

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP146/2018

**CATCHWORDS**

Costs; s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

<b>APPLICANT</b>	Darren Ingwersen (ABN: 62 129 137 890) t/as Western Victoria Painting and Decorating
<b>RESPONDENT</b>	Nick Smith
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	B. Josephs, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	11 May 2018
<b>DATE OF SUBMISSIONS AS TO COSTS</b>	Costs' submissions filed by the respondent. No costs' submissions were filed by the applicant by 25 May 2018 or at all.
<b>DATE OF ORDER</b>	16 July 2018
<b>DATE OF REASONS</b>	16 July 2018
<b>CITATION</b>	Ingwersen v Smith (Building and Property) [2018] VCAT 1103

**ORDER**

- 1 The applicant must pay the costs of the respondent fixed at \$1,000.

B. Josephs  
**Member**

**APPEARANCES:**

For Applicant Mr D. Ingwersen, in person.

For Respondent Mr W. Stephenson of Counsel.

## REASONS

- 1 Mr Ingwersen, proprietor of Western Victoria Painting and Decorating, undertook painting works for Mr Smith at Mr Smith's property.
- 2 For the works undertaken, Mr Ingwersen was paid \$13,606 for four invoices dated between 25 July and 6 September 2017. However, his final invoice, dated 11 September 2017 for \$8,172, remained unpaid and this was the subject of Mr Ingwersen's application.
- 3 Mr Smith denied liability for Mr Ingwersen's claim and counterclaimed \$23,250.30 for rectification works, replacement lawn, paint removal from aggregate concrete areas, and an expert report from Mr Mark Amos.
- 4 Mr Ingwersen withdrew his application at hearing and, at the conclusion of the hearing, I made an order accordingly. I also ordered Mr Ingwersen to pay \$22,702.50 to Mr Smith for the counterclaim and to reimburse the application fee of \$467.80.
- 5 At the hearing, Mr Smith was represented by Mr Stephenson of Counsel. Each of the parties gave evidence and Mr Amos also attended and gave evidence on behalf of Mr Smith.
- 6 Pursuant to Mr Stephenson's request, I also made orders reserving costs and for the parties to deliver costs' submissions.
- 7 Mr Smith has provided submissions. Mr Ingwersen has not provided submissions.
- 8 Mr Smith's submissions have been made in an affidavit sworn by him and in an affidavit sworn by his father.
- 9 The costs sought by Mr Smith are the fee of Mr Amos of \$1,000 for attending the hearing to give evidence and the fee of \$1,500 of Mr Stephenson for his appearance.
- 10 Having considered the submissions filed, I am satisfied that it is fair to award costs of \$1,000 in favour of the respondent for the fee of Mr Amos, having regard to the matters contained in section 109 (3) of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 11 Section 109 of the Act provides:
  - 109 Power to award costs**
  - (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 to 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) 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.
- (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3) (a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
- (5) Before making an order under subsection (4), the Tribunal must give the representative a reasonable opportunity to be heard.
- (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

12 While the general rule in VCAT that each party bears their own costs is designed to promote access to justice generally and to minimise the overall level of costs in tribunal proceedings as far as is practicable (*Stonnington CC v Blue Emporium Pty Ltd* [2004] VCAT 1441 at [13]), each case depends on its own facts and circumstances.

13 However, as observed in *Johnstone v Mansfield SC* [2009] VCAT 287 at [15], the awarding of costs is not a form of punishment, but is “rather a reimbursement of expenses that a party may have been put to over and above the expenses expected to be incurred when one commences a proceeding in the Tribunal.”

14 In this proceeding there were a number of interlocutory orders made and a considerable number of documents filed. Mr Smith obtained the report of Mr Amos following an inspection by Mr Amos of Mr Smith’s property on 9 November 2017. This was after Mr Ingwersen had made his claim and prior

to Mr Smith making his counterclaim. As Mr Smith had already filed and served his expert report, on 13 February 2018 among other orders, the Tribunal required Mr Ingwersen to file and serve any expert report upon which he sought to rely by 20 March 2018 but if he did not wish to rely on expert evidence, then he was to advise the Tribunal and Mr Smith of this position by the same date. Mr Ingwersen was also ordered to ensure that any expert engaged by him must provide reasonable notice by email to Mr Smith for his requested time to inspect the premises.

- 15 However, the Tribunal among other orders made on 27 April 2018, and due to the apparent failure to that date by Mr Ingwersen to have an expert access the premises and provide a report, ordered by consent that the expert attend on 30 April 2018 at 1.00 pm. Orders were also made that any expert report upon which Mr Ingwersen may apply was to be in a form complying with the Tribunal's Practice Note 2 and that experts upon which the parties may wish to rely must be present at the hearing for cross – examination.
- 16 Mr Ingwersen's expert did attend the inspection but no report was obtained. However, it was not until the hearing that Mr Ingwersen made it clear that the expert was not supportive of his case.
- 17 At no stage did Mr Ingwersen admit liability in respect of any part of the counterclaim prior to the hearing and it was necessary for Mr Amos to give evidence.
- 18 Given the time that had elapsed from the commencement of the proceedings, Mr Ingwersen's failure to comply with Tribunal orders relating to an expert inspection, the significant delay in notification of his non-reliance on expert evidence, and his position adopted in respect of the counterclaim, I find it fair in all the circumstances that he be ordered to reimburse the cost of \$1000 for the attendance of Mr Amos at the hearing.
- 19 On 9 May 2018, the Tribunal formally ordered that each of the parties might, but were not obligated to, be represented by a legal representative at the hearing on 11 May 2018. However, I do not regard the proceeding as so sufficiently complex, even in light of the non-compliance with orders by Mr Ingwersen, to warrant departure from the general principle that Mr Smith should himself bear the costs of Mr Stephenson.
- 20 I have made an order accordingly.

B. Josephs  
**Member**