VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D1026/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building dispute – costs applications – *Victorian Civil and Administrative Tribunal Act* 1998 – s.109 – whether fair to make an award of costs – offers of settlement - s.112 – whether offer capable of acceptance by offeree - whether any costs should be awarded - partially successful claim by both parties – many claims by both parties unsuccessful – relevant considerations – apportioning costs according to success – difficulty of

APPLICANTS	Mr Peter Hyndman, Mrs Margaret Hyndman
RESPONDENT	Hurtob Homes Pty Ltd (ACN 005 064 746)
FIRST JOINED PARTY	Unitex Granular Marble Pty Ltd (ACN: 005 99 561)
SECOND JOINED PARTY	Senad Ibrahimovic t/as Sena The Handyman
THIRD JOINED PARTY	Tiling Creations Pty Ltd (ACN: 109 736 245)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs applications
DATE OF HEARING	25 July 2014
DATE OF ORDER	5 September 2014
CITATION	Hyndman v Hurtob Homes Pty Ltd (Building and Property) [2014] VCAT 1126

ORDER

1. Order the Respondent to pay to the Second Applicant one third of the Applicants' costs of this proceeding, which includes reserved costs and the costs of her application for costs, such costs if not agreed to be assessed by the Victorian Costs Court in accordance with the County Court Scale.
2. Order the Second Joined Party to pay to the Respondent:
   (a) one half of the costs of the Applicants ordered to be paid to the Second Applicant by the Respondent as provided in paragraph 1 of this order;

(b) the Respondent's costs of the proceeding as between the Respondent and the Second Joined Party but not including its costs relating to any of the other parties. Such costs includes reserved costs and the costs of its application for costs, and if not agreed they are to be assessed by the Victorian Costs Court in accordance with the County Court Scale. In assessing those costs, the costs relating to the hearing shall be limited to one day;

3. Order the Second Applicant and the Respondent to pay the costs of the First Joined Party of this proceeding, including reserved costs and the costs of its application for costs, such costs if not agreed to be assessed by the Victorian Costs Court in accordance with the County Court Scale.

4. Save as aforesaid, there shall be no order as to costs.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Second Applicant	Mr C. Lovell, Solicitor
For the Respondent	Mr A. Beck-Godoy of Counsel
For the First Joined Party	Mr C. Gilligan of Counsel
For the Second Joined Party	Mr P. Cadman of Counsel
For the Third Joined Party	No appearance

REASONS

Background

1 This proceeding concerned a claim by the Applicants ("the Owners") against the Respondent ("the Builder") claiming damages for defective and incomplete work in the construction of two attached units in Kew. The Builder defended the claim and counterclaimed for money said to be due to it under the building contract.

2 One of the main defects alleged by the Owners was defective rendering. On 31 July 2012, on the application of the Respondent, the Tribunal joined the three joined parties to the proceeding.

3 The First Joined Party ("Unitex"), supplied materials used by the Second Joined Party ("the Renderer") who carried out the rendering work the Owners complained about.

4 In its Amended Points of defence and counterclaim dated 20 August 2012, the Builder asserted that the Owners' claims were apportionable claims within the meaning of the *Wrongs Act* 1958 and that, as a concurrent wrongdoer, its liability was limited by that Act, having regard to the extent of its liability for the losses claimed.

5 By their Amended Points of Claim, also dated 12 August 2012, the Owners claimed that, if the claims that it made were apportionable claims, which they denied, they sought recovery from the Third Parties of damages equivalent to their liability for the loss.

6 After the proceeding was commenced the first Owner, Mr Hyndman, died and thereafter it was continued by the Second Owner who was executor of his will and the beneficiary entitled to his estate.

Hearing

7 The proceeding came before me for hearing last December 2013 with five days allocated. After seven days of hearing I reserved my decision. The order was handed down on 4 April 2014.

8 In summary, the following orders were made:

(a) The Builder was to pay the Second Owner $67,173.12;

(b) The Owners' claims against Unitex and the Renderer were dismissed;

(c) The Second Owner was to pay the Builder $10,780.68;

(d) the Respondent's claim against Unitex was dismissed; and

(e) The Renderer was to pay to the Builder $54,694.72.

9 Costs were reserved. Applications for costs were then made by the Second Owner, the Builder and Unitex.

The applications for costs

10 The applications for costs came before me on 25 July 2014. Mr C. Lovell, Solicitor appeared on behalf of the Second Owner, Mr A. Beck-Godoy of Counsel appeared for the Builder, Mr C. Gilligan of Counsel appeared for Unitex and Mr P. Cadman of Counsel appeared for the Renderer. The Third Joined Party did not appear.

11 The Second Owner relied upon an affidavit of her Solicitor, Alexander McKellar sworn 24 July 2014. I was also handed a formal settlement offer dated 2 July 2012, an affidavit of the Builder's Solicitor Mr Cloak, sworn 25 July 2014, and a settlement offer by the Renderer dated 26 July 2012 offering to carry out rectification works.

12 After hearing submissions from Counsel I informed the parties that I would provide a written decision.

The law

13 The Tribunal's power to award costs is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") which (where relevant) says as follows:

> "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);
>
> (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."

14 Parties pay their own costs unless the Tribunal considers that it would be fair in the circumstances of a particular case to order a party to pay the costs of another party. In exercising its discretion to make such an order, the Tribunal will have regard to the matters set out in s.109(3), although that is by no means an exhaustive list of the things to be considered (see *Martin v. Fasham Johnson Pty Ltd* [2007] VSC 54 para. 28).

15 Proceedings concerning domestic building disputes are normally costly to conduct. Experts' reports are usually required which are expensive. The discovery process of even a modest building dispute is usually arduous and costly involving a large number of documents on both sides. Witness statements are usually ordered and they are most commonly drawn or settled by counsel. There are generally many factual issues involved as well as legal issues, often requiring complex legal argument. The hearing will usually occupy several days. For these reasons, the "nature and complexity of the proceeding" is commonly regarded as warranting an order for costs in favour of a successful party.

16 It has been said that a "substantially successful party" in the Tribunal's Domestic Building List is entitled to have a reasonable expectation that an award of costs will be made in his favour. (see *Australian Country Homes v. Vassiliou* (VCAT) 5 May 1999 – unreported). However it is now established that, although such awards are commonly made in such cases, there is no presumption that they should be (See *Pacific Indemnitry Undeerwriting Agencey Pty Ltd v. Maclaw* [2005] VSCA 165).

17 In each case the question is whether it is fair in the circumstances of the particular case that a party be ordered to pay the costs of another party. The onus of establishing that is on the party seeking the order for costs Since every case is different, reference to what occurred in other cases is of little assistance.

The Owner's Submissions

18. The Second Owner seeks an order that the Builder pay the Owners' costs. The costs are sought from the commencement of the proceedings until 31 October 2012 on a party/party basis and thereafter on a Solicitor/Client basis.

19. Further, she relies upon two offers made to settle the proceeding. The first of these, which was made on 31 October 2012, was as follows:

    (a) the Builder to pay the Owners $50,000.00 plus costs and interest to be greed or otherwise determined by the Tribunal;

    (b) Unitex to pay $10,000.00 to the Owners;

    (c) the Renderer to pay $10,000.00 to the Owners;

    (d) the claim against the Third Joined Party to be withdrawn;

    (e) the proceeding to be struck with a right of reinstatement.

20. The offer was not accepted. Mr Lovell sought to rely upon the provisions of s.112 of the Act. That section provides (where relevant) as follows:

    "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 sub-section (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."

21. Mr Lovell submitted that the orders made on 4 April 2014 were not more favourable to the Builder than the terms of the first offer and if one simply deducts the amount ordered to be paid to the Builder by the Second Owner from the amount the Builder was ordered to pay to her, that is certainly so. However the order also involved the two Joined Parties each paying $10,000.00 and I cannot look at only part of the offer in isolation.

22. To be effective either under the Act, an offer must be capable of being accepted by the offeree. In *Ahn Construction v Shoji Investments Pty Ltd* [2004] VCAT 2425 I said (at para 12):

"The scheme of the Act is that an offer pursuant to s.112 must be "to settle the proceedings". An offer to settle only on the condition that a certain requirement is fulfilled is not in my view an offer to settle the proceedings. It is an offer to settle that will only become effective if something should happen in the future. Further, if the condition attaches to the offer, rather than to any agreement arising from its acceptance, then it would not seem that it was "open for acceptance" within the meaning of s.114(1). Finally, I would have to determine for the purposes of s.112(1)(d) whether or not the orders that I ultimately made were more favourable to the Applicant than the terms of the offer. I think the scheme of the Act is that the offer must be able to be evaluated and assessed at the time it is made not at some later time looking back at the offer with the benefit of hindsight. At the time the offer was made the Applicant did not and could not know whether the proceedings would be settled or not and so he could not be certain that the acceptance of the offer would settle the proceedings. For all these reasons, I do not think that the offer satisfies s.112 of the Act."

23. Although the facts of that case were slightly different, the offer here was likewise dependant upon a condition that needed to be fulfilled, that is, the agreement of the two joined parties to pay $10,000 each. Hence the mere acceptance of the offer by the Respondent could not have settled the proceedings.

24. On 11 July 2013 the Second Owner made a further offer that the Builder pay to her $30,000.00 and that Unitex pay to her $10,000.00, both payments to be inclusive of any amount of costs and interest. Certainly, this offer was much more favourable to the Builder than what was ultimately ordered. However again, it was not an offer that it was able to accept because it required Unitex to accept it as well. Ultimately, I ordered that the case against Unitex be dismissed.

25. Mr Lovell argued that, given the nature and complexity of the proceeding it was appropriate to make an order for costs.

26. He said that the Second Owner was substantially successful and much of the hearing time was occupied in regard to matters in respect of which she succeeded, notably rendering work and also the unsuccessful claims by the Builder.

The Respondent's submission

27. Mr Beck-Godoy sought orders that:

    (a) the Builder not pay the Second Owner's Costs;

    (b) the Second Owner pay the costs of Unitex;

    (c) the Renderer pay the Builder's costs; and

    (d) the Third Joined Party also pay the Builder's costs.

28. Mr Beck-Godoy pointed out, correctly, that pursuant to s109(1) the starting point in any application for costs is that parties bear their own costs.

29. However, he said that:

    (a) the Owners brought "exorbitant and unjustified claims" most of which, he submitted, were rejected in the reasons for decision given. He suggested that the total of the amounts claimed by the Second Owner were $459,273.58 which was a little over $400,000.00 more than the net amount ultimately awarded when the amount ordered to be paid by the Second Owner to the Builder is deducted;

    (b) the Builder was put to considerable expense in fighting significant claims by the Owners which were unsuccessful. In particular, he said that the claim with respect to noise transference through the party wall was only abandoned at the commencement of the hearing;

    (c) the evidence of Mr Hegarty, the Owner's expert, was not accepted and that Mr Hegarty had simply adopted Mr Hyndman's views about the work;

    (d) Mr Hegarty had prepared three voluminous reports that "… were all proven to be largely defective and a waste of the lions share of each parties time and cost..", and that this wasted the lions share of the hearing. He said that in Mr Hegarty's reports he used "unmeasured

language", particularly in his criticism of Mr Campbell. It is true that I did criticize Mr Hegarty in that regard.

30. On 2 July 2012 the Builder made an offer of $50,000 plus interest plus costs to settle the Owners' claim, Although that was less favourable to the Owners than the order eventually made, Mr Beck-Godoy submitted that it was unreasonable for the Owners not to have accepted the offer.

31. Mr Beck-Godoy's submission that the Second Owner should be ordered to pay the costs of Unitex was based upon an affidavit sworn by his instructing Solicitor, Mr Cloak.

32. In that affidavit Mr Cloak swore that, on 29 November 2013 the Builder and Unitex agreed between themselves that the Builder's claim against Unitex would be withdrawn and Unitex would not seek any costs. Mr Cloak deposed that he then had a conversation with the Owner's Solicitor Mr Pilley and that Mr Pilley told him that the Owners required Unitex to be retained in the proceeding. As a result of that, Mr Cloak says that he then informed Unitex's Solicitors that it was not released. Mr Cloak said that on the first day of the hearing Mr Pilley again advised that Unitex was required to be retained in the proceedings.

33. Mr Beck-Godoy said that, as the Second Owner was "the roadblock" to the release of Unitex, she should pay its costs.

Unitex's submission

34. By letter from its solicitors to the Tribunal dated 11 April 2014, Unitex sought an order that the parties that joined it to the proceeding pay its costs. Mr Gilligan submitted that Unitex was entirely successful in defending the proceeding brought against it and that the claim by the Builder was dismissed.

35. Unitex was joined as a party on the application of the Builder on 31 July 2012 and then a claim was made against it by the Owners on 12 August 2012. Once joined it would remain a party until the proceeding was determined. Its removal as a party before then would have required an order of the Tribunal. That could only have occurred by agreement of both the Owners and the Builder. The Builder was prepared to release it but the Owners were not.

36. If it is appropriate to make an order for costs in this proceeding it does not appear to be seriously suggested that there should not be an order that Unitex be paid its costs. The question is, who should pay them?

37. There was no real evidence lead by either the Builder or the Second Owner to substantiate any claim against Unitex. Since the Builder had sought to have Unitex released from the proceeding earlier and since this could have occurred without any cost, it must follow that the costs that it now seeks arise because the Owners would not agree to release it.

38. I cannot find that it was wholly the fault of the Second Owner. I am concerned that it was not suggested that the Builder offered to amend its defence by abandoning its claim for apportionment but I think that if that been raised at the time it could have been dealt with.

39. Unitex expressed a willingness before the hearing to make no claim for costs if it should be released from the proceeding. Although the Builder wanted it out of the proceedings, there was no application to amend the Points of Defence.

40. Unitex was joined on the Builder's application and so any order for costs would generally be made against the Builder. However, by refusing to agree to let Unitex out of the proceeding the Second Owner must share responsibility for the resulting costs.

The Renderer's submission

41. Mr Cadman submitted that, in all the circumstances there should be no order for costs or alternatively, that the Renderer should not be ordered to pay the costs of any other party.

42. He referred me to the provisions of s.109(1) and said this was, in effect, a simple building defects case made complex by a range of factual claims brought and litigated between the Owners and the Builder over which the Renderer had no control or input. The Renderer became a party to the proceeding long after the relationship between the Owners and the Builder had become quite acrimonious.

43. He said that the majority of costs were incurred in relation to matters between the Owners and the Builder in which the Renderer had no part. He said that these were litigated in an adversarial manner and many were ultimately found to be without merit. He pointed to the relatively small proportion of the amount claimed by the Owners that they succeeded on, the dismissal of the Second Owner's claims against the Joined parties and the dismissal of the Builder's claims against Unitex. He submitted that no party was substantially successful and so there should be no order as to costs.

44. He submitted that, although it was ultimately found on the preponderance of expert evidence that the render was defective, the Renderer's defence was "reasonable, plausible and arguable" and that many of the claims in his points of defence were established.

Reconciling the submissions made

45. There is substance in all of these submissions.

46. Of the matters to be considered that are referred to in s.109(3) I think those relevant to the present case are 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 and also the nature and complexity of the proceeding.

47. Dealing first with the nature and complexity of the proceeding between the Owners and the Builder, this was a complex matter that required experienced counsel on both sides. There were experts' reports and witness statements and the hearing ran for several days. It was not unreasonable or excessive for the parties to engage legal representation and, given the claims made on both sides, the cost to prepare for the hearing would have been large.

48. As for Unitex and the Renderer, they both knew that a substantial claim was brought against them. I think Mr Cadman's description of the rendering claim as "a simple building defects case" understates the position. The cost of rectifying the complaints about the render, if they should be established, was always going to amount to many thousands of dollars. An expert report was obtained by each of them and Unitex engaged representation although the Renderer did not.

49. It was the sort of case where it was be necessary for the parties to spend a considerable amount of money to conduct it properly. That is a factor in favour of making an order for costs.

50. As to 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, it is relevant that most of the claims made by both the Owners and the Builder were not established and most of the hearing time was taken up arguing about those claims. Quite obviously, neither side should be awarded the costs of pursuing claims that failed. Moreover, the argument in favour of an order for costs by the opposite party in regard to successfully defending the failed claim is just as strong as the argument by that party for the costs of the claims upon which that party succeeded.

51. The principal defect established during the hearing was the rendering of the two units which was carried out by the Renderer. As will be apparent from the above figure this accounted for most of the amount ordered to be paid to the Second Owner by the Builder.

52. However there were a great many other allegations made on both sides as between the Second Owner and the Builder which were not successful. These occupied most of the hearing time and consumed the majority of the costs.

53. The losses exceeded the successes by a large margin. The amounts awarded to both the Second Owner and the Builder were substantially less than their claims. The Second Owner's claim amounted to $368,089.84 by the time the matter came for hearing. In addition, she sought the return of the sum of $38,383.74 said to have been overcharged and $52,800.00 damages for delay. The overall total was over $400,000. The Builder's claim against the Second Owner was for $77,104.01 plus a 15% margin on that sum.

54. Weighing the cost of successful claims plus successful defences on both sides is not easy and often the appropriate course would be to make no order as to costs. However one clear factor is that the defective nature of the render was not seriously challenged by the Builder. That being so it should not have put the Owners to the expense of litigating it.

55. I should add that I have considered the offers and attempts made by each of the parties to settle the proceedings. These were praiseworthy but I do not think that any of them assists me. There was no offer made that fell within s.112 of the Act or that would qualify as a Calderbank offer that was not beaten by the offeree.

Conclusion

56. Taking all of these matters into consideration, I think that it would be fair in the circumstances to order that:

    (a) one third of the Second Owner's costs be paid by the Builder;

    (b) the Renderer pay to the Builder one half of the costs ordered to be paid by it to the Second Owner;

    (c) the Builder's costs of its proceeding against the Renderer, but not including its costs relating to any other parties, be paid by the Renderer. In assessing those costs, the costs relating to the hearing shall be limited to one day;

    (d) the costs of Unitex be paid equally by the Second Owner and the Builder;.

57. The costs ordered include the costs of these applications for costs.

SENIOR MEMBER R. WALKER