VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1251/2017

CATCHWORDS

Costs application: s109 of the *Victorian Civil and Administrative Tribunal Act 1998* considered; s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* considered in relation to reimbursement of fees.

APPLICANT	Double M Constructions Pty Ltd (ACN :085 221 76) t/as Double M Unit Trust
RESPONDENT	Timetrex Pty Ltd (ACN: 006 586 223)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	In Chambers
DATE OF RECEIPT OF APPLICANT'S SUBMISSIONS	15 Apil and 2 May 2019
DATE OF RECEIPT OF RESPONDENT'S SUBMISSIONS	16 May 2019
DATE OF ORDER	1 August 2019
CITATION	Double M Constructions Pty Ltd v Timetrex Pty Ltd (Building and Property) [2019] VCAT 1148

ORDERS

1. The respondent must pay to the applicant damages in the nature of interest in the sum of $1,834.63.

2. The respondent must pay to the applicant its costs of the proceeding on the standard basis, such costs, if not agreed, to be assessed by the Costs Court on the County Court Scale.

3. Pursuant to section 115B of the *Victorian Civil and Administrative Tribunal Act 1998*, the respondent must reimburse to the applicant the total filing fees paid by the applicant of $298.60.

MEMBER C. EDQUIST

REASONS

INTRODUCTION

1. This decision is concerned with an application for interest, costs and reimbursement of fees made by the applicant. The applicant, Double M Constructions Pty Ltd ("**the Carpenter**"), is a company operated by a carpenter named Mark Micklethwait. The respondent, Timetrex Pty Ltd ("**the Builder**") is a building company of which the principal is Mario Mazza. The proceeding arose out of a contract made between the Carpenter and the Builder for the performance of carpentry work at a project in Pridham Street, Kensington. The proceeding came on for hearing on 11 and 12 September 2018. After this the parties exchanged submissions.

2. On 12 February 2019 I made orders ("**the Orders**") with reasons ("**the Reasons**") including an order that the Builder must pay the Carpenter the sum of $13,610.54. The Carpenter had made submissions regarding interest, and the Builder was in the Orders given an opportunity to file response submissions concerning interest within 30 days. Liberty was reserved to Carpenter to apply for costs and for reimbursement of fees.

THE CLAIM FOR INTEREST

3 In its written submissions, the Carpenter highlighted that the Tribunal has jurisdiction under ss 53(2)(b)(ii) to award damages in the nature of interest. I note that under ss 53(3) the Tribunal, when awarding damages in the nature of interest, may base the amount awarded on the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983*, or on any lesser rate it thinks appropriate.

4 The Carpenter submitted that it is appropriate to apply the rate set under the *Penalty Interest Rates Act 1983.* I accept this contention. This is the default position under the *Domestic Building Contracts Act 1995,* and the Builder made no submission to the effect that the default position should not apply.

5 The Carpenter also submitted that interest should run from 21 September 2017, which it says is the date the proceeding was commenced, to the date of the decision. I accept the submission in principle, but note that the Tribunal received the filing fee on 9 October 2017, and I will adopt this as the starting date for the running of interest.

6 The Carpenter, as noted, received an award of $13,610.54. The relevant calculation is that for the 492 days between 9 October 2017 and 12 February 2019, interest 10% per annum equates to $3.7289 per day. The total interested calculates comes to $1,834.63. I will award this sum to the Carpenter.

THE CLAIMS FOR COSTS MADE BY THE CARPENTER

7 The Carpenter makes two separate claims for costs. It made an offer which it says enlivened s 112 of the *Victorian Civil and Administrative Tribunal Act 1998* ("**the VCAT Act**") on 28 May 2018. It seeks its costs up to that

date on the standard basis, but seeks its costs from that date on an indemnity basis.

THE TRIBUNAL'S POWER TO AWARD COSTS

8 Before looking at the applicant's submissions, it is relevant to note that Tribunal's power to award costs is governed by s 109 of the VCAT Act Because of its centrality to this decision, the relevant parts are now set out:

> (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.

9 Guidance as to how to approach s 109 was provided by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1], where his honour said:

> 18 It can be seen that the general rule to apply in all proceedings is that "each party is to bear their own costs in the proceeding." Despite the general rule, the Tribunal may at any time order a party to pay costs to another party. The general rule expressed in s.109(1) must yield to a finding by the Tribunal pursuant to s.109(3). However, the Tribunal may not make an order unless it is "satisfied that it is fair to do so", and in arriving at that decision the Tribunal is bound to have regard to a series of matters set out in s.109(3). Despite the fact that the various matters are listed, s.109(3)(e) operates to extend the relevant matters if the Tribunal considers that some other matter is relevant. That is, the listed matters are not exhaustive.
>
> 19 It follows that the general rule applies and the Tribunal may only make an

[1] [2007] VSC 117

> order for costs if it is satisfied that it is fair to do so. That finding is an essential prerequisite to making an order for costs.
>
> 20 In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows –
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may 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 paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

The Carpenter's submissions

10 The Carpenter contends, firstly, that it would be fair for the Builder to pay its costs on the basis of the relative strengths of the claims made by each of the parties. It says that the Builder "ultimately did not present any reliable evidence to support its defence or its counterclaim, and the claim for unpaid invoices pressed by Double M was substantially successful by reason of the evidence supporting it". In this way, it says ss 109(3)(c) is enlivened.

11 Secondly, it says that the proceeding was, by nature, one which justifies an award of costs. Specifically, it contends:

> The Tribunal ought properly have regard to the fact that, whilst of course there is no presumption that costs will be ordered, costs are commonly ordered in the Building and Property List.

The Builder's submissions

12 The Builder's response to the Carpenter's contention about the operation of ss 109(3)(c) is that its defence was genuine. It rejects the Carpenter's contention about the nature and complexity of the proceeding, submitting, at [7(a)], that:

> In accordance with section 109(1) the Tribunal should find that each party is to bear their own costs in the proceeding on the basis the dispute is a simple dispute between a builder and sub-contractor; it is a small claim, and there is no reason to depart from this principle.

Discussion

13 The Carpenter bears the burden of displacing the default position arising under ss 109(1) that each party is to bear its own costs. The Carpenter's submissions about costs were sparse, and, regrettably in my view, the Carpenter made no reference to the Reasons in support of its arguments. Accordingly, it is necessary for me to look at the Reasons to see whether

the Carpenter's submission about the relative strengths of the respective claims is justified.

Relative strengths

14 I note from a review of the Reasons that the key issue was whether the contract was a lump sum contract, or a rates contract. Ultimately, I found for the Carpenter, because the documentary evidence supported its case rather than that of the Builder. The second major issue in the case related to the hours worked by Mr Micklethwait and his employees. I accepted their evidence. The third phase of the case concerned the counterclaim. The first limb of the counterclaim related to defective work. There were 13 different defects complained of. Four of these (Items 10, 11, 12 and 13) were completion items, which were not claimable against the Carpenter as the contract was a rates contract. After carefully weighing the evidence, I found against the Builder in relation to the other items. The fourth part of the case concerned the builder's claim for liquidated damages of $5,000. This claim was closely analysed, and in the absence of any term regarding liquidated damages in the contract, either express or implied, this claim failed.

15 The Reasons reveal that, on the basis of the documentary evidence, it was inevitable the Builder would lose the contest as to whether the contract was a lump sum contract or a rates contract. The Builder was not in a position to challenge the hours contended for by the Carpenter. For these two reasons, it can be said that the Carpenter's claim was strong and the Builder's defences to that claim were weak.

16 I turn to the counterclaim. I do not regard the counterclaim as being completely without merit. I acknowledge that I found against the Builder in respect of each alleged defect, but this does not necessarily mean that the Builder's counterclaim for defects was so hopeless that it was improper to run it. In respect of each defect (other than the completion items) the evidence had to be carefully weighed.

17 The second limb of the counterclaim related to liquidated damages. It stands in different position to the counterclaim for defects. On the bases articulated in the Reasons at [112-125], the claim for liquidated damages was, and I use the word deliberately, hopeless.

18 Notwithstanding my view concerning the weakness of the claim for liquidated damages, I consider that the Builder was entitled to run its counterclaim concerning defects. For this reason, I do not think this is a case in which it would be fair, merely because of the relative strengths of the claims of the parties, to order that the Builder should pay the costs of the Carpenter.

Nature and complexity of the proceeding

19 I note at the outset that I do not accept the Carpenter's submission that because "costs are commonly ordered in the Building and Property List" I should award costs in this particular case. As noted by Ormiston JA in

Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd[2] there should be no presumption that "costs ought to be paid in favour of claimants in domestic building disputes" brought in the Tribunal. However, as Ormiston JA went on to acknowledge at [35], it does not follow that particular factors in building disputes, cannot activate the Tribunal's power to award costs under s.109. The key point is that every case has to be approached on its own merits.

20 With this in mind, I turn to the Builder's specific contentions relating to the nature and complexity of the proceeding. I reject the Builder's argument that the dispute was a simple one. A review of the Reasons, which run for 24 pages, makes this abundantly clear. As noted, it was necessary to resolve an issue about the nature of the contract, to assess the hours worked by the Carpenter's director and employees, to review 13 defects, and to consider a monetarily significant claim for liquidated damages. Far from being simple, the case is factually complex, and also raised some legal issues.

21 I note that each party saw fit to brief Counsel for the hearing. This is not itself a reason to award legal costs under s 109, but it is a factor which reinforces the view that this was a complex dispute.

22 I also reject the Builder's contention that this was a "small" claim. The Carpenter was seeking $14,227.29 at the outset of the hearing for unpaid invoices. Against this, a review of the Reasons indicates the Builder was seeking damages in respect of defects totalling $7,920.

23 In addition, the Builder was seeking $5,000 for liquidated damages. The counterclaim, accordingly, stood at $12,920.

24 As the claims of the Carpenter and the Builder were diametrically opposed, the parties were actually more than $27,000 apart.

25 $27,000, of course, is not a huge figure. However, as the total dispute had four elements, I find that the claim by its nature and complexity engages the operation of ss 109(3)(d). I further find that because of this, it is fair to order that the Builder should pay the Carpenter's costs of the whole proceeding on the standard basis.

The Carpenter's claim for costs assessed on an indemnity basis

26 The Carpenter contends that it served a valid offer for the purposes of s 112 of the VCAT Act, and that the effect of the offer is that it is entitled to recover its costs after the date of the offer on an indemnity basis.

27 The offer was dated 28 May 2018. It was made by one party to another in a civil proceeding, which satisfies ss 112(1)(a). It was expressed to be made in accordance with s 112 of the VCAT Act, alternatively as an offer made for the purposes of *Calderbank v Calderbank*[3] and other cases based on the Calderbank principles. The Carpenter offered to accept the sum of $12,000 on the basis that each party would bear its own costs to date. If the Builder

[2] (2005) 13 VR 483; [2005] VSCA 165 at [34].
[3] [1975] 1 All ER 333.

had accepted the offer, it would have been in a better position that it now finds itself under the Orders made by the Tribunal. Accordingly, ss 112(1)(d) is engaged[4]. The offer was expressed to be "without prejudice save as to costs" for the purposes of ss 113(1), and required payment to be made within 30 days of written acceptance, which satisfies ss 113(4). Finally, the offer was expressed to be open for a period of 14 days, which is the minimum period contemplated by ss 114(2). I accordingly find that the offer meets each of the requirements for an effective offer under s 112.

The Carpenter's contention

28 The Carpenter contends that by reason of ss 112(2), it has a prima facie entitlement to order that the Builder pays all its costs after the date of the offer. I have some sympathy for the Carpenter's position, having regard to the wording of subsection 112(2), which provides:

> 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.

29 Despite the reference in ss 112(2) to "all costs", the Court of Appeal has indicated in *Velardo v Anonov* [5]:

> Section 112(2) creates, on the other hand, a prima facie entitlement to payment of 'all costs' in favour of a successful offeror. Ordinarily, it appears, costs would be assessed in such a case on a party and party basis - although the Tribunal would be empowered to allow costs on a more favourable basis.

30 *Velardo v Anonov* was determined before 1 April 2013 when Rule 63.28 of the *Supreme Court (General Civil Procedure) Rules 2005* was amended with the effect that costs in a proceeding are to be taxed on:

> (a) the standard basis;
>
> (b) the indemnity basis; or
>
> (c) such other basis as the Court may direct.

31 It is for this reason, that since 1 April 2013, the Tribunal has taken the view that even where there is an effective offer for the purposes of s 112, unless circumstances exist which would justify the making of an order on an indemnity basis, the order for costs made should be on the standard basis.

Principles relevant to an award of costs on an indemnity basis

32 The Carpenter accepted, in its written submissions at [6], that extraordinary circumstances are required to justify an order for costs on an indemnity basis. However, no authority was referred to. The Builder, on the other hand, referred to a number of authorities at [7(b)]. For present purposes it is

[4] Sub-section 112(1)(d) requires the Tribunal to form an opinion that the orders made are "not more favourable" to the recipient and the offer.
[5] (2010) 24 VR 240; [2010] VSC 838, at [47].

sufficient to observe that *In 24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[6] the Court of Appeal, at [9], adopted with approval the judgement of Harper J in *Ugly Tribe Co Pty Ltd v Sikola*[7] in which His Honour 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.

33 The special circumstances in the present case upon which the Carpenter relies in contending for an order for costs on an indemnity basis are:

(a) the Builder's defence to its claim was not based on any reliable evidence, but on an amorphous series of claims of defects and on serious assertions that the Carpenter had premised it claim on fraudulent falsification of timesheets;

(b) the Builder did nothing to reduce costs; and

(c) the Builder increased costs and prolonged the hearing by:

(i) putting forward fanciful claims;
(ii) presenting its case in an opaque fashion;
(iii) conducting lengthy cross-examination;
(iv) presenting unlabelled and unidentified photographs; and
(v) making claims without a proper basis, for example the claim for liquidated damages.

34 When I apply the criteria identified by Harper J in *Ugly Tribe* to these contentions, I observe that fraud is not alleged against the Builder, and neither is contempt of the Tribunal. However, some of the other characteristics of the proceeding which fall within those criteria are arguably present. For instance, I consider the Builder did not run its claim

[6] [2015] VSCA 216
[7] [2001] VSC 189. at [7]–[8].

particularly efficiently. Moreover, I have already indicated that the Builder's claim for liquidated damages was hopeless.

35 However, I refer to the detailed comments already made about the manner in which the Builder defended the claim. It was entitled to test Mr Micklethwait's evidence by robust cross-examination. It was also entitled to press its counterclaim for defects. For this reason, it cannot be said, in my opinion, that the Builder brought its claim for an ulterior purpose, or that it defended the Carpenter's claim improperly. In all the circumstances, I find this is *not* a case which warrants an award of indemnity costs from the date of the offer.

REIMBURSEMENT OF FEES

36 When it commenced the proceeding, the Carpenter paid a filing fee of $298.60. The Carpenter seeks an order for reimbursement of that fee under s 115B(1) of the VCAT Act. Pursuant to ss 115B(3), in exercising its discretion regarding reimbursement of fees, the Tribunal must in a proceeding such as this, have regard to—

(a) the nature of, and issues involved in, the proceeding; and

(b) the conduct of the parties (whether occurring before or during the proceeding), including whether a party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse; and

(c) the result of the proceeding, if it has been reached.

37 I have discussed above the nature and complexity of the proceeding. The parties were at its outset $27,000 apart, and complex issues had to be determined. The Carpenter has been vindicated on its claim for hours worked under a rates contract, and has escaped liability entirely in respect of the Builder's claim for defects, *and* in respect of the Builder's hopeless claim for liquidated damages. In short, the hearing resulted in a resounding victory for the Carpenter. In these circumstances I have no hesitation in ordering that the Builder must reimburse to the Carpenter the filing fee it paid of $298.60.

MEMBER C EDQUIST