VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP775/2014

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.109(1) – application for order for costs of proceeding – whether "fair" in the circumstances to order Respondent to pay the Applicant's costs - relevant considerations – building dispute involving expert evidence and a substantial counterclaim – likely cost of conducting the proceeding - reasonableness of conduct of parties in respective offers made to settle the proceeding a relevant consideration – split hearing caused by conduct of successful party – costs of further hearing to assess damages awarded to other party

APPLICANT:	Peter Kyle
RESPONDENT:	Michael Wilson
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Application for orders for costs
DATE OF HEARING:	29 May 2019
DATE OF ORDER:	21 June 2019
CITATION:	Kyle v Wilson (Building and Property) [2019] VCAT 936

ORDER

Order the Respondent to pay the Applicant's costs of this proceeding, including reserved costs, up to 27 April 2017 and also the costs of this application for costs, such costs, if not agreed, to be assessed on the standard basis in accordance with the County Court scale by the Victorian Costs Court.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant:	Mr R. Rozenberg, of Counsel
For Respondent:	In person, by telephone

REASONS

Background

1 This proceeding concerned claims by the Applicant ("**the Builder**") and the Respondent ("**the Owner**") against each other with respect to the construction of a house by the Builder for the Owner on his land in Gippsland.

2 The proceeding was commenced by the Builder, seeking payment for the frame stage. After this was paid by the Owner, the Builder determined the building contract ("**the Contract**"). He then amended his claim to seek an amount of $19,419.58 for the cost of windows that he had ordered for the project that he could no longer use and also claimed some interest.

3 The Owner issued a counterclaim alleging that the Builder had repudiated the Contract and seeking unspecified damages. When the damages sought were eventually quantified, the claim by the Owner was $375,082.16.

4 The matter came before me for hearing on 6 February 2017 with six days allocated. At the commencement of the hearing the Builder sought to increase his claim to seek substantial damages from the Builder for the loss of the benefit of the Contract. The amendment was opposed by counsel for the Owner. After some discussion with counsel, I determined that I would proceed with the hearing in order to decide the issue of termination and, if the Builder was successful on that issue, I would then list the proceeding for a further hearing for the assessment of damages.

5 The termination issue was decided in favour of the Builder and, following directions, there was a further hearing for the assessment of damages on 25 May 2018. At that further hearing, the Builder's damages were assessed at $13,346.39 and I ordered the Owner to pay that sum as well as an amount of $2,193.92 interest.

6 The Owner has appealed to the Supreme Court of Victoria against both the decision as to termination and the assessment of damages. That appeal is still pending.

7 The Builder now seeks an order for its costs of the proceeding.

The costs hearing

8 The costs application came before me for hearing on 29 May 2019. Mr R Rozenberg of counsel appeared on behalf the Builder and the Owner appeared in person by telephone.

9 After hearing submissions, I informed the parties that I would provide a written decision.

Power to award costs

10 The power of the Tribunal to award a party costs of a proceeding is conferred by s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("**the Act**") which, where relevant, provides as follows:

> "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.
>
> ……"

11 In the case of *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J in said (at para 20 et seq.) that the proper approach to be taken by the Tribunal in regard to any application for costs is as follows:

> "20. 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."

His Honour added (at para 22):

> "22. Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule."

Submissions

12 The Owner submitted that I ought not to decide the question of costs until his appeal is determined. However, on 10 December 2018, Cavanough J ordered that the proceeding in the Supreme Court be listed for judicial mediation:

> "…to take place after the issues between the parties as to their costs in the VCAT proceedings have been resolved by a determination of VCAT or by agreement".

13 The application for costs having been made and submissions having been received from both sides I ought to determine it. Quite obviously, if the Owner's appeal is successful, any award of costs will fall with the principal order.

14 The Owner submitted that the Builder should be ordered to pay his costs or, in the alternative, that the costs should lie where they fall and that it is not fair in the circumstances of the case to make an order for him to pay the Builder's costs. He pointed to the presumption in a s.109(1) of the Act that each party pay his own costs and said, correctly, that the discretion under subsection (3) is dependent on the facts of each case and cannot be fettered.

15 The Owner referred to the deterioration in his family's finances as a result of the Builder's conduct and to what he regards as the justice of the case to indicate that it would not be fair to make an order for costs against him. He

said that additional evidence showed that the stumps of the house were not properly founded and that the building had since been demolished.

16 It is not "fairness" in any general sense that is to be considered but whether in the circumstances, as disclosed by the findings of the Tribunal, it would be fair to make an order that one party pay the costs of another.

17 As to the matters referred to in s.109(3), those relevant to the present case were said to be as follows:

Unreasonably prolonging the time taken to complete the proceeding

18 Mr Rozenberg submitted that the Owner was responsible for unreasonably prolonging the time taken to complete the proceeding. He said that there were instances of the Owner failing to comply with the Tribunal's orders and multiple delays and adjourned applications by the Owner.

19 In a similar vein, the Owner said that the Builder has purposely delayed the proceeding on numerous occasions and suddenly changed his claim on the morning the trial started. He said that he had been "ambushed" and made various other complaints about how the Builder conducted the proceeding.

20 The instances of non-compliance by the parties appearing from the file are as follows:

(a) The Owner was late in filing and serving his defence and counterclaim. A compliance hearing was listed but was vacated beforehand on 20 April 2015 because the defence and counterclaim had been filed and served.

(b) The Builder obtained leave on 8 October 2015 to amend his Points of Claim, requiring the Owner to file Amended Points of Defence. Costs on that occasion were reserved.

(c) There was a compliance hearing held on 12 November 2015 because the Owner had not filed and served his experts' reports and an extension of time was given. He was ordered to pay the Builder's costs.

(d) On 11 May 2016 the Owner was ordered to serve upon the Builder a draft Scott Schedule by 30 June 2016. By a further order on 8 September 2016, the date for service by the respondent of the Scott Schedule was extended to 6 September 2016.

21 The late amendment by the Builder on the first day of hearing caused the proceeding to be split which caused considerable delay in its final determination.

22 Following the publishing of the decision on the termination issue, the assessment of damages was fixed for hearing for 14 July 2017 but was then vacated and re-fixed for 9 November 2017. Then, on 23 October 2017, the hearing was further adjourned on the application of the Builder to 27 February 2018. On 27 February 2018, it was further adjourned, this time on the application of the Owner, to 25 May 2018.

23 On 1 May 2018 the Owner was given an extension of time to file his experts' reports concerning the assessment of damages.

24 The assessment proceeded on 25 May 2018 when I heard the Builder's submissions but the Owner, who was then unrepresented, sought to file and serve written submissions and I directed these to be filed and served by 10 June 2018. After considering the submissions made, damages were assessed at $15,540.42.

25 The hearing of the termination point was conducted competently by counsel on both sides. In the hearing of the assessment of damages I had considerable difficulty with the Builder's expert evidence.

26 The history of the proceeding shows delay in the conduct of the proceeding on both sides and does not support an application for costs by either side.

The relative strengths of the claims made by each of the parties

27 Mr Rozenberg submitted that the Owner's case in regard to the termination of the Contract was weak. That is not altogether accurate. The question whether the Owner had provided sufficient evidence of his capacity to pay was finely balanced. Some evidence was provided and although I came down on the Builder's side in finding that he had not provided sufficient evidence, it would not have taken much additional evidence to have tipped the scale in the Owner's favour.

28 Further, there were minor deficiencies in the work for which the Builder was responsible and there was a respectable argument advanced on behalf of the Owner to the effect that the relevant stages were not reached, although I ultimately found that they were. The Owner's case on this point failed, largely because I found that some of the issues had been compromised by agreement with the Owner.

29 Overall, it was a difficult case with substantial points made on both sides. There is nothing about the relative strengths of the two cases that would suggest that it would be fair for an order for costs to be made in favour of one of the parties.

The nature and complexity of the proceeding

30 Much is commonly made of this factor when an application for costs is made by the successful party in a building case.

31 In *Pacific Indemnity Underwriting v. Maclaw* [2004] VSCA 165, Ormiston J said (at para 35):

> "Now it does not follow that particular factors in building disputes, especially building insurance disputes of this kind, cannot activate the Tribunal's power to award costs as laid down by s.109, such as the "nature and complexity" of some building disputes or the unreasonableness of a Builder's or insurer's conduct, but it should be borne in mind at all times that the scheme of the VCAT legislation is that prima facie each party is to "bear their own costs in the

> proceeding". Why Parliament saw this to be appropriate in cases such as the present and why it chose not to vary s.109 so far as domestic building disputes, or at least claims against insurers, are concerned, may, to some eyes, be hard to fathom. If the same disputes were still able to be litigated in one of the ordinary courts of this State, there would be the conventional "bias" in favour of the conclusion that costs should follow the event, even if only on a party/party basis. But that is not the presumption of the present legislative scheme, as represented in particular by s.109."

32 The Owner also referred me to the following passage from the judgment of Morris J in the case of *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 2000 (paras 17 and 18):

> "17 Section 109 of the *VCAT Act* gives the tribunal a broad discretion in relation to costs. The existence of such a discretion enables the tribunal to do its best to provide a just outcome, subject to the basic principle that each party will usually bear its own costs. There is much to be said for the existence of such a broad discretion. But, equally, it is important that the obligation to pay costs be predictable; as this promotes certainty. A proper balance is likely to be promoted if decisions as to costs are only made after serious and close consideration of the statutory provisions; and then according to principles and practices that develop in relation to particular provisions, cases or lists.
>
> 18 In my opinion, for an award of costs to be made it is not sufficient to demonstrate that the nature of the proceeding has a strong resemblance to inter-parties litigation in a court. Section 109(1) of the VCAT Act is designed to cover proceedings in all lists of the tribunal, including those where proceedings are characteristically similar to those conducted in the County Court of the Supreme Court. But paragraph (d) of section 109(3) of the VCAT Act anticipates that certain types of proceedings will be brought before the tribunal which will be of a character to enable the tribunal to be satisfied that an order should be made as to costs."

33 It is relevant to consider that the present case involved extensive expert evidence, assembled at considerable expense, and the services of solicitors and counsel to conduct the proceeding. The legal points raised were highly complex and the case was a difficult one. It is certainly the sort of case that would be costly to conduct. The fact that the successful party has been required to conduct such a case and incur that cost in order to establish and enforce his rights is an important consideration. It acquires added force where it can be said that it was unreasonable in the circumstances for the unsuccessful party to have put the successful party to that expense.

Any other matter the Tribunal considers relevant

34 The other relevant factor urged by Mr Rozenberg was that the Builder had made an offer to settle the proceeding which would, in practical terms, have been much more favourable to the Owner than the ultimate outcome.

35 The offers made were as follows:

(a) On 7 December 2015 the Owner offered to settle the proceeding for $80,000 to be paid to him by the Builder.

(b) On 10 March 2016, the Owner offered to settle in accordance with detailed terms of settlement, which provided for the Builder to return to the site and complete the construction of the house for an agreed price of $231,873.00 inclusive of GST, due performance to be monitored by an independent building expert to be paid for by both of the parties. The document also required additional work to be done by the Builder, including replacing parts of the construction already completed, widening the driveway and for the Builder to pay the Owner's costs of the proceeding. The Builder did not agree to this proposal.

(c) On 5 April 2016 the Builder's solicitors returned an amended version of the proposed terms of settlement, which included a number of changes. The existing stumps were to remain, the building consultant was to be paid for by the Owner, the Builder was required to provide evidence of his capacity to pay and there would be no order that the Builder pay the Owner's costs. This proposal was not accepted by the Owner.

(d) On 12 April 2016 the Owner's solicitors returned the further amended version providing for the Builder to repay the frame stage payment of approximately $50,000 before commencing works, regrade and widen the driveway, construct a temporary fence around the works for the duration of the works and also pay the Owner's costs of the proceeding. This proposal was not accepted by the Builder.

(e) On 1 July 2016 the Owner offered to accept an "all-in" sum of $110,000.00 from the Builder in order to resolve the dispute. That was also not accepted by the Builder.

36 According to the affidavit filed on behalf of the Builder, the amount of $231,873 referred to in these offers was calculated by taking the original Contract price of $337,190 and subtracting the amounts that had already been paid by the Owner.

37 Where an offer of settlement is payment of money, it is usually easy to see whether or not it would have been more advantageous to the unsuccessful party to have accepted it. However, in the present case it seems clear to me that the counter-offer made by the Builder was reasonable and ought to have been accepted by the Owner. Although the stumps were to remain, the Builder was offering to replace the frame, which, according to the expert evidence, had become severely degraded from exposure to the weather because the Owner had not taken any steps to protect it following termination of the Contract.

38 It seems from the Owner's offers that he was prepared to make very little in the way of a concessions in order to resolve the matter. For example, not only did he want the damaged building elements replaced at the Builder's

cost and his driveway widened, he also wanted the Builder to pay his costs. I think that if the Owner had adopted a more reasonable position in the negotiations, the proceeding might well have settled.

39 Considering the nature and complexity of the proceeding and the offers that were made on both sides, I think that it is fair in the circumstances to order that the Owner pay the Builder's costs of the proceeding up to the end of the first hearing and also, the costs of this application for costs. The Builder was put to substantial expense, largely in defence of a very substantial counterclaim by the Owner which he went some distance to try and settle.

40 As to the hearing of the assessment of damages, those costs were incurred because of the late amendment to the Builder's case. Liability and damages ought to have been dealt with in the one hearing. Moreover, the amount of damages sought was $77,241.10 and yet I awarded only $15,540.42. In these circumstances, it would not be fair to order the Owner to pay costs of this second hearing.

Orders to be made

41 There will be an order that the Owner pay the Builder's costs of this proceeding, including reserved costs, up to 27 April 2017 and also the costs of this application for costs, such costs, if not agreed, to be assessed on the standard basis in accordance with the County Court scale by the Victorian Costs Court.

SENIOR MEMBER R. WALKER