not, because of the doctrine of *functus officio*. For, if a matter cannot be resolved under s119 then upon final orders being pronounced the Tribunal is indeed *functus officio*. As Senior Member Young has said: "Once made I cannot reassess my reasoning and resulting determination other than to correct minor slips or omissions". See *Pratley v Racine* [2007] VCAT 159 at [3]. And in my view this is not a matter which can be resolved under s119. It is not plain or obvious to me that there is any mistake or error on my part whatsoever. Nothing emerges "at once" as Morris J mentioned.

20 Therefore, I reject the application to proceed under s119 to correct the orders I made. The same are, in my view, sustainable on the basis of what was argued before me. If the Respondent takes exception, it should appeal if still able to do so. Or, as Counsel for the Applicants intimated, the Respondent should look elsewhere.

21 I should mention I have treated this matter as if r4.17 of the Rules had been complied with.

Costs

22 The Applicants apply for costs under s109 of the Act. In my Reasons for Decision I indicated misgivings about ordering costs in a matter of this nature. I have, however, approached the submissions made to me with an open mind. Nevertheless, having done so, I am not satisfied under s109(2) that it would be fair to depart from the position established in s109(1) – that is, that each party should bear their own costs. Nothing in s109(3) persuades me otherwise. Nor am I satisfied that a correctly framed Calderbank offer (see *Calderbank v Calderbank* [1975] 3 A11 ER 333) was forwarded by the Applicants. I do not believe I should receive any evidence of the various telephonings etc., and I indicated this at the resumption of the case.

23 I am satisfied, however, having regard to s109(3), and under s109(2), that it would be fair to depart from s109(1)) (as was submitted to me) in respect of the costs incurred on 1 February 2007. In my view the Respondent's case for submitting I should act under s119 was exceedingly weak and without tenable basis. I have regard particularly to s109(3)(c). I accept that defending the application was not without its difficulty. I have regard to ss109(3)(d) and (e).

Conclusion

24 I reject the application for correction under s119.

25 I allow the Applicants' costs in respect of 1 February 2007.

26 I otherwise reject the Applicants' application for costs.

SENIOR MEMBER D. CREMEAN