VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D1088/2011

BUILDING AND PROPERTY LIST

CATCHWORDS

Costs application. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998.

FIRST APPLICANT BY CROSS-CLAIM	Desmond Thomas Fraser
SECOND APPLICANT BY CROSS-CLAIM	Maureen Fraser
FIRST RESPONDENT BY CROSS-CLAIM	Mr Guntram Sperling
SECOND RESPONDENT BY CROSS-CLAIM	Dr Heidi Kastner
BEFORE:	Senior Member M. Farrelly
WHERE HELD:	Melbourne
HEARING TYPE:	Costs Hearing
DATE OF HEARING:	20 July 2018
DATE OF ORDER:	23 July 2018
CITATION:	Fraser v Sperling (Building and Property) [2018] VCAT 1144

ORDER

The first and second respondents by cross-claim must pay the costs of the proceeding of the first and second applicants by cross-claim, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the First and Second Applicants by Cross-claim:	No appearance
For the First and Second Respondents by Cross-claim:	No appearance

REASONS

1 This proceeding has a long history.

Brief background

2 A number of claims arose from a failed building development project at Dinner Plain in the Victorian snowfields, including the claims brought by the first and second applicants by cross-claim, Mr and Mrs Fraser ("**the applicants**") against the first and second respondent by cross-claim, Mr Sperling and Dr Kastner ("**the respondents**").

3 In 2009, the applicants purchased a block of land at Dinner Plain, and in late 2010 the construction of two homes on the land commenced. The respondents, who together traded as "the Alpine woodpecker", were one of two named builders in the relevant building contract, such contract having been entered on behalf of the applicants by a third party agent.

4 Finance for the land purchase and the construction project was obtained from the National Australia Bank ("**NAB**"). The loans were secured by mortgages over the Dinner Plain property and the applicants' residential home in Corowa. In August 2011, at which time the construction of the two homes was nearing completion, the building works stopped. In 2013, by which time no further building works had been carried out and the applicants had fallen well behind in their loan repayments, the NAB exercised its right as mortgagee to sell the two incomplete homes at Dinner Plain together with the applicants' residential home in Corowa.

5 In a proceeding involving a number of claims between various parties involved in the development project, the applicants brought a claim against the respondents for substantial alleged loss and damage, including:

a) lost profit the applicants say they would have made on the sale of the two Dinner Plain homes had they been completed; and

b) the lost value of the residential home in Corowa which was sold by the NAB; and

c) the residual debt to the NAB which exceeded $500,000 in June 2013 and continued to accrue

6 The respondents denied liability saying that their role in the development project was limited to the provision of supervision services for a modest fee.

7 After a six-day hearing in September 2014, I handed down my decision on 16 October 2014 whereby I dismissed the applicants' claim.

8 The applicants appealed the decision. The initial appeal was unsuccessful in the Supreme Court, however the applicants' subsequent appeal to the Court of Appeal was allowed. The matter was remitted to the Tribunal for further

hearing and determination in accordance with the Court of Appeal's reasons.

9 At a directions hearing before me on 5 June 2017, the parties agreed to the further hearing being conducted on the basis of submissions, including written submissions to be filed and served ahead of the further hearing, with reference to transcript from the first hearing.

10 The further hearing was conducted before me for one day on 12 October 2017. The applicants' claimed loss and damage, at the time of the further hearing, exceeded $1,200,000. I handed down my decision on 16 November 2017. Although I found in favour of the applicants, I found also that the bulk of damages claimed by them were not recoverable. I assessed the applicants' damages as $55,931, and I ordered the respondents to pay that sum. I reserved costs with liberty to apply.

11 The applicants now apply for their costs of the proceeding.

COSTS UNDER THE VCAT ACT

12 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("**the Act**") provides that each party is to bear its own costs in the proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, order that a party pay all or a specified part of the costs of another party. The relevant provisions of s109 are:

> (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.

13 Section 112 of the Act makes special provision in respect of the making of a cost order in circumstances where a party has rejected a settlement offer made by another party:

112 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.

14 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*[1] Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s109 of the Act:

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;

[1] [2007] VSC 117 at [20]

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 s109(3).

Level of costs

15 Where the Tribunal is minded to make an order for costs, the Tribunal will often identify the basis and scale upon which the sum of costs is to be assessed or "taxed" in the event the parties are unable to agree on the sum of costs.

16 As to the *scale* of costs, the Tribunal will usually identify a scale operative within the Magistrates Court, the County Court or the Supreme Court. If the Tribunal does not nominate any particular scale, the applicable scale will, by virtue of rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, be the County Court scale.

17 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher "indemnity" basis generally includes all costs *actually* incurred save in so far as they are of an unreasonable amount or have been unreasonably incurred.

18 As I have noted in the past[2], in my view indemnity costs may be ordered only in exceptional or extreme cases such as where the conduct of a party is vexatious or particularly obstructive or where a party's case is hopeless or fanciful and with no real prospect of success or where a claim is brought for an ulterior purpose.

The applicants' claim for costs.

19 The respondents did not appear at the cost hearing before me, and no prior submissions were received from them.

20 The applicants have been represented by a lawyer throughout the course of the proceeding. Although there was no appearance on behalf of the applicants at the cost hearing, the applicant's lawyer had sent in prior written submissions with a note to the effect that he was unable to attend the costs hearing and that the applicants sought to rely on the written submissions.

21 The submissions, very brief, are as follows:

i This proceeding was complicated vexed and required significant cross examination and legal analysis. It certainly warranted legal representation.

ii The proceeding had a largely commercial character.

[2] Taylor v Trentwood Homes Pty Ltd [2012] VCAT 1125 at para 34

iii The applicants presently are hugely out-of-pocket in terms of legal costs and have thereby been denied any remedy.

iv Due to the above nature of the proceeding and the fact the applicants were successful in the proceeding it would be fair if they were granted an order for costs pursuant to section 109(3)(d) and section 109(3)(e) [of the Act].

22 It not clear what is meant by "*largely commercial character*". It is apparent, from the evidence at the hearing, that the applicants possessed little commercial experience themselves. They entered the construction project on the advice of Mrs Fraser's son, Mr Atwell, who was a real estate agent at the time, and they relied almost entirely on Mr Atwell to manage the construction project on their behalf. As set out in my previous decision of 16 October 2014, Mr Atwell, through his corporate vehicle, was involved in a similar construction project involving similar parties who also fell into dispute. To the extent these factors give a "commercial character" to the proceeding, I consider it is of little relevance to the issue before me, namely whether I consider it fair to depart from the prima facie rule on costs and make an order of costs in favour of the applicants.

23 In my view, the fact that the applicants are "*hugely out-of-pocket in terms of legal costs*" is not, of itself, sufficient reason to depart from the prima facie rule on costs. All litigants who engage lawyers in lengthy proceedings in this Tribunal will be significantly out-of-pocket in terms of legal costs, and success in a proceeding brings no guarantee of a cost order. Litigants' prospects of a favourable cost order might be considerably improved by the use of prudent settlement offers capable of attracting the operation of section 112 of the Act. In this case, there is no submission as to any settlement offers attracting the operation of section 112 of the Act.

24 The applicants' submissions reference s109(3)(e) of the Act, which provides that the Tribunal may consider "*any other matter the Tribunal considers relevant*". Other than the matters I have discussed above, the applicants present no "*other matters*" that might be considered relevant.

25 That leaves s109(3)(d), which I consider to be the applicants' strongest submission. That is, that it would be fair, having regard to the nature and complexity of the proceeding, to depart from the prima facie rule and make an order of costs in favour of the applicants.

26 The proceeding certainly involved complex matters of fact and law including, but not limited to:

a) the nature of the arrangements or agreements between the respondents and the two other corporate builders involved in the development project;

b) the identity of all parties to a number of building contracts, including the role of Mr Atwell and his corporate vehicle acting as agent for the applicants;

c) the nature and effect of the agreement between the applicants, the respondents and the second builder (Fingal Holdings Pty Ltd) in April 2011, after the first builder had abandoned works;

d) the facts and circumstances leading to the abandonment of the project by the second builder;

e) the role of the respondents throughout, and analysis of their contractual obligations;

f) assessment of the applicants' loss and damage, having regard to legal principles as to causation.

27 In my view, the nature and complexity of the issues warranted the engagement of experienced lawyers throughout the course of the proceeding. I note that in the early stages of the proceeding, back in 2013, the respondents were represented by experienced Counsel. They became self-represented in around mid-2014 and remained self-represented thereafter.

28 In my view, the nature and complexity of the proceeding is a significant factor weighing in favour of making a cost order in favour of the applicants.

29 For completeness, I comment briefly on s109(3)(c) of the Act which provides a further matter for consideration, namely the relative strengths of the claims of each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.

30 The fact that the applicants succeeded on their claim, albeit to a limited extent having regard to the quantum of damages awarded compared to the much larger quantum of damages claimed, is testament to the fact that the applicant's claim was stronger than the claim (the defence) of the respondents. That is not to say, however, that the respondents' defence had no tenable basis in fact or law. The facts were complex, as was the legal analysis of the facts. The complexity is perhaps well indicated by the fact that there was appeal, first to the Supreme Court and subsequently to the Court of Appeal, before the matter was remitted for further hearing to the Tribunal.

31 In my view, it cannot be said that the respondents' defence to the claims brought against them was devoid of merit or destined to fail.

CONCLUSION

32 After consideration of the matters discussed above, I am satisfied that, by reason of the nature and complexity of the proceeding, it is fair to depart from the prima facie rule on costs and make an award of costs in favour of the applicants.

33 The applicants make no submission as to the level of costs. I consider the appropriate level to be the standard basis pursuant to the County Court scale.

34 Accordingly, I will order that the applicants pay the respondents cost of the proceeding, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

SENIOR MEMBER M. FARRELLY