VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP315/2015

CATCHWORDS

Building; contract for provision of electrical services; Applicant substantially successful; award of $9,917; applications for costs; s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT:	Mr Ilija Joveski t/as Poreche Electrics
FIRST RESPONDENT:	Melbourne Development Group (Aust) Pty Ltd (ACN 141 952 356)
SECOND RESPONDENT:	Mr Mile Jovanovski
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Hearing
DATE OF HEARING:	28 September 2015
DATE OF FILING OF APPLICANT'S SUBMISSIONS	7 October 2015
DATE OF FILING OF RESPONDENTS' SUBMISSIONS	13 October 2015
DATE OF ORDER:	15 December 2015
DATE OF REASONS:	15 December 2015
CITATION	Joveski v Melbourne Development Group (Aust) Pty Ltd (Building and Property) [2015] VCAT 2020

ORDERS

1. The Respondents must pay to the Applicant damages in the nature of interest of $503.73.
2. The Respondents must reimburse to the Applicant the hearing fee of $199.90 it paid in respect of the hearing on 17 July 2015 and the hearing fee

of $199.90 it paid in respect of the hearing on 28 September 2015, a total of $399.80.

3. The Respondents must pay to the Applicant his reasonable costs of the hearing on 17 July 2015 thrown away by the adjournment, fixed at $990.

4. The Respondents must pay to the Applicant under s 109(3)(a)(i) costs fixed at $715.

MEMBER C EDQUIST

APPEARANCES:

For Applicant	On 28 May 2015 and on 17 July 2015 Ms M Carmelli, solicitor, and on 28 September 2015, Mr J McKay of Counsel
For Respondents	On 28 May 2015, on 17 July 2015 and on 28 September 2015, Mr S Buchanan of Counsel

REASONS

Nature of application

1 The Applicant issued this proceeding on 24 March 2015 seeking damages in the sum of $10,000 for breach of an agreement to carry out electrical works at a development in St George's Road, Thornbury. The proceeding was heard over two days, and concluded on 28 September 2015. The Applicant was successful on his claim, and was substantially successful in defending a counterclaim for damages for breach of the agreement brought by the First Respondent. The Applicant has sought orders for the costs of the proceeding and an order for interest. The Applicant also seeks the costs of a directions hearing on 17 July 2015, assessed on an indemnity basis.

Brief history of the proceeding

2 This proceeding was set down for hearing on 28 May 2015. At the conclusion of that hearing, the matter was not completed, and it was re-listed again for hearing on 17 July 2015. For reasons which will be explained, the hearing on 17 July 2015 could not proceed, and that day proceeded as a directions hearing. The Applicant sought costs on the day on an indemnity basis. This application was reserved. The matter was listed again for hearing on 28 September 2015. A compliance hearing was listed for 22 September 2015, but was vacated by the Tribunal on 21 September 2015. The hearing on 28 September 2015 proceeded, and the matter was concluded on that day.

3 On 28 September 2015, the Tribunal ordered, for the reasons given orally at the conclusion of the hearing, that the Respondents were to pay the Applicant the sum of $9,917.00, and were to reimburse to the Applicant the filing fee paid by him of $525.60. Orders were made for the filing of submissions regarding the application for costs made by the Applicant and regarding the application for interest made by the Applicant.

4 I now give my decision in relation to:

(a) the Applicant's claim for its costs of the directions hearing on 17 July 2015 on an indemnity basis;

(b) the Applicant's claim for its costs of the proceeding other than the costs of 17 July 2015; and

(c) the Applicant's claim for interest.

Overview of the Claim and Counterclaim

5 The Applicant's claim was for payment for electrical works performed under an agreement made with the Respondents. The claim, as articulated in the Points of Claim, was for $10,000 plus interest.

6 The Respondents filed a notice of defence of 25 May 2015. The essence of the defence was that:

(a) the agreement was made between the Applicant and the First Respondent; and
(b) the liability of the First Respondent was limited to $40,600, which sum was paid to the Applicant; and
(c) the Applicant breached the agreement by failing to undertake the electrical works in a proper and workmanlike manner.

7 On 22 May 2015, the First Respondent lodged a counterclaim for $11,942 against the Applicant, claiming that the Applicant:

(a) had failed to carry out the electrical work in a proper and workmanlike manner;
(b) did not complete the work; and
(c) had failed to take reasonable care of the premises when undertaking the work.

The first day of the hearing

8 On the first of the hearing the Applicant was represented by his solicitor Ms M Carmelli. The Respondents were represented by Mr S Buchanan of Counsel. The Applicant, Mr Joveski, gave evidence through a Macedonian interpreter. As it happened, the interpreter had been booked for only one hour, and the hearing could not continue beyond the allotted time. The proceeding was adjourned part heard for further hearing on 17 July 2015.

The events of 17 July 2015

9 When the hearing on 17 July 2015 began, Ms Carmelli again appeared for the Applicant and Mr Buchanan again appeared for the Respondents. The matter could not proceed, however, because the Respondents had not paid their hearing fee. Furthermore, the Second Respondent, Mr Jovanovski, was not present, and Mr Buchanan said that he was between 40 minutes and an hour away.

10 When I indicated that the Tribunal's discretion to make an order under s 78 of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act') had been enlivened, Ms Carmelli, on behalf of the Applicant, submitted that it would be appropriate to make an order on the claim, dismiss the counterclaim, and award costs.

11 Mr Buchanan submitted it would be inappropriate to make an order on the claim and to dismiss the counterclaim. He conceded that it would be appropriate to award the costs of the day to the Applicant.

12 Ms Carmelli then clarified that the Applicant was seeking costs on an indemnity basis. Mr Buchanan disputed that this was appropriate.

13 The Second Respondent, Mr Jovanovski, arrived and the Tribunal was informed that the hearing fee had been paid. As two hours had been

allocated for the hearing, and the interpreter booked for the hearing was only available for that period, it was necessary to adjourn the matter for further hearing. The proceeding was listed for further hearing on 28 September 2015 with an allowance of one day, and the hearing on 17 July 2015 was converted into a directions hearing. The Applicant was ordered to file and serve submissions as to why it was entitled to indemnity costs as distinct from costs on the ordinary basis, and also submissions as to the quantum of costs it was seeking. The Respondents were ordered to file and serve submissions in reply. The Respondents were directed to deliver a copy of the electrical plans for the project to the Applicant, and orders were also made regarding the filing of amended Points of Counterclaim and Points of Defence to Counterclaim, as an amendment to the Counterclaim had been foreshadowed by the Respondents. An order regarding experts' reports was made. Finally, an order was made for the exchange of copies of documents to be relied on at the hearing.

14 The Applicant filed submissions in support of its application for indemnity costs of the hearing on 17 July 2015, on 30 July 2015. The Respondents filed submissions in response on 14 August 2015.

The hearing on 28 September 2015

15 When the hearing resumed on 28 September 2015 Mr J McKay of Counsel appeared on behalf of the Applicant. Mr Buchanan again appeared on behalf of the Respondents.

16 Mr Joveski was put in the witness box and gave further evidence through an interpreter. He was cross-examined by Mr Buchanan on behalf of the Respondents. Ms Carmelli was then put in the witness box, and gave sworn evidence to explain why the case as presented differed from the case set out in the Applicant's Points of Claim.

17 The Respondents then called Mr Ian Bozinovski, another electrician who had carried out work on the Respondents' development after the Applicant had left the site. The Second Respondent, Mr Jovanovski, was then called. Each side then made submissions through Counsel. The Tribunal ordered, for reasons given orally, that the Respondents pay to the Applicant the sum of $9,917, calculated as follows:

(a) $10,000 in respect of the Applicant's claim; less
(b) a set-off of $83 in respect of the counterclaim.

18 Pursuant to the orders made on 28 September 2015, the Applicant filed submissions in relation to his application for costs of the proceeding, other than the costs of 17 July 2015, and in respect of his application for interest, on 7 October 2015. The Respondents filed submissions in response on 13 October 2015.

The Applicant's claim for costs in respect of the directions hearing on 17 July 2015

19 The jurisdiction of the Tribunal to award costs in respect of the directions hearing on 17 July 2015 arises under s 78 of the VCAT Act. This provides:

> **78 Conduct of proceeding causing disadvantage**
>
> (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
>
> (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
>
> (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
>
> (c) asking for an adjournment as a result of (a) or (b); or
>
> (d) causing an adjournment; or
>
> (e) attempting to deceive another party or the Tribunal; or
>
> (f) vexatiously conducting the proceeding; or
>
> (g) failing to attend mediation or the hearing of the proceeding.
>
> (2) If this section applies, the Tribunal may—
>
> (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
>
> (b) if the party causing the disadvantage is not the applicant—
>
> (i) determine the proceeding in favour of the applicant and make any appropriate orders; or
>
> (ii) order that the party causing the disadvantage be struck out of the proceeding;
>
> (c) make an order for costs under section 109.
>
> (3) The Tribunal's powers under this section are exercisable by the presiding member.

The Applicant's submissions dated 30 July 2015

20 The Applicant seeks costs of the hearing on 17 July 2015 on an indemnity basis. If s 78 is enlivened, as it has been in this case, any order for costs must be made under s 109 of the VCAT Act.

21 The Applicant advances two reasons why he should receive his costs of the hearing on 17 July 2015. The first is that he was unnecessarily disadvantaged by the manner in which the proceeding was conducted because an adjournment of the hearing scheduled for 17 July 2015 was sought, in circumstances where further defects had allegedly been found at

the development by 29 May 2015, and there was ample opportunity after that date for the Respondents to advise the Applicant of the proposed adjournment. That an adjournment was being requested was only notified to the Applicant on 15 July 2015. The Applicant contends the hearing on 17 July 2015 could not proceed as intended because an oral application to adjourn the proceeding was made by the Respondents, and that, in the circumstances, this conduct was unreasonable and caused a delay in the hearing of the matter resulting in an additional cost burden on the Applicant.

22 The second basis for seeking costs was that, at the beginning of the hearing on 17 July 2015, the Respondents had failed to comply with the obligation to pay a hearing fee. The Applicant says:

> The situation was remedied by the appearance of Mr Jovanovski who paid the hearing fee but not before causing loss of time to the Tribunal and the Applicant.

23 The Applicant notes that:

> Counsel for the respondents argued that the non-payment of the hearing fee was not the fault of the respondents as they presumably relied upon the advice of their solicitors…

24 The Applicant reminded the Tribunal of its power to make an order for costs directly against the Respondents' solicitors pursuant to s 109(4) of the VCAT Act.

25 The Respondents, in their submissions dated 14 August 2015 resisting an order for indemnity costs, contest the proposition that the hearing on 17 July 2015 could not proceed as intended because they made an oral application to adjourn the hearing. Rather, the Respondents say, the matter was prevented from proceeding on 17 July 2015 for two reasons, namely:

(a) the Respondents had not paid the hearing fee; and

(b) the Second Respondent failed to attend the hearing.

26 The Respondents provided an explanation as to why the Second Respondent failed to attend the hearing at the outset, saying that he believed an adjournment had been granted on the basis of an affidavit that had been sent to the Applicant's solicitor. Furthermore, it was said that the solicitors for the Respondents did not believe that they received notice of the requirement to pay the hearing fee prior to the commencement of the hearing. It was contended that the errors on the part of Respondents that led to the adjournment were 'simple and unintended'. In these circumstances, it was not appropriate for an indemnity costs order to be made, as an order for indemnity costs should only be made in exceptional circumstances.

Ruling as to the costs of 17 July 2015

27 I accept the contention put by the Respondents that the reason the hearing on 17 July 2015 could not proceed was not because of any application for

an adjournment made by them. The reason that the hearing of 17 July 2015 had to be adjourned was because the hearing fee had not been paid prior to the scheduled starting time. This is reflected in Order 1 made on that day, which vacated the hearing.

28 Furthermore, Order 4 made on 17 July 2015 indicated that the Tribunal's discretion to award costs pursuant to s 78 had been enlivened because the Applicant had been unnecessarily disadvantaged by the conduct of the Applicant by Counterclaim (First Respondent) in not having paid the hearing fee by the start of the hearing, and not doing so until approximately an hour and a quarter into the scheduled hearing time of two hours, thereby necessitating the vacation of the hearing.

29 As noted, the liability of the Respondents to pay the costs of the day on the standard basis was conceded on 17 July 2015 by the Respondents' Counsel.

30 On 17 July 2015, Orders were made for the Applicant to file and serve submissions as to why he contended he was entitled to costs on an indemnity basis, as distinct from an ordinary basis. The submissions filed on 30 July 2015 did not directly address this issue. They did make it clear that the Applicant sought costs on an indemnity basis of $1,430.55 inclusive of GST. However, they were essentially a set of submissions as to why the Tribunal's discretion under s 109(3) to award costs had been enlivened. They did not outline any special features of the proceeding which might justify an award of costs on an indemnity basis.

31 I find that the Applicant is entitled to his reasonable costs of the hearing on 17 July 2015 thrown away by the adjournment, **assessed on the standard basis**.

32 Pursuant to Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008*, the default scale of costs is the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

33 Reference to the Rules of the County Court indicates that 'County Court costs scale' means a fee, charge or amount that is 80 percent of the applicable rate set out in Appendix A to Chapter I of the Rules of the Supreme Court.

34 Reference to Appendix A of the Supreme Court Scale of Costs indicates that the rate for an attendance requiring legal skill or knowledge by a legal practitioner for each unit of six minutes or part thereof is $38 exclusive of GST. This, of course, equates with a rate of $380 per hour exclusive of GST. The allowable rate on the County Court scale for an attendance by a legal practitioner is accordingly $304 per hour exclusive of GST.

35 Applying this rate, I find the Applicant is entitled to costs of $900 plus GST, a total of $990.

36 The Applicant urged the Tribunal, should it not be inclined to make an order for costs on an indemnity basis against the Respondents, to make an

order that the Respondents' solicitors pay the Applicant's costs on an indemnity basis.

37 For the reasons given, I do not think indemnity costs ought to be awarded to the Applicant in respect of the hearing on 17 July 2015. The Applicant has received an award of costs in respect of that day on the standard basis, and it is unnecessary to consider further the Applicant's claim for costs against the Respondents' solicitors personally. Accordingly, it is not necessary for a hearing to be scheduled so that those solicitors can be heard, as would be their entitlement under s 109(5) of the VCAT Act if there was a prospect that costs might be ordered against them personally.

The Applicant's claim for costs in respect of the proceeding other than the costs of 17 July 2015

The Applicant's threshold submission

38 The Applicant's first point is that the prohibition against awarding costs in a proceeding relating to a *small claim*, as defined in Chapter 7 of the *Australian Consumer Law and Fair Trading Act 2012*, which is contained in s 4I(1) of Part 2AB of Schedule 1 of the VCAT Act, does not apply because the Applicant's claim was for $10,000 plus interest.

39 Section 183 of the *Australian Consumer Law and Fair Trading Act* defines a *small claim* as including a consumer and trader dispute in relation to a claim for performance of work of a value not exceeding $10,000 or other prescribed amount that arises out of a contract for the supply of goods or the provision of services other than a contract of life insurance.

40 The Applicant contends that the claim for interest, being made either under the *Domestic Building Contracts Act* or the *Australian Consumer Law and Fair Trading Act*, is plainly a claim for damages in the nature of interest. I accept this submission. The total claim for damages accordingly exceeds $10,000. Even if the claim is one made under the *Australian Consumer Law and Fair Trading Act*, it is not a *small claim* as defined by s 183 of that Act. It therefore is not a small claim for the purposes of s 4I(1) of Part 2AB of Schedule 1 of the VCAT Act, and this is a case in which the Tribunal can potentially award costs.

41 The Applicant and the Respondents agree that the issue of costs of the proceeding generally is governed by s 109 of the VCAT Act. This relevantly 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 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.

42 The operation of this provision was explained by Gillard J in *Vero Insurance Ltd v Gombac Group Pty Ltd* (2007) 26 VAR 354; [2007] VSC 117 as follows:

> In approaching the question of any application for costs pursuant to s 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows –
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may 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 s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

Applicant's submissions on the operation of s 109 of the VCAT Act

43 The Applicant says that it would be fair for the Tribunal to order that the Respondents pay its costs of the proceeding, pursuant to s 109 of the VCAT Act, for the following reasons:

(a) The Applicant has been entirely successful in its claim, and has resisted over 98% of the First Respondent's counterclaim. These outcomes are said to be relevant to the discretion of the Tribunal pursuant to s 109(3)(c) and (e).

(b) The Respondents' resistance to the claim was not 'tenable' within the meaning of s 109(3)(c).

(c) The nature of the proceeding warrants an award of costs. Although the quantum involved was small, both sides were represented by counsel, and the case involved legal questions of repudiation, quantum meruit and causation. There was also a factual contest concerning the contract price that required 'forceful cross-examination'. The proceeding was run as a piece of commercial litigation. This is relevant to s 109(3)(e).

(d) The disadvantageous conduct of the Respondents is relevant to s 109(3)(a).

(e) Given the small sums involved, if the Tribunal does not award costs to the Applicant, the Applicant will be deprived of the fruits of the award made in his favour. This is an 'other matter' for the purposes of s 109(3)(e).

Respondents' submissions in response

44 In summary, the Respondents say:

(a) The scheme of the VCAT Act is that prima facie each party is to bear its own costs of a proceeding. Reference is made to the judgment of Ormiston JA in *Pacific Indemnity Underwriting Agency Pty Ltd v McLaw No 651 Pty Ltd* (2005) 13 VR 483, where His Honour emphasised this point.

(b) The claim was a small one, and in the circumstances it would be unusual for the Tribunal to order costs. Reference is made to *Tanner v Miratone Concreting Contractors* (Domestic Building) 2007 VCAT 164 at [36].

(c) Although the Tribunal's power to award costs is often enlivened in the Building and Property List on the basis of the nature and complexity of the proceedings, the present proceeding is not such a case. It may have been run with representatives on either side as a 'proper piece of commercial litigation', but it was not a complex piece of litigation. It boiled down to a question of credit.

(d) The proposition that the Respondents' case was not tenable is not sustainable. The Applicant changed his case during the running of the hearing. The successful case made out by the Applicant's evidence was not the case he pleaded. The Respondents say:

> In the circumstances there is no basis to suggest that the respondents were not justified in defending the proceeding…

(e) As to the proposition that the manner in which the Respondents' conduct of the litigation was 'disadvantageous to the Applicants, this has not been demonstrated. On the other hand the affidavits of Ms Carmelli demonstrate:

> the unnecessarily combative approach taken by the applicant to the proceeding as a whole.

(f) The second day of the hearing was wasted, but this has been dealt with separately. The third day was not wasted, and was usefully used to complete the case, including, amongst other things, the re-opening of the Applicant's evidence in chief.

45 It is appropriate to consider each of Applicant's contentions, and the Respondents' responses, in turn.

Outcome

46 The Applicant acknowledges that, while success in a proceeding does not itself justify an award of costs, it is undoubtedly the starting point for consideration of costs under both s 109(3)(c) and (e).

47 The Applicant referred the Tribunal to its own decision in *Fasham Johnson Pty Ltd v Ware* [2004] VCAT 1708. Reference to that decision certainly illustrates the point that success in a proceeding in the Tribunal does not of itself justify an order for costs. Senior Member Cremean said at [12]:

> Costs are discretionary and it is in the nature of an exercise of discretion that its exercise one way or another cannot be compelled. And under s 109 success in a proceeding does not by itself justify an order for costs. Something further must be shown.

48 I do not consider that the fact that the Applicant was successful is sufficient of itself to enliven the Tribunal's discretion regarding costs under s 109(3).

Relative strengths of the claims

49 Section 109(3)(c) refers 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.

50 Although the Respondents lost the claim brought by the Applicant, and had only a small success on the counterclaim, this does not necessarily mean that the defence of the claim was not tenable in the relevant sense. The fact that the case involved, as the Applicant contends, issues of repudiation, quantum meruit and causation, suggests that it may have been an appropriate proceeding for either party to take to a hearing.

51 The Respondents contend that the Applicant's case as pleaded was not the case that was made out by the Applicant's evidence, and they point out in support of this contention that on the last day of the hearing the Applicant's solicitor, Ms Carmelli, was called to give sworn evidence to explain how

the case as pleaded differed from the evidence presented by the Applicant. I agree with the Respondents' contention that, in these circumstances, there is no basis to suggest that the Respondents were not justified in defending the proceeding. I find that s 109(3)(c) does **not** apply so as to enliven the jurisdiction of the Tribunal to award costs.

Nature of the proceeding

52 The Applicant relies on s 109(3)(d), which establishes the 'nature and complexity of the proceeding' as one of the criteria relevant to the exercise of the Tribunal's discretion regarding costs.

53 The Applicant contends that the fact that the case involved complex legal issues, including a factual contest concerning the contract price which required forceful cross-examination, and was run as a proper piece of commercial litigation, is a relevant matter. The Tribunal's decisions in *Styles v Murray Meats Pty Ltd* [2005] VCAT 2124 at 17 and *Bovalino v Crea* [2006] VCAT 2302 at 23 are cited.

54 In *Styles*, Deputy President McKenzie had to deal with an application for costs in a complex matter involving a claim for sexual harassment, which was successful, and a claim under the *Equal Opportunity Act 1995*, which was not.

55 Deputy President McKenzie observed that the case was said to be similar to *Bryce v City Hall Albury Wodonga Pty Ltd* [2005] VCAT 2013 in which His Honour Judge Dove had awarded costs in favour of the successful complainant. It was said that *Styles*, like *Bryce*, was fiercely contested. In both cases the parties were represented by counsel. And both involved considerable oral and documentary evidence and extensive cross-examination, and both were conducted in a way in which matters are usually conducted before courts. Deputy President McKenzie said, starting at [15]:

> … My approach to this costs application is this. As the Victoria Court of Appeal pointed out in *Pacific Indemnity Underwriting v Maclaw* [2005] VSCA 165, the position under s 109 of the VCAT Act is different from that applying in the courts. The general rules is that costs lie where they fall unless the Tribunal considers it fair to award otherwise. Whether it is fair to order otherwise must be determined on a case by case basis. Some of the factors taken into account may be of a more general nature. Other factors will relate only to the case in question. It is difficult to argue by reference to analogy in other cases. Each case must be considered on its merits and will be different from each other case.
>
> …
>
> (17) I also accept that a party will not be entitled to costs in every case where both parties have been legally represented or a

matter has been vigorously contested. This may be a decisive factor in a particular case, but will not always be decisive.

(18) Fiercely contested cases occur in many lists in VCAT not only in the anti discrimination list. As I have said, how fiercely a case is contested may be a factor in the particular case but would not be a factor in all cases.

(19) The question is whether in a particular case it is fair to award costs in favour of one part (sic) or the other.

56 In *Bovalino v Crea*, Judge Bowman, Vice President, had to deal with an application for costs made by a successful applicant. The proceedings in the Tribunal had arisen out of a failure by the respondent to honour the terms of a settlement deed which had been executed to resolve earlier Supreme Court proceedings. His Honour said at [22]:

> I am also urged by Mr Best to consider s 109(3)(d) of the Act. Mr Gillies has quite correctly pointed out that the ultimate hearing of the matter was much briefer than had been anticipated. I would suspect that, to no small extent, is due to his becoming involved in the matter, identifying the relevant issues from the *Crea* perspective, and condensing the various arguments so as to address these. He correctly points out that, in my ruling of 17th August 2005, I commented that the matter was not unusually complex. However, the earlier issue of jurisdiction, which was raised by the *Creas*, was not simple. It provoked quite complex submissions with reference to many authorities. It required a detailed ruling. Furthermore, the very nature of the proceeding involved the interpretation of and (sic) alleged non-compliance with the terms of a Deed of Settlement relating to Supreme Court proceedings which had run over several days. Reliance by *Bovalino* on s 109(3)(d) does not seem to me to be misplaced.

57 As indicated by Deputy President McKenzie in *Styles*, each case is to be treated on its own merits. The fact that the parties were both represented may be a relevant factor, but it is not of itself determinative of the question of whether costs should be awarded. Nor is the fact that the case was vigorously contested.

58 I agree with the Respondents' contention that the present case was not particularly complex. It did not involve issues of jurisdiction, nor interpretation of a deed, as was the case in *Bovalino v Crea*. While the Respondents in the present proceeding ran a defence to the Applicant's claim which was ultimately unsuccessful, this does not necessarily mean that the defence was so un-meritorious that it should not have been run. In the context of a $10,000 claim for work and labour, I find that to award costs just because the claim was unsuccessfully defended would be inappropriate, particularly as the claim successfully run at the hearing was not the case originally pleaded.

If costs of the proceeding are not awarded, the successful Applicant will be deprived of the fruits of his award

59 This was certainly a relevant factor which influenced Senior Member Walker when he awarded costs in *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463 [at 20].

60 However, as has been remarked, each case must be considered on its merits. The Applicant's case was a straightforward case for work and labour done. The Applicant could have presented the case himself, albeit with the assistance of an interpreter. To make an award of the costs of the entire proceeding (apart from the costs of the hearing on 17 July 2015), merely because not to do so would substantially deprive the successful Applicant of the benefit of the litigation, would undermine the policy inherent in s 109 of the VCAT Act which is to the effect that ordinarily each party should bear their own costs. An award of costs would undermine that policy because, in virtually every case in which an applicant is pursuing a modest sum, but uses a solicitor as advocate, a large part of any award obtained will be dissipated in legal costs. For this reason, although I am empathetic to the position of the successful Applicant, I do not think it would be fair to order costs because of this argument, and I decline to do so.

Disadvantageous conduct of the Respondents

61 I have reviewed the affidavit of Ms Carmelli, sworn 18 September 2015, and her email of 25 September 2015 containing a letter to the Respondents dated 23 September 2015. The affidavit sets out the alleged procedural misconduct of the Respondents upon which the Applicant relies in seeking costs.

62 One of the complaints centres on the fact that the Respondents said at the hearing on 17 July 2015 that they were going to amend their counterclaim, but in the event did not do so. Ms Carmelli wrote to the Respondents' lawyers about this on 5 August 2015 and again on 25 August 2015. On 8 September 2015, Ms Carmelli wrote to the Tribunal regarding the missing amended counterclaim, seeking a compliance hearing, and copied that letter to the Respondents' solicitors. Ms Carmelli was not informed that the counterclaim was not going to be amended until 16 September 2015. She drafted an affidavit and swore it on 18 September 2015 in respect of the compliance hearing. The compliance hearing was vacated by the Tribunal on 22 September 2015 after the Respondents' solicitors confirmed to the Tribunal that their clients would not be amending the counterclaim on 21 September 2015.

63 Another complaint made by Ms Carmelli in her affidavit related to the failure by the Respondents' solicitors to promptly serve documents. These documents included:

(a) the initial Points of Counterclaim, which Ms Carmelli received directly from the Tribunal three days before the first day of the hearing;
(b) copies of tax invoices forming part of the counterclaim, which Ms Carmelli had to ask for in a letter dated 27 May 2015 addressed to the Respondents' solicitors;
(c) evidence that the Respondents had paid monies referred to in the four invoices forming part of the Counterclaim, in respect of which Ms Carmelli wrote to the Respondents on 28 May 2015, on 19 June 2015, and again on 23 June 2015;
(d) the electrical plans, which were due under an order of the Tribunal to be delivered on 24 July 2015, in respect of which Ms Carmelli wrote to the Respondents' solicitors on 5 August 2015.

64 Furthermore, Ms Carmelli deposes that she had to write, on 16 July 2015, to the Respondents' solicitors rejecting their request made on 15 July 2015, for an adjournment of the hearing on 17 July 2015.

65 Having regard to the contents of Ms Carmelli's affidavit and exhibited correspondence, I find that the Respondents' conducted the proceeding in a manner that in some respects justifies an award of costs under s 109(3)(a)(i), which empowers the Tribunal to award costs if it is satisfied that it is fair to do so having regard to that fact the Applicant has been unnecessarily disadvantaged by the Respondents' failure to comply with orders of the Tribunal.

66 The relevant failures to comply with orders are:

(a) the failure to send a copy of the electrical plans, which were due under the Tribunal's order of 17 July 2015, to be supplied by 24 July 2015.
(b) failing to deliver amended Points of Counterclaim despite being ordered by the Tribunal on 17 July 2015 to do so by 31 July 2015.

67 I find that breach of the Tribunal's order relating to delivery of the electrical plans unnecessarily disadvantaged the Applicant because it reasonably caused Ms Carmelli to write to the Respondents' solicitors on 5 August 2015.

68 I further find that the breach of the Tribunal's order relating to the delivery of the counterclaim unnecessarily disadvantaged the Applicant because it reasonably caused Ms Carmelli to write to the Respondents' solicitors on 5 August 2015 and again on 25 August 2015; to write to the Tribunal regarding the missing amended counterclaim on 8 September 2015, seeking a compliance hearing, and to copy that letter to the Respondents' solicitors; and to draft the affidavit she swore on 18 September 2015 in respect of the compliance hearing. It is relevant to note that the Respondents' solicitors did not advise the Applicant that they did not intend to amend their counterclaim after all, until 16 September 2015

69 I will award costs against the Respondents in respect of the matters set out in paragraph 69 and 70, fixed at $650 plus GST, a total of $715. This award is in addition to the order for costs awarded in respect of the hearing on 17 July 2015.

Claim for reimbursement of hearing fees

70 The Applicant submits that it incurred hearing fees for 17 July 2015 in the sum of $199 and for 28 September 2015 in the same amount.

71 The Tribunal confirms that fees of $199.90 were paid by the Applicant on each occasion.

72 It is appropriate, as the Applicant has been substantially successful in the proceeding, that the Applicant be reimbursed in respect of each of these hearing fees pursuant to s 115B of the VCAT Act, and an order for reimbursement of $399.80 will be made.

The Applicant's claim for interest

73 The Applicant claims interest calculated at the interest rate fixed from time to time from 7 September 2014 under s 2 of the *Penalty Interest Rates Act 1983*.

74 I find that this is an appropriate course, having regard to s 184(4) of *Australian Consumer Law and Fair Trading Act.*

75 The base amount to which interest is to be applied is the award of $9,917.

76 The Applicant contends that interest should be applied from 7 September 2014 but makes no submission as to why that date is appropriate.

77 There was no written contract between the Applicant and either of the Respondents, and accordingly there is no express provision in the contract upon which such an award of interest can be based.

78 I am prepared to award interest from the day after the date of institution of the proceeding, that is to say from 25 March 2015, until the date of the award, namely, 28 September 2015.

79 The relevant interest rate under the *Penalty Interest Rates Act* for the 68 days between 25 March 2015 and 31 May 2015 was 10.5%, and the interest calculated for this period is $193.99. The interest rate applicable for the 120 days between 1 June 2015 and 28 September 2015 was 9.5%, and interest for this period is $309.74. The total amount of interest I will award is therefore $503.73.

Summary

80 I will order that:

(a) The Respondents must pay to the Applicant damages in the nature of interest of $503.73.

(b) The Respondents must reimburse to the Applicant the hearing fee of $199.90 it paid in respect of the hearing on 17 July 2015 and the hearing fee of $199.90 it paid in respect of the hearing on 28 September 2015, a total of $399.80.

(c) The Respondents must pay to the Applicant his reasonable costs of the hearing on 17 July 2015 thrown away by the adjournment, fixed at $990.

(d) The Respondents must pay to the Applicant under s 109(3)(a)(i) costs fixed at $715.

MEMBER C EDQUIST