

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1599/2018

CATCHWORDS

DOMESTIC BUILDING–COSTS–Section 109 *Victorian Civil and Administrative Tribunal Act 1998* whether circumstances exist so as to make it fair that the applicant should be paid its costs of their claim made in the proceeding–found that in the circumstances there was no basis for doing so.

APPLICANT	Fred Kevin
SECOND APPLICANT	Leila Kevin
RESPONDENT	Pooyan (Ryan) Toussipour t/as Eagle Eyes Building Services
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Costs applications on the papers. Applicants’ written submission filed 3 May 2019, as amended by written submission filed 24 May 2019. Respondent’s written submission filed 28 May 2019.
DATE OF ORDER	6 June 2019
CITATION	Kevin v Toussipour (Costs) (Building and Property) [2019] VCAT 833

ORDER

1. The applicants’ claim for costs is dismissed.
2. The respondent’s claim for costs is dismissed.

A T Kincaid
Member

REASONS

- 1 I heard this proceeding on 25 and 26 February 2019, on a third day 19 March 2019, and on a fourth day 30 April 2019.
- 2 I determined the matter on 30 April 2019, giving my reasons orally.
- 3 Mr and Mrs Kevin (the “**applicants**”) made a claim dated 3 May 2019 for their costs in the total sum of \$11,169.95. They subsequently filed on 9 May 2019 an amended claim in the total sum of \$11,564.05.
- 4 By email dated 22 May 2019, the Tribunal directed the applicants to the provisions of section 109 of the *Victorian Civil and Administrative Act 1998* (“**the Act**”). They were invited to make a submission as to why they should be awarded costs, having regard to the considerations set out in section 109(3) of the Act. The applicants re-filed the same claim for costs that they had filed on 9 May 2019, without addressing the relevant matters.
- 5 Mr Toussipour (the “**respondent**”) filed a submission headed “application for reserved costs” dated 3 April 2019 and amended on 19 April 2019. The submission contains largely a narrative unrelated to costs, disputing aspects of my findings. It also contains submissions concerning alleged misleading conduct by the applicants during the hearing, which I have considered in relation to his costs application.
- 6 Notwithstanding the parties’ having failed to address the relevant matters in their respective applications for costs, I am well in a position to do so, having heard the proceeding.

The claim

- 7 The applicants have owned their home at Mill Park, Victoria since 2009. It was constructed in about 1978. They engaged the respondent to carry out renovation works in late 2017, involving the construction of a deck surround to a new external spa installation, and landscaping works at the back and front of the dwelling. I found that Ms Kevin was the person mainly responsible for directing the respondent in regard to increased scope of the works, which proceeded in an undocumented fashion.
- 8 The applicants subsequently issued a proceeding against the respondent in the Tribunal, seeking damages in the sum of \$90,586.45. This was the amount of a quotation that they had received prior to the hearing from a building contractor Vertex Home Constructions Pty Ltd (“**Vertex**”).
- 9 Of the total amount quoted by Vertex, \$50,531.45 was the amount to rectify allegedly defective works undertaken by the respondent. These items were identified in paragraphs 6.1-8.18 of a report of a registered building practitioner, Mr M Bontalik dated 24 November 2018 (Revision). Mr Bontalik was of the opinion that these items failed in certain respects to comply with the *Building Act 1993*, the *Regulations*, the NCC and relevant NCC referenced standards.

- 10 The balance of the amount quoted by Vertex was \$40,055 was the amount to rectify other claimed defective works which, although not considered by Mr Bontalik to be breaches of the *Building Act 1993*, the *Regulations*, the NCC and relevant NCC referenced standards, were considered to be examples of poor workmanship in breach of the relevant warranties in the *Domestic Building Contracts Act 1995*. These items were identified in Appendix B to the report of Mr Bontalik.

The counterclaim

- 11 The respondent counterclaimed for the balance of the contract price allegedly due to him, plus claimed variations.
- 12 At the conclusion of the hearing, the respondent's counterclaim (including two amounts agreed by the parties during the hearing) stood at \$62,080.50 calculated as follows:

Monies allegedly due pursuant to an accepted quotation dated 3 December 2017	\$50,000
Variation 1 Decking double sized, due to the applicants' alleged decision to have the spa further west, away from the house, than originally anticipated	\$8,000
Variation 2 Changes of decking material from Merbau to Ekodeck plus \$8,400 Less (\$4,000) Merbau cost	\$4,400
Variation 3 45 m2 of paving removed from front driveway, and charcoal coloured concrete laid Sub-contractor's charges \$10,500 plus GST	\$11,550
Variation 4 Removal and re-blocking of bluestone wall, removal of excess 10 pieces of bluestone and tipping costs	\$5,000
Variation 5 Removal of grass and shrubs in front yard and synthetic turf	\$5,000
Variation 6 Planting of magnolias and white pebbles	\$2,000
Variation 7 Digging and installation of channel drain near entrance to protect the house from flooding.	\$1,000
Variation 8 Plumbing cost for extra gutter for the roof and spa return and fix of damaged PVC pipes from soil erosion \$3,500 claimed, but abandoned day 3	—

Variation 9 Sandpit near decking area	\$1,200
Variation 10 Planting 4 fully grown screening plants	\$745.50
Variation 11 Planter box construction near glass pool fence with Ekodeck plus	\$2,000
Variation 12 Pizza oven carriage \$500 agreed day 3	\$500 (agreed)
Variation 13 Build outdoor furniture Evidence that this was a gift (day 3). \$800 claimed, abandoned day 3.	—
Variation 14 scrubbing splashed paint \$300 \$175 Agreed day 3.	\$175.00 (agreed)
Variation 15 Assembly of applicants' outdoor furniture \$500 claimed, abandoned day 3	—
Variation 17 Replacing fluoro lamps in verandah and garage area. \$450 claimed, abandoned day 3.	—
Money Claim 18 Debt collection agency fees \$4,010 but amended on day 3 to \$1,010.	\$1,010
GROSS CLAIM, INCLUDING AGREED ITEMS	\$92,580.50
Less paid by owners	\$30,500.00
TOTAL NET CLAIM	\$62,080.50

- 13 Central to the applicants' allegations was that the quotation of the respondent that they accepted was dated 8 October 2017, entitled "Landscaping and spa slab" for \$27,157.90. It provided for the removal of their existing pool that had been damaged due to soil erosion on the north side, the pouring of a new concrete slab on which a new spa was to be erected, surrounding merbau decking and other works described in the quotation.
- 14 In contrast, and as appears from my above summary of the counterclaim, the respondent contended that the relevant quotation, accepted by the applicants was for \$50,000 dated 3 December 2017. He considered that there was support for this in a document tendered on day 3, which was a copy of another quotation dated 17 August 2016 for \$30,000 but amended

in the first applicant's handwriting to show \$47,273 plus \$4,727.27, a total of \$52,000.27.

- 15 The applicants' evidence was that at one point they were thinking about having the respondent construct a new pool, and that this was the reason for the \$50,000 quotation being requested by them from the respondent. The quotation referred to a pool. They gave evidence that they went back to their original idea of having a spa instead, and that the respondent agreed.
- 16 This was a proceeding where the contractual documentation was badly wanting. To some extent it was explained by the fact that when the applicants approached the respondent to do the work, they were friends. Both the applicants and the respondent mix in the Melbourne Iranian community. They became friends as a result of their respective sons becoming friends at school. The respondent conceded that, because of his close association with the applicants, he was not as diligent with his paperwork as would normally be the case.
- 17 The applicants and the respondent are no longer friends. Their current relationship, as demonstrated many times during the hearing, is attended by a high degree of vitriol. The hearing was punctuated by rancorous verbal exchanges between the parties. At one point, I had to warn Ms Kevin that I would be asking her to leave the hearing room.

Which contract did the applicants accept?

- 18 My first task was to determine the terms of the contract. Was it the \$50,000 quote relied on by the respondent, or was it the \$27,157.90 quotation relied on by the applicants?
- 19 In my reasons, I found that it was the \$27,157.90 quotation. It was the quote whose terms, I found, most reflected the work that was actually done by the respondent. It was headed "landscaping and spa slab". This was, in broad terms, the work that was undertaken.
- 20 The quotation relied on by the respondent, on the other hand, was headed "swimming pool repair". It referred to "pool installation" which, of course, was not done. The quotation relied on by the respondent did not refer to a "concrete slab 150 mm thick approximately 3.5m x 3m" which was also done, and which was referred to in the \$27,157.90 quotation relied on by the applicants.
- 21 I found that there was no sensible basis, in the absence of a signed agreement, for me to conclude that the \$50,000 quotation governed the relationship having regard to the work actually performed by the respondent.

Reduced counterclaim as a result of my findings on which contract prevailed

- 22 It followed, therefore, that the respondent's total gross claim was not \$92,580.50 as claimed, but was \$69,738.40. This is \$22,842.10 less, which is the difference between \$50,000 and the applicable invoice of \$27,157.90.
- 23 I also found from the evidence that the applicants paid \$30,500 as contended by the respondent, as follows:

November 2017 payment	\$8,000
December 2017 payment	\$5,000
January 2018 payment	\$7,000
January 2018 payment	\$8,000
SUB-TOTAL	\$28,000
Further monies paid	\$2,500
TOTAL PAID	\$30,500

- 24 I did not accept the applicants' evidence that they paid a further \$5,000 on 12 January 2018, as claimed in Appendix 3 to their Points of Claim. I found, from reviewing the respondent's text messages, that his message "\$5,000 received thanks" was not sent on 12 January 2018 as claimed by the applicants, but had been sent on 21 November 2017. I found that that payment of \$5,000 is the one referred to above as the "December 2017 payment".
- 25 As a result of my findings in respect of the applicable quotation, and by my further findings in respect of the amounts paid by the applicants, the net counterclaim of the respondent was therefore reduced to \$39,238.40.

Findings

- 26 In the result, I found that:
- (a) the applicants had proved only \$35,271.97 of their claimed amount of \$90,586.45, particulars of which are provided in my orders dated 30 April 2019;
 - (b) the respondent had proved \$27,220.50 of his variations claim which, together with my finding as to the applicable quotation, meant that the respondent had proved only \$23,878.40 of his \$62,080.50 counterclaim as it stood at the conclusion of the hearing.

COSTS IN THE TRIBUNAL

- 27 The Tribunal's powers in respect of making orders for costs are constrained by Section 109 of the Act, which 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 sub-section (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.

28 *In Vero Insurance Ltd v Gombac Group Pty Ltd*,¹ Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

In approaching the question of any application to costs pursuant to section 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

¹ [2007] VSC 117.

Tribunal may also take into account any other matter that it considers relevant to the question.²

- 29 In the courts, it is often the case that costs generally “follow the event”. That is to say, where in a case such as this, there is a claim and counterclaim, the respective issues are not interlocked, the hearing time is equally taken up by both claims, and where the plaintiff succeeds in the claim and the defendant on the counterclaim, in the court’s discretion this would usually result in the plaintiff having the costs of the claim and the defendant having the costs of the counterclaim.³ Such an argument could not, however, be mounted in the case of a proceeding before the Tribunal. This is because it is apparent from the terms of section 109(1) of the Act that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding.
- 30 By section 109(2) of the Act, the Tribunal is empowered to depart from the general rule that each party is to bear its own costs, but it is not bound to do so. It may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3).

CONCLUSION

- 31 I have concluded that there is no criterion set out in section 109(3) of the Act which applies either to the claim brought by the applicants as would make it fair to make an order for costs against the respondent, or applies to the counterclaim as would make it fair to make an order for costs against the applicants.
- 32 Both claim and counterclaim were demonstrated to have been properly brought, in the sense that each resulted in a finding of liability towards the respective claimant. However, as is often the case in proceedings before the Tribunal, both parties were equally unsuccessful in proving more than half of their respective claims.
- 33 I also consider that given the lack of a written contract, and the poor state of the evidence on both sides as to which of the quotations was the applicable one, the parties were equally responsible for being required to attend a lengthy hearing before the Tribunal, in order to have their respective rights and liabilities determined.
- 34 To the extent that the respondent relies on the alleged dishonest conduct of the applicants, as may have attracted a costs order having regard to the consideration in section 109(3)(a)(v) of the Act, I find his submission unproved.
- 35 I should also add that the applicants’ claim for costs includes claimed expenses that are generally not recoverable by an unrepresented party in a

² Ibid at [20].

³ See discussion in *Barescape Pty Limited as trustee for the V’s Family Trust v Bacchus Holdings Trust (No 12)* [2012] NSWSC 1591 at [6] per Justice Black.

claim for costs.⁴ Of the total amount claimed by them, the only items which fall under the category of costs that may, in the Tribunal's discretion, be recovered by an unrepresented party are the claimed costs of experts (\$2,430), the Tribunal's fees (\$1,370.65), absences from work to attend the Tribunal (Mr Kevin claims \$2,800, Mrs Kevin claims \$800).

36 I make orders dismissing the costs claims.

A T Kincaid
Member

⁴ See generally *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC* [2004] VCAT 2188 at [8].