

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP1990/2018

CATCHWORDS

Domestic building contract – proceeding determined pursuant to section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* – assessment of loss and damage

FIRST APPLICANT	Thomas James
SECOND APPLICANT	David James
RESPONDENT	Arch Projects Pty Ltd ACN 164 289 589
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	24 July 2019
DATE OF ORDER	24 July 2019
CITATION	James v Arch Projects Pty Ltd (Building and Property) [2019] VCAT 1114

ORDER

The respondent must pay to the applicants the sum of \$465,460.18.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants

Mr M. Croft, solicitor

For the Respondent

No appearance

REASONS

1. This proceeding came before me for a hearing to assess and determine the quantum of the applicants' loss and damage, following orders made on 14 May 2019 determining the proceeding in their favour.
2. A brief summary of the events leading to this hearing, based on the evidence of the applicants, is as follows:
 - a. The applicants were at all material times the registered proprietors of 53 and 55 Collier Crescent, Brunswick, Victoria (the property).
 - b. They engaged the respondent to construct a single story extension to the rear of the existing dwelling on the property and to construct a new two storey dwelling on the property (the works).
 - c. The contract was made up of a standard form Master Builders Association of Victoria HIC5 building contract signed on 17 December 2015, a 17 page specification prepared by Logan Shield of Geometrica dated 19 November 2015 and architectural drawings numbered A01-A06 prepared by Logan Shield of Geometrica dated 19 November 2015 (the contract).
 - d. The respondent commenced the works but was unable to complete the works, in part as the registered builder had his building licence suspended by the Victorian Building Authority prior to the completion of the works.
 - e. On 19 September 2017 the solicitor acting for the applicants issued a notice pursuant to clause 20.1 of the contract, advising of the applicants' intention to terminate the contract if the respondent failed to remedy specified breaches of the contract.
 - f. The respondent failed to remedy the breaches listed in the notice and the solicitor for the applicants terminated the contract pursuant to clause 20.2 on 6 October 2017.
 - g. The applicants then engaged another builder, consultants and contractors to rectify and complete the works.
 - h. They referred the domestic building work dispute to Domestic Building Dispute Resolution Victoria ("DBDRV"), which issued a certificate of conciliation.
 - i. The applicants then commenced this proceeding on 18 December 2018.
 - j. The respondent failed to attend the directions hearing in the proceeding held on 7 March 2019. In the orders made on 7 March

2019 the Tribunal warned the respondent that if it failed to file Points of Defence by the due date an order would be made under section 78 of the *Victorian Civil and Administrative Tribunal Act 1998*.

- k. The respondent failed to file Points of Defence by the due date or at all, and on 14 May 2019 the Tribunal ordered:

“Pursuant to section 78 of the *Victorian Civil and Administrative Tribunal Act 1998*, the proceeding is determined in favour of the applicants with the quantum of damages to be assessed.”

- l. Notice of the application, notice of the directions hearing, the order made on 7 March 2019 and the order made on 14 May 2019, which contained notice of the hearing date, were served on the respondent at its registered address as well as at the address of its shareholder listed with ASIC.

3. In this proceeding, the solicitor for the applicants has filed with the Tribunal the following documents in support of the calculation of their loss and damage:

- a. an expert report prepared by a building consultant, Ms Georgia McKay of Buildwise Projects, dated 16 October 2017, in which she lists a number of items which in her opinion are incomplete or defective. I was advised that this was a preliminary report and it did not address all outstanding issues at that time;
- b. lists of further defects and incomplete works prepared by the applicants, which includes the opinion of Ms McKay in respect of each item listed by the applicants as to whether they are defective or incomplete, dated 17 July 2019;
- c. an expert report prepared by a quantity surveyor, Mr Michael Cordia, of MP Cordia & Associates Pty Ltd, dated 17 February 2019, in which he provides his opinion on the reasonable costs to complete the works, the reasonable costs to rectify the works, the quantum of losses and damages suffered by the applicants as at that date;
- d. a supplementary expert report prepared by Mr Cordia dated 19 July 2019 in which he provides his opinion on the reasonableness of other items of loss and damage suffered by the applicants;
- e. a spreadsheet prepared by the applicants’ solicitor, which was adopted by Mr Cordia, which makes adjustments to the amounts sought in respect of incomplete and defective works taking into account the opinion of Ms McKay provided 17 July 2019;

- f. copies of invoices, receipts and other documents which provide evidence of the amounts actually spent by the applicants and which were assessed by Mr Cordia in the preparation of his reports.
4. At the hearing, Ms McKay and Mr Cordia gave evidence affirming the opinions expressed in their reports. Mr Cordia adjusted some of his figures during his oral evidence.
5. Based on the documents provided to me and the expert opinions provided, I am satisfied that the reasonable amount of loss and damage suffered by the applicants as a result of the termination of the contract is set out in the tables in Mr Cordia’s supplementary report, as amended by him during his oral evidence, and is summarised at Table 6.0, as follows:

Item		53 Collier Crescent	55 Collier Crescent
8.1	Estimated cost for the work to be completed as set out at table 1.0	\$29,641.32	\$23,600.79
8.2	Estimated cost of rectification of project defects and completion works as set out at table 3.0	\$139,910.00	\$77,923.17
8.3	Other costs incurred in completion of the works, as set out at table 4.0	\$25,914.87	\$19,711.77
8.4	Other quantum or damage suffered or will be suffered in the future in relation to the termination of the contract in completion of the works as set out at table 5.0	\$83,965.84	\$64,792.42
Totals		\$279,432.03	\$186,028.15

6. I note that the other costs incurred (table 4.0) includes amounts for legal costs and experts charges. The Tribunal has power to award costs under a number of provisions.
7. Costs of the proceeding (that is, the costs incurred following the commencement of the proceeding on 18 December 2018) fall under s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”). I am satisfied pursuant to section 109(2) that it is appropriate that the

respondent pay the applicants' costs of the proceeding, including legal and expert costs. In particular, I rely on the following subsections of s.109(3):

- (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party by conduct such as –
 - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse, ...
 - (c) the relative strengths of the claims made by each of the parties...;
8. Further, the applicants also incurred the costs of solicitors and experts prior to the commencement of the proceeding. These may be classified as damages, and may be awarded pursuant to section 53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*. From my perusal of the invoices, these costs relate to necessary work done in order to terminate the contract, to complete the works, to liaise with the warranty insurer and in preparation for this proceeding.
9. I am satisfied from my perusal of the invoices rendered by the applicants' solicitor that it is appropriate to award all of the costs claimed either as damages or pursuant to section 109(2) on an indemnity basis.
10. Accordingly I will make an order that the respondent must pay to the applicants the sum of \$279,432.03 and \$186,028.15, being \$465,460.18.

SENIOR MEMBER S. KIRTON