VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D979/2013

CATCHWORDS

Costs and interest hearing. Costs awarded pursuant to section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998. Interest awarded pursuant to section 53 of the *Domestic Building Contracts Act* 1995.

APPLICANTS	Heski Carpenters Pty Ltd and Mr Amet Eski
RESPONDENTS	Gaycel Pty Ltd and 1A Enfield Street St Kilda Pty Ltd
JOINED PARTY	Mr Ergun Gulcan
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Costs and Interest Hearing
DATE OF HEARING	20 October 2017
DATE OF ORDER	10 November 2017
CITATION	Heski Carpenters Pty Ltd v Gaycel Pty Ltd (Building and Property) [2017] VCAT 1833

ORDERS

1. The applicants must pay the respondents $4453.62, as assessed interest.

2. The applicants must pay the respondents' costs 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

APPEARANCES:

For the Applicants	Mr J. Selimi of Counsel
For the Respondents	Mr J. Gray, solicitor
For the Joined Party	No appearance

REASONS

1 This proceeding was heard by me over sixteen days in December 2014, August 2015 and January 2016. It involved disputes arising from the renovation of a two-storey, 8 unit apartment block in St Kilda owned by the respondents ("**the owners**"). The applicants were, together, the builder carrying out the renovations ("**the builder**"). The joined party ("**the cabinetmaker**") was the subcontractor cabinetmaker engaged by the builder during the course of the renovation works.

2 In the proceeding, the builder claimed $129,200.50 as monies owed under the building contract. Interest and costs were also claimed.

3 By their counterclaim, the owners claimed around $826,000 as damages for, amongst other things, alleged overpayments to the builder, delay damages and the cost to rectify defective building works. Interest and costs were also claimed.

4 As against the cabinetmaker, the builder claimed that if it was found to be liable in respect of the cabinetry works, it sought contribution from the cabinetmaker.

5 In a separate proceeding (proceeding D1193/2013) the cabinetmaker brought its claim against the builder and/or the owners for monies owed for the cabinetry works carried out. This proceeding was heard with the primary proceeding.

6 On 5 May 2016 I handed down my decision with written reasons. I ordered that the builder must pay the owners $107,618.09. I also ordered that the cabinetmaker must pay the builder $43,351. The cabinetmaker's claim for monies owed was dismissed. I reserved the questions of interest and costs with liberty to apply.

7 Following the owners' unsuccessful appeal of the decision to the Supreme Court, the matter returned before me on 20 October 2017 to hear the owners' application for interest and costs, and the builder's cross application for costs. Mr Selimi of counsel represented the builder. Mr Gray, solicitor, represented the owners. There was no appearance for the cabinetmaker.

8 Initially, the owners' claim for costs was brought against the builder, and in the alternative, as against the builder and the cabinetmaker. At the commencement of the hearing before me on 20 October 2017, the owners confirmed that they no longer pursued any application for costs as against the cabinetmaker.

COSTS

9 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.

9 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;
>
> 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).

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

10 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.

Level of costs

11 Under section 111 of the Act, where the Tribunal is minded to make an order for costs, the Tribunal may fix the amount of costs itself or it may order that the costs be assessed by the Victorian Costs Court. The Tribunal will usually identify the basis and scale upon which any assessment of the costs should proceed.

12 As to the "basis" of costs, there are now generally two alternatives, namely "standard" and "indemnity". The "standard" basis generally 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.

13 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.

Cost claims

14 The owners seek an order that the builder pay the owners' costs of the proceeding on a standard basis pursuant to the County Court scale.

15 The builder defends the owners' claim, and brings its own claim for costs. The builder seeks an order that the owners pay a half to two thirds of the builder's costs of the hearing only, that is the costs of the 16 day hearing. The builder says such an order is justified having regard to large amount of hearing time spent dealing with the owners "overpayments" claim which was wholly unsuccessful. The builder does not nominate any particular scale for such costs. As a "fallback" position, the builder says there should be no order for costs.

Relative strength of claims

16 The builder submits that the strength of its claims, relative to the claims of the owners, is illustrated by the fact that the owners brought a claim for damages of around $826,000, but they succeeded in obtaining an order for only $107,618.

17 The owners submit that the strength of its claims, relative to the builder's claim, is illustrated by the fact that, in addition to the order in favour of the owners for a sum of $107,618, the builder's claim against the owners for $129,200.50 wholly failed.

18 It is true that the builder successfully defended some of the substantial claims brought against it by the owners. However, the owners successfully defended the builder's claim, and obtained an order in their favour for a significant sum of money. In my view the relative strengths of the parties' claims favours the owners, but it is not decisive.

Owner's offer 1 July 2013

19 The owners say that I should consider an offer of settlement made by them in a letter from the owners' lawyer to the builder dated 1 July 2013. At that time, the contract between the builder and the owner had not yet been terminated. The builder had recently terminated its contract with the cabinetmaker, and the owners and the builder were in dispute as to who should meet the cost of replacing the unsatisfactory cabinetry works. The events and communications between the owners and the builder leading up to 1 July 2013, and the letter of offer dated 1 July 2013, are set out in detail in my decision of 5 May 2016. I reproduce below the owners' offer to the builder of 1 July 2013:

> **Re: major domestic building contract for building works at 1A Enfield St Kilda &Offer to settle**
>
> Our client Gaycel Pty Ltd will settle all outstanding matters between Gaycel Pty Ltd and Heski Carpenters Pty Ltd on the following basis:
>
> 1. Amet Eski / Heski Carpenters Pty Ltd pay the cost of

- replacing all Kitchens in whole including stone benchtops and
- replacing all Wardrobes (excluding sliding mirror doors);
- repairing all storage cupboards in all 8 apartments less

2. All work to be carried out by qualified and experienced cabinet makers to the satisfaction of Ken Yucel.
3. Gaycel Pty Ltd will pay the amount outstanding on the original cabinetry contract being $22,290 to Heski Carpenters Pty Ltd.
4. Amet Eski / Heski Carpenters Pty Ltd to reimburse Gaycel Pty Ltd for the $1000 council fine incurred by electricians.
5. Amet Eski / Heski Carpenters Pty Ltd agrees that all monies paid to it to date are the final amount owing on the contract between the parties (other than the above $22,290).
6. Amet Eski / Heski Carpenters Pty Ltd agrees to do all things in its power to bring the project to completion and obtain occupancy certificates.

This offer remains open for acceptance for 7 days from 1 July 2013.

Yours faithfully

20 The owners do not suggest that the above offer enlivens the operation of section 112 of the Act. What they say is that the above offer proposed a sensible, commercial outcome which the builder should have accepted. The owners submit that the builder's rejection of the offer is a further reason as to why it would be fair to depart from the prima facie rule on costs and order the builder to pay the owners' costs.

21 I do not accept the submission. In my view, the offer is uncertain and ambiguous, and the builder was justified in rejecting it.

22 Condition 2 in the offer requires the cabinetry rectification works to be carried out *"to the satisfaction of Ken Yucel"*. In my view it would be unreasonable to expect the builder to agree to a settlement that was, at least in part, dependent upon works being carried out to the satisfaction of the owner's representative. The parties were in dispute over a number of matters and, in my view, a settlement contingent upon works being carried out "to the satisfaction" of one party is a recipe for more disputation.

23 Condition 5 in the offer requires the builder's agreement that, save for a further payment of $22,290 to be made in respect of the cabinetry works, the builder agrees that the owner has made all payments owing under the contract. The problem with this condition is that it leaves the builder with no further entitlement to payment in respect of any further direct costs, including subcontractors invoices, it might incur in completing all of the building works. The owners say that this condition should be interpreted in light of the practice whereby the owners, and not the builder, had been making direct payment to subcontractors. But this is not what the condition says. And under the building contract, it is the builder and not the owners

who incurs, in the first instance, the direct costs of the building works. In my view, the uncertainty raised by this condition was reason enough for the builder to reject the offer.

24 For the above reasons, I find that the settlement offer of 1 July 2013 should have no bearing on my consideration in respect of costs of the proceeding.

Nature and complexity of the proceeding.

25 The owners say the proceeding was complex, both in fact and in law. The builder says it was not a particularly complex proceeding.

26 The facts and legal issues are set out in detail in my decision of 5 May 2016. In my view, the proceeding involved complex issues of fact and law, including the following:

- Who was the "builder" under the building contract?
- The contract price estimate specified in the "cost plus" building contract. The contract price estimate was founded on a detailed cost estimate produced by a building consultant engaged by the builder, Mr Odicho. Mr Odicho's cost estimate document was annexed to and formed part of the building contract. However, the document annexed to the building contract was significantly different to the original cost estimate document produced by Mr Odicho. There was conflicting evidence over this matter, and my finding on the evidence was instrumental in my finding that the contract price estimate in the building contract did not meet the requirement of s13(2) of the *Domestic Building Contracts Act* 1995 ("**the DBC Act**");
- Who was the cabinetmaker, and was the cabinetmaker engaged by the builder or the owners?
- Assessment of the quality of cabinetry works having regard to a large number of photographs and the evidence of 3 expert witnesses.
- Was the termination of the cabinetry subcontract justified?
- Was the owner's termination of the building contract justified and valid?
- Analysis of a large number of alleged excessive costs and defective building works.
- Analysis of the various heads of damage claimed by the owners, having regard to the "cost plus" nature of the building contract.

27 The builder submits that such complexity that the proceeding had was largely caused by the owners' pursuit of their "overpayments" claim for $356,159. That claim was wholly unsuccessful because I found it to be misconstrued having regard to the relevant provisions of the DBC Act.

28 The builder says that the "overpayments" claim took up the majority of the proceeding hearing time, and in this regard they refer to the considerable time spent examining, and taking evidence in respect of, the numerous schedules setting out works and costings produced by the owners' representative, Mr Yucel. The builder's application for costs is founded on this issue. The builder submits that where much of the proceeding time was taken up by the owners' pursuit of this misconstrued claim that was wholly rejected, it is fair that the owners pay a portion of the builder's cost of the hearing. The builder says a fair portion is a half to two thirds.

29 I do not accept the builder's submission. While it is true that a considerable portion of hearing time was spent examining and taking evidence in respect of the various schedules produced by Mr Yucel, and while a number of those schedules were referenced in relation to the owners' unsuccessful "overpayments" claim, that was not the only purpose of the schedules produced by Mr Yucel.

30 As noted in my decision of 5 May 2016, Mr Yucel was thoroughly involved in the progression of the building works from the outset, and he had control of the documentation as to the direct costs of the building works. Indeed, the builder's final claim for monies owed, the very claim the builder brought in the proceeding, was founded on the advice provided by Mr Yucel as to the total sum of direct costs incurred on the project.

31 When one is assessing claims under a "costs plus" contract, it is necessary to analyse the direct costs incurred. Some of the schedules produced by Mr Yucel were a useful aid to this task.

32 Other schedules produced by Mr Yucel were helpful in other ways. For example, a schedule setting out rectification costings in respect of alleged defective building works was very helpful.

33 While it can be said that a few of the schedules produced by Mr Yucel were self-serving or superfluous, generally I found the schedules to be helpful. In my view, the schedules brought organisation to a complex factual matrix such that it might even be said that the hearing time was reduced, not lengthened.

34 I do not accept that the owners' pursuit of the "overpayments" claim had any significant impact on the length of the hearing. This finding is sufficient to dismiss the builder's application that the owners pay a portion of the builder's cost of the hearing.

Conclusion on costs

35 Having regard in particular to the nature and complexity of this proceeding as discussed above, and noting also that the applicant's claims were, relative to the respondent's claims, stronger, I am satisfied that it is fair to depart from the prima facie rule on costs and order that the builder pay the owners' costs of the proceeding.

36 I am also satisfied that it is fair that such costs should be assessed on the basis sought by the owners and has prescribed in rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008. Accordingly, I will order that the builder must pay the owners' costs 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.

INTEREST

37 The owners seek an order that the builder pay interest on the sum of damages, $107,618.09, I awarded in my decision of 5 May 2016. In their application for interest and costs, the owners sought an order for interest "from July 2013 to date". At the hearing before me on 20 October 2017, the owners' lawyer confirmed that the owners sought interest for the period commencing from the date the owners' filed their counterclaim in this proceeding, 5 November 2013, to the date the damages sum awarded was paid by the builder, 11 October 2016. The owners submit it is appropriate to calculate the interest at the rate prescribed for the relevant period pursuant to section 2 of the *Penalty Interest Rates Act* 1983.

38 As set out in my decision of 5 May 2016, the damages awarded in favour of the plaintiff were made up of:

(a) $92,751.95 as my assessment of the reasonable cost to rectify defects in the building works carried out by the builder. Of that sum, I found that $62,183 had been incurred by the owners, and the remaining $30,568.95 was the estimated cost to be incurred in the future to rectify defective bamboo flooring.

(b) $26,071.50 as liquidated damages for delay pursuant to the terms of the building contract.

39 The owners submit that the interest should be included as part of the damages awarded in order to place them in the position they would have been had the building contract not been breached by the builder. They say that the interest is part of the damages that flow from the builder's breaches of the contract.

40 Under s53 of the *Domestic Building Contracts Act* 1995, the Tribunal may make any order it considers fair to resolve a domestic building dispute including an order for damages in the nature of interest. Section 53(3) provides:

> 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.

41 It should not be assumed that the Tribunal will, as a matter of ordinary course, award interest. The test is whether it is "fair".

42 The builder says that in the owners' counterclaim filed in the proceeding, the owners make no claim for interest in the nature of damages. While that is true, having regard to the Tribunal's general power to award interest as noted above, and noting also that in my decision of 5 May 2016 I reserved the question of interest with liberty to apply, I consider that I may award interest if I think it fair.

43 The builder submits that, having regard to the failure of the owners "overpayments" claim, as discussed above, it would not be fair to award interest. I do not accept this submission. As discussed above, I do not accept that the owners' pursuit of the "overpayments" claim had any significant impact on the length of the hearing.

44 I do not accept that the interest claimed can be simply categorised as damages flowing from the builder's breaches of contract. The liquidated damages sum was calculated pursuant to the terms of the contract, not as restorative damages flowing from breach of the contract. The allowance for rectification of defective bamboo flooring was the estimated future cost of rectification works. It is not known whether such cost, or any cost, was expended in rectifying the bamboo flooring.

45 Having regard to the nature and quantum of the claims in the proceeding brought by both parties, and my determination on all of those claims as set out in my decision of 5 May 2016, I consider it fair that the owners be awarded interest on the sum of damages awarded, $107,618.09, from the date of my decision, 5 May 2016, to the date the damages were paid, 11 October 2016. I am also satisfied that it is fair to calculate the interest at the rate prescribed during that period pursuant to section 2 of the *Penalty Interest Rates Act* 1983, that rate being 9.5%. I calculate such interest to be $4453.62.

46 Accordingly I will order that the builder must pay the owners interest in the sum of $4453.62.

SENIOR MEMBER M. FARRELLY