**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING & PROPERTY LIST** VCAT REFERENCE NO. BP1027/2017

## CATCHWORDS

Domestic building contract - claim for costs - s.109(3)(c), (d), (e), *Victorian Civil & Administrative Tribunal Act* 1998 - meaning of 'costs' - whether extends to a party's own time and expenses incurred in preparing for and attending the Tribunal, including preparing pleadings, evidence and submissions

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| **APPLICANT** | JCM Builders Pty Ltd (ACN: 115 843 984) |
| **RESPONDENT** | Hicks General Construction Pty Ltd (ACN: 607 499 598) t/as Dowcon Steel |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member S. Kirton |
| **HEARING TYPE** | Costs Hearing |
| **DATE OF HEARING** | 6 February 2019 |
| **DATE OF ORDER** | 3 April 2019 |
| **CITATION** | JCM Builders Pty Ltd v Hicks General Construction Pty Ltd (Building and Property) [2019] VCAT 476 |

## ORDER

1. The applicant must pay the respondent's costs fixed at $1872.

**SENIOR MEMBER S. KIRTON**

**APPEARANCES:**

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| For the Applicant | Mr M. White of counsel |
| For the Respondent | Mr Philip Downing and Mr Jason Downing, directors |

## REASONS

1. This is an application brought by the respondent ("Dowcon") for their costs of this proceeding. The proceeding involved a claim by the applicant builder ("JCM") in respect of steelwork provided by Dowcon for a home renovation in Vermont South. Final orders dismissing the claim were made on 22 October 2018[1]. The question of costs was reserved.

2. At the hearing of the costs application on 6 February 2019, JCM was again represented by Mr Marcel White of Counsel and Dowcon was represented by its directors, Mr Philip Downing and Mr Jason Downing. I reserved my decision.

3. For the reasons set out below, I allow the application for costs and fix the amount at $1872.

4. Dowcon relied particularly on subsections 109(3)(b), (c), (a)(vi) and (e) of the *Victorian Civil and Administrative Tribunal Act* 1998. Section 109 provides relevantly:

> s.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);
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> (iv) causing an adjournment;
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> (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;

[1] [2018] VCAT 1595

(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.

5. In summary, Dowcon's submission included the following points:

a. JCM's conduct in serving over 700 pages of documents, many of which were unnecessary and not referred to during the hearing and included many duplicates, was responsible for prolonging unreasonably the time taken to complete the proceeding, within the meaning of ss.(b). Further, Dowcon had to devote considerable time and cost to defend the case but picking out the issues and the relevant documents from the material that had been served.

b. The claim had no tenable basis in fact or law, per ss.(c), particularly as the applicant conceded in cross examination that there was always going to be some water damage to the house while the roof was off, it was JCM's obligation to protect the building, and it had not passed that obligation on to Dowcon.

c. JCM's conduct was vexatious, within the meaning of ss.(a)(vi), in that they did not raise any issues with the lift shaft until after the dispute had been to adjudication under the Security of Payment Act regime. Then JCM dropped the claim for the lift shaft defects at the hearing.

d. Dowcon made an offer to settle the proceeding by a payment of $5000. This offer did not comply with the requirements of s.112, but it may be taken into account under ss.(e).

e. Further, JCM's conduct was dishonest, which is a matter that should be considered under ss.(e). Examples of the alleged dishonesty include:

i. JCM claimed its loss and damage arose from fixing the water damage, while Mr Borg's evidence indicated that the work performed was either part of the contracted scope, or that JCM had already been paid by the owner for fixing the water damage;

ii. JCM's reliance on a construction schedule, which it failed to discover, and which I found to have been not a contract document, uncertain and inaccurate.

iii. JCM's failure to produce copies of the invoices sent to the owner, or certificates from other trades, which would have shown the scope and timing of the alleged rectification work.

f. The proceeding was brought as revenge for Dowcon having successfully referred the dispute to adjudication under the Security of Payment Act. JCM failed to pay the adjudicated amount until Dowcon commenced enforcement proceedings in the Magistrates Court. This proceeding was a manufactured claim brought to avoid paying what Dowcon was due under the contract.

6. In response, JCM disputed any vexatious or dishonest conduct, and said, correctly in my view, that they had run the hearing efficiently. However Mr White conceded that it would be "nigh on impossible to resist the respondent's costs if they had been legally represented", in light of the offer that had been made and rejected. I agree. I am satisfied that it is appropriate to order that JCM pay Dowcon's costs under s.109(2) from the date of the offer.

## WHAT COSTS ARE PAYABLE?

7. JCM's real defence to the costs claim is that the meaning of "costs" in s.109 means legal costs. As Dowcon was not legally represented, in practical terms an order for costs means that there is very little for it to be able to recover. While Dowcon spent in excess of $27,000 in preparing for and attending the mediation, directions hearings and the hearing (including preparing pleadings, evidence and submissions), only $1872 involved fees paid to solicitors.

8. Mr White referred me to a number of authorities in support of his submission. Regrettably, I accept that these authorities represent the correct interpretation of s.109, even though it produces an unfortunate result for Dowcon.

9. In *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC*[2] President Morris held:

> "It remains true that an order as to costs is an order in the nature of an indemnity (or partial indemnity). Hence there is no power for the Tribunal to make an award of costs in favour of an unrepresented person in relation to expenses which would have been incurred if the person engaged professional services, but were not in fact incurred. Further, there is no power for the Tribunal to make an order as to costs in favour of an unrepresented person based upon the time spent by that person in relation to the proceeding. However where an unrepresented person loses wages or incurs travelling expenses in order to attend the hearing of the proceeding, this is an outgoing directly related to the proceeding which can be indemnified."

[2] [2004] VCAT 2188 at [18]

10. Senior Member Rickards in *Johnstone v Mansfield SC*[3] confirmed this approach:

> "It is well established that 'costs' do not include the time taken by an unrepresented person (who is not a lawyer) in preparing and conducting his or her case."

11. In *Schoonderbeek Pty Ltd v Greater Shepparton CC*[4] Deputy President Dwyer discussed the issue in further detail:

> "…I do not agree with the Council's contention that the applicant cannot recover any costs as a self-represented party, on the basis of an argument that costs comprise only legal costs incurred by a lawyer on its behalf. I accept that there is some ambiguity in the authorities on the extent (if any) that a self-represented party can recover costs. *In Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403, the High Court had indicated that costs meant 'legal costs', and some VCAT decisions have followed that principle notwithstanding that *Cachia* concerned a matter in the NSW courts, rather than a Tribunal such as VCAT that encourages self-representation and that also has governing legislation explicitly recognising non-lawyer 'professional advocates'. For my part, I agree with the sentiment expressed by the then VCAT President Justice Morris in *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC* [2004] VCAT 2188, to the effect that the constitution, purpose and practices of VCAT militate against the decision in *Cachia* being too strictly applied in a VCAT context.
>
> However, having said that, I consider that the costs that are capable of being awarded in favour of a party who is not represented by a lawyer should still be very broadly in the general nature of legal costs – for example the costs of the professional advocate, or the costs of an expert witness necessarily retained to give relevant evidence in the proceeding. I do not consider that the costs capable of being awarded to a self-represented party should ordinarily extend to costs that are more in the nature of personal costs or administrative expenses…
>
> I acknowledge that the Council's argument against awarding costs to a self-represented party, and its reference to the decision in *Cachia*, was perhaps put most strongly in the context of the applicant's claim for $9800 for the 'attendance time' of its managing director in preparing and appearing at the hearing. As I have noted, this aspect of the costs application was subsequently withdrawn by the applicant – quite properly in my view. Apart from any debate about the strict application of the decision in *Cachia* to a Tribunal such as VCAT, there is a reasonably well-established principle that 'costs' do not include the time taken by a self-represented person in preparing and conducting its case. I would not have allowed those so-called 'costs' in this proceeding."

[3] [2009] VCAT 287 at [21]
[4] [2017] VCAT 1204 at [28] – [31]

12. In *Barbary v CBL Insurance*[5] Senior Member Riegler (as he then was) considered the meaning of 'costs' in the context of a building case. The claim was brought for the costs of a non-professional advocate (Mr Bean) who was a family member of a party with industry expertise applicable to the case. Senior Member Riegler extensively examined and summarised the authorities and concluded:

> "In my view, had Parliament intended to extend the meaning of "costs" beyond that of the meaning identified in numerous decisions of superior courts, including the High Court of Australia, it could have easily done so by defining that word to include, for example, the reasonable time of a self-represented litigant to prepare for a hearing. However that is not the case.
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> The situation might be different if Mr Bean was engaged as an expert engineer to provide expert opinion in his field of expertise to be used in the litigation. In my view, that would constitute a legitimate disbursement incurred by the applicant. However, that situation does not arise here. Mr Bean or his associated company are not professional advocates.
>
> In the absence of that jurisdictional power, I am of the opinion that notwithstanding the merits of the Applicant's claim for costs, there is no power for me to order those costs. This is a regrettable situation. However it is a situation that can only be remedied by legislative change. Consequently, I have little option but to dismiss the Applicant's claim."

13. Mr Downing tried to rationalise the costs claim as being for the value to the company of his and his brother's time in defending the claim. He equated it to the lost wages referred to in *Aussie Invest*. However I consider that their position is in reality analogous to that in *Barbary*, such that they are not professional advocates nor independent experts providing opinion evidence.

14. As Mr Downing said, Dowcon finds itself in the unenviable position that it would have been better off by engaging lawyers than by appearing themselves. Despite this, I am not prepared to depart from the Tribunal's previous decisions, even though it produces a most unsatisfactory result for the respondent. It was a deliberate policy intention of government to frame VCAT's costs powers as it did, and government has not changed these provisions in the more than 20 years the Act has been in operation.

15. Having said that, I will allow the legal costs actually incurred when Dowcon consulted solicitors. Mr White conceded this was a cost within the meaning of s.109 and I will fix these costs at $1872.

## ORDERS

16. As a result of the above findings I will make the following orders:

[5] [2016] VCAT 1218 at [29] – [31]

1. The applicant must pay the respondent's costs fixed at $1872.

**SENIOR MEMBER S. KIRTON**