VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP350/2017

CATCHWORDS

Claim for interest and costs – liability of owner-builder for interest – consideration of s.137B and s.137C of the *Building Act* 1993 and s.53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995 – liability for costs under s.109 *Victorian Civil & Administrative Tribunal Act* 1998

APPLICANT	Ms Kylie Douglas
FIRST RESPONDENT	Mr David John Kelso
SECOND RESPONDENT	Ms Tashia Dixon
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	22 May 2018
DATE OF ORDER	31 May 2018
CITATION	Douglas v Kelso (Building and Property) [2018] VCAT 680

ORDERS

1. The respondents must pay to the applicant damages by way of interest in the sum of $1733.90.

2. Having regard to section 115B(1) of the *Victorian Civil And Administrative Tribunal Act* 1998 and being satisfied that the applicant has substantially succeeded in her claim, the Tribunal orders the respondents to reimburse the applicant for the filing fee she paid, in the amount of $209.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Ms J. Johnston, solicitor
For the Respondents	Ms T. Dixon

REASONS

Background

1. This is an application brought by the applicant for the costs of this proceeding and also for interest.

2. The dispute concerned a claim for compensation for the cost of rectifying water damage and consequential repairs which occurred to the applicant's apartment. The matter was heard on 26 April 2018, and final orders were made on 2 May 2018. The respondent was ordered to pay the applicant the sum of $16,549.74 and the second respondent's counterclaim was dismissed[1].

3. This application for costs and interest came before me for hearing on 22 May 2018. Ms. Johnston, solicitor, appeared for the applicant and the second respondent appeared in person. There was no appearance by the first respondent. After hearing submissions from the parties, I reserved my decision.

4. Following the hearing, the applicant's solicitor sent the Tribunal a letter containing a further short submission in respect of the claim for interest. The second respondent sent an email responding to the applicant's solicitor's letter. I read and considered both those documents prior to making this decision.

5. For the reasons set out below, I allow the application for interest but the application for costs is dismissed.

The application for interest

6. This claim was made in respect of defective building work carried out by the respondents. I found that the respondents acted as an "owner-builder" within the meaning of sections 137B and 137C of the *Building Act* 1993 ("the Building Act"), which required the respondents to jointly provide warranties to the applicant as an implied term of the contract of sale.

7. The order made by the Tribunal that the respondents are liable to the applicant was made as a consequence of the finding that they were in breach of these warranties. That is, the claim was made and determined under the *Building Act*.

8. It has been noted many times before that the Tribunal is a creature of statute and has no inherent jurisdiction[2] and can only exercise powers conferred on it under the VCAT Act or in one of the enabling enactments.

[1] Douglas v Kelso [2018] VCAT 680
[2] Pizza Fellas Pty Ltd v Eat Now Services Pty Ltd [2018] VCAT 507

9. The Building Act is one of the enabling enactments, but there is no provision in that Act which gives the Tribunal jurisdiction to make an order for interest. Similarly, there is no provision in the VCAT Act that allows an order for interest to be made.

10. The applicant's solicitor submitted that as the works carried out by the respondents were domestic building work, the Tribunal could make an order under section 53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995 ("the DBC Act"), which provides that the Tribunal may "order the payment of a sum of money by way of damages (including… damages in the nature of interest)".

11. This question was considered by Senior Member Walker in *Bestawaros v Sorace*[3] where it was submitted that because the claim in that case had been brought for a breach of the owner-builder warranties implied by the Building Act, and no reliance had been placed upon the warranties implied by sections 8 and 9 of the DBC Act, the Tribunal does not have jurisdiction to deal with the claim.

12. Senior Member Walker held as follows at [16] – [20]:

> 16. I do not accept that submission.
>
> 17. By s.53 of the [Domestic Building Contracts Act 1995], the Tribunal may make any order it considers fair to resolve a "domestic building dispute". A domestic building dispute is defined by s.54 to be a dispute or claim arising between various persons, including a building owner and a builder, in relation to the carrying out of domestic building work…
>
> 18. Section 3 (1) defines the word "builder" as including a person who, or a partnership which, carries out domestic building work, manages or arranges the carrying out of domestic building work or intends to do any of those things.
>
> 19. It is not disputed that the respondents constructed the house or that the owners are the present owners of it and are entitled to the benefits of the warranties set out in, or implied into, the contract. [The respondent] submitted that an owner-builder is a "separate species" from that of a builder but however one might describe them, the respondents clearly fall within the definition of "builder" set out in the Act.

[3] [2016] VCAT 1005

> 20. It does not make any difference whether the cause of action is pursuant to a domestic building contract or a contract for the sale of land. The dispute is nonetheless one between a builder and a subsequent owner of a house to whom the builder has warranted the quality of the work."

13. Accordingly the Tribunal has jurisdiction to make an order for interest pursuant to section 53(2)(b)(ii) of the DBC Act. This section provides as follows:

> 53. Settlement of building disputes
>
> (1) the Tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) without limiting this power, the Tribunal may do one or more of the following –
>
> … (b) order the payment of a sum of money –
>
> (i) found to be owing by one party to another party;
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest);
>
> … (c) 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 section 2 of the Penalty Interest Rates Act 1983 or on any lesser rate it thinks appropriate."

14. Senior Member Walker considered the circumstances in which interest may be awarded pursuant to this section in *Quinlan v Sinclair*[4] at [10] - :

> 10. … There is no guidance in the Act as to the circumstances in which such damages should be awarded, apart from s.53(1) which indicates that it must be "fair" to do so.
>
> 11. It cannot be "fair" to make any order that is not in accordance with the evidence and established legal principles. The tribunal cannot make an award of damages in the nature of interest simply because the section confers the power. Before awarding damages in the nature of interest the Tribunal should satisfy itself that it is appropriate as a matter of law to do so in order to compensate the other party, wholly or partly, for loss and damage suffered as a result of the offending party's breach of the contract. Damages in the nature of interest are damages suffered because the successful party has been deprived of the use of the money but whether an award of such damages is "fair" must be determined in each case.

[4] [2006] VCAT 1063

15. In *Khan v Kimitsis trading as Quest Building*[5] he held as follows:

> Interest is awarded to compensate the aggrieved party for having been deprived of the amount awarded from the date that it should have been paid until the date of judgement.

16. In the present case, the applicant is out of pocket for the following amounts:

    a. $13,607.24 paid to Nazcorp Pty Ltd to repair the balcony; and

    b. $75 and $1867.50 in relation to the bed.

17. I will allow interest on these amounts at the rate prescribed by the *Penalty Interest Rates Act* 1983, currently 10% p.a., from the date of commencing the proceeding (22 March 2017) to the date of judgement (2 May 2018), being 407 days:

    $15,549.74 x 407 x 10%p.a. = $1733.90

18. The applicant is not out of pocket for her other claims, as she has not yet paid these out, so no interest will be awarded in respect of these items.

The application for costs

19. The applicant applies for her costs of the proceeding, and relies on section 109(3)(c) of the VCAT Act. The second respondent opposes the application, saying there is no reason to depart from the presumption in section 109 (1) that each party should bear their own costs.

20. Section 109 says in part:

> s.109:
>
> (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);

[5] [2009] VCAT 912

(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.

21. As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should 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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

22. In relying on subsection 109(3)(c), the applicant refers to the following factors:

a. her claim was strong and the defence that the respondents were not owner-builders was weak;

b. the applicant was substantially successful in her claim;

c. the counterclaim had no basis in law and was untenable;

d. the second respondent had been advised by the Tribunal at a directions hearing on 21 December 2017 that her defence was not strong and she should seek legal advice.

23. Further, the applicant says that there were a number of directions hearings and adjournments of the hearing, but makes no claim for any costs in respect of those dates, apart from the directions hearing on 21 December 2017. She says that directions hearing arose as a result of a

misunderstanding by the Tribunal and the costs of that directions hearing were expressly reserved.

24. She seeks the amount of costs be fixed at $5412, being costs on the Magistrates Court Scale D.

25. The second respondent opposes the application for costs and says that a proper consideration of the matters under section 109(3)(c) leads to the conclusion that her defence was not untenable and had some strength relative to the claim. She says:

    a. she had obtained legal advice that she was not an owner-builder;

    b. the applicant amended her claim after receiving correspondence from the respondent's then solicitor to drop her claim under the DBC Act and bring the claim under the Building Act;

    c. the matter has been adjourned several times through no fault of the respondents;

    d. the second respondent has suffered personal expense and time to attend each of the scheduled hearings;

    e. she engaged and paid for an expert and the Tribunal accepted his expertise and that his opinions were plausible;

    f. the case was decided largely on the fact there was no membrane present and the second respondent was at a disadvantage because she had not been invited to view the state of the works at the time the applicant had the balcony rectified;

    g. all the respondents' records are held by the first respondent and he failed to participate in the proceeding, which meant that the second respondent was unable to prove that a registered builder had been engaged or that a waterproofing membrane had in fact been installed;

    h. the applicant has received a windfall by being compensated for a new bed which she purchased months after the damage allegedly occurred; and

    i. a party should be entitled to come to the Tribunal without representation and it would not be fair to penalise the respondent by a departure from subsection 109(1).

26. Weighing up the matters put by each party, I am not satisfied that it is fair to exercise the Tribunal's discretion under s109(2) and make an order for costs.

27. I do not accept that the respondents' defence was so hopeless as to be untenable:

    a. Up until the hearing, the allegation made by the applicant's expert (in his written report) was that there was "inadequate membrane". It was only at the hearing that he gave evidence for the first time that there was no membrane at all.

    b. The respondents had written correspondence at the time of the building works which stated that a waterproof membrane had been installed and relied on that in their defence.

    c. Most significantly, the second respondent relied on the expert opinion of a consultant whose expertise the Tribunal found to be credible. His opinion was not accepted ultimately because the respondents were unable to prove that a membrane had been laid. That was a question of fact which was only determined at the hearing.

    d. As for the legal advice that she was not an owner-builder, I note the response filed by the first respondent which was to the effect that he had engaged a registered builder to carry out the works. Although ultimately that could not be proven, this does not mean that the defence was untenable or significantly weaker than the claims brought by the applicant.

28. Accordingly the applicant's claim for costs is dismissed.

Finding regarding reimbursement of filing fee

29. As the applicant has been substantially successful in her claim, she is entitled under s 115B of the *Victorian Civil and Administrative Tribunal Act* 1998 to an order that she be reimbursed by the respondents the filing fee she paid, in the sum of $209.

SENIOR MEMBER S. KIRTON