

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP806/2015

CATCHWORDS

Costs; s109 Victorian Civil and Administrative Tribunal Act 1998

APPLICANT	Daniel Alejandro Climent t/as DKC Tile & Stone
RESPONDENT	I 2 Interiors Pty Ltd (ACN 140 787 328)
WHERE HELD	Melbourne
BEFORE	B Thomas Member
HEARING TYPE	Hearing
DATE OF HEARING	25 February 2016
DATE OF ORDER	9 March 2016
CITATION	Climent v I 2 Interiors Pty Ltd (Building and Property) [2016] VCAT 350

ORDERS

- 1 The Respondent shall pay the Applicant's costs of the proceeding to be assessed by the Costs Court on a standard basis under the County Court Scale.
- 2 Under section 115B of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, the Respondent shall reimburse the Applicant the filing fee of \$525.60 paid on the Application.

B Thomas
Member

APPEARANCES:

For the Applicant	In person
For the Respondent	No appearance

REASONS

Nature of Application

- 1 The Applicant commenced this proceeding on 27 May 2015 claiming the sum of \$26,399.00 for various works carried out for the Respondent between 21 November 2014 and 30 January 2015. The proceeding was heard on 23 November 2015 but the Respondent did not appear. The Applicant was successful on his claim.
- 2 The Applicant seeks his costs of the proceeding –
 - (a) Under s109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the Act) ; or alternatively
 - (b) Under ss112, 113 and 114 of the Act.

Brief History of the Proceeding

<i>21 May 2015</i>	Application filed.
<i>23 June 2015</i>	Proceeding listed for mediation on 29 July 2015.
<i>24 July 2015</i>	The Respondent's solicitor requested an adjournment of the Mediation on the basis that the Respondent had not received the Application.
<i>29 July 2015</i>	By consent the Mediation was adjourned to 13 August 2015.
<i>13 August 2015</i>	The representative of the Respondent, Jim Karasividis, was introduced as a director of the Respondent. The Applicant produced an ASIC search of the Respondent showing that Karasividis was not a director. Karasividis therefore had no authority to settle the proceeding on behalf of the Respondent. The Mediation was therefore aborted.
<i>19 August 2015</i>	The Applicant served a settlement offer pursuant to Part 4, Division 8 of the Act in the sum of \$18,000.00 inclusive of interest and costs).
<i>1 September 2015</i>	The proceeding was listed for a Directions Hearing on 24 September 2015.
<i>24 September 2015</i>	The Respondent was ordered to file and serve Points of Defence by 30 September 2015.

<i>5 October 2015</i>	The Respondent's solicitor advised the applicant's solicitors and the Tribunal that it no longer acted for the Respondent.
<i>21 October 2015</i>	At a Non-Compliance Hearing there was no appearance by the Respondent. The Respondent was ordered to file its Points of Defence by 11 November 2015, otherwise the proceeding would be determined in favour of the Applicant.
<i>12 November 2015</i>	The Applicant's solicitors advised the Tribunal that the Respondent had failed to file and serve Points of Defence.
<i>23 November 2015</i>	Pursuant to s78 of the Act the Tribunal determined the proceeding in favour of the Applicant and ordered the Respondent to pay the Applicant the sum of \$26,399.00, interest in the sum of \$1,165.00 and reserved costs.

VCAT's discretion to award costs

3 Section 109 of the Act provides –

Power to award costs

- (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.

4 Section 112 of the Act provides -

Presumption of order for costs if settlement offer is rejected

- (1) This section applies if—
 - (a) a party to a proceeding (other than a proceeding for review of a decision) 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.
- (3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal—
 - (a) must take into account any costs it would have ordered on the date the offer was made; and
 - (b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

5 I am satisfied that the criteria set out in (a), (b) and (c) are enlivened in this proceeding. The Respondent, without any explanation, failed to comply with the Tribunal's Orders of 24 September and 21 October 2015. The Mediation was adjourned because the Respondent claimed not to have received any documentation regarding the Applicant's Application and yet conceded that *the correct registered address was inserted in the application by the Applicant*.

6 Finally, I am satisfied that the Respondent did not demonstrate any tenable basis to defend the proceeding. At no stage did the Respondent give any indication of what its defence to the Applicant's claim was, let alone whether that defence had any merit.

- 7 Therefore I consider it is fair to award costs to Mr Climent under s109 of the Act.
- 8 As the order obtained by the Applicant on 23 November 2015 is more favourable than his offer made on 19 August 2015, he is entitled to the same order for costs as under s109 of the Act.

The quantum of costs to be awarded to the Applicant

- 9 The Applicant seeks an order for costs of \$7,343.48 made up as follows –

- Solicitors fees \$6,343.48
- Counsel’s fees (Mediation) \$1,000.00

- 10 I consider that costs to be awarded to the Applicant should be assessed on the County Court scale.

B Thomas
Member