

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP123/2016

CATCHWORDS

Domestic building, interest, costs, *Victorian Civil and Administrative Tribunal Act 1998* ss.109(3)(a)(v) (alleged deceptive conduct), and 109(3)(a)(vi) (alleged vexatious conduct), conduct in the course of the proceeding, s. 109(3)(c) (relative strengths of claims), VCAT fees – ss. 115B(1)(a) and 115C.

APPLICANT	Mrs Alison Larsson
RESPONDENT	Mr Peter Priftis t/as Priftis Constructions
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	22 May 2019
DATE OF ORDER	25 June 2019
CITATION	Larsson v Priftis Constructions (Building and Property) [2019] VCAT 952

ORDERS

- 1 The applicant must pay the respondent's costs thrown away (if any) accrued because of the applicant's action in filing and serving Amended Points of Claim on 8 June 2017. Failing agreement between the parties as to those costs, they are to be determined by the Costs Court on a standard basis on the County Court scale.
- 2 The applicant must pay the respondent interest of \$1,144.55.
- 3 The applicant must reimburse the respondent VCAT Daily Fees of \$2,346.35.
- 4 **I direct the Principal Registrar to send copies of these orders and reasons to the parties by email.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr Larsson.
For Respondents	In person, together with Mrs Priftis and Ms A. Priftis.

REASONS

- 1 These orders and reasons concern the respondent-Builder's claim for costs and interest, and the applicant-Owner's claim which was made in the "Applicant's Response to the Respondent's Application for Costs and Interest" ("Owner's Response") filed 9 May 2019 and dated 8 May 2019.
- 2 On 20 December 2017 I published my decision concerning primary liability which awarded a nett sum of \$8,997.68 to the Builder. I reserved costs and interest as follows:
 - Costs and interest are reserved, with liberty to both parties to apply. The attention of both parties is drawn to ss109 and 115B of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 3 In the last paragraph of the reasons of 20 December 2017 ("Reasons") I included, after the word "interest", "(under the claim as distinct from under the contract)".
- 4 The proceeding was set down for the costs hearing by order of 13 March 2019, having regard to a letter from the Builder of 15 February 2019 where he sought "to reserve my rights to claim costs losses and compensation". The respondent's letter had contained matters which a brief glance had indicated might have referred to "without prejudice" discussions and offers between the parties. The letter was referred to another Tribunal Member who redacted the letter to remove such references and copies were sent to both parties.
- 5 In "Other Matters" before the orders of 13 March 2019 I said:
 - B. The orders of 20 December 2017 brought the proceeding to an end, and no further claims may be made under it with the exception of claims for interest and costs, as reserved in order 2.
 - C. By way of clarification, the interest that may be claimed is on the amount awarded on 20 December 2017.
- 6 Order 2 was for the respondent to send the Tribunal and the Owner an outline of facts and contentions by 10 April 2019 and for the Owner to do likewise by 8 May 2019.
- 7 On 23 April 2019 the Builder sent the Tribunal an "Outline of Facts and Contentions regarding the Costs Application by the Respondent" ("Builder's Outline"). As mentioned above, the Tribunal received the Owner's Response on 9 May 2019. Mr Larsson, who appeared for the Owner, also handed up the "Submission to the Respondent's Application for Costs and Interest" ("Owner's Submission") at the commencement of the costs hearing.

ORDERS SOUGHT

The Builder's claim

- 8 The Builder sought an award of interest which appeared to be for \$9,659.89 at the bottom of page 3 of the Builder's Outline, although in his letter of 15 February 2019 it was \$5,398.59.
- 9 He also sought:
- | | |
|--------------------------------|-------------|
| Costs of legal advice | \$8,818.54 |
| Humiliation and loss of income | \$25,000.00 |
| Expert report by Mr Beck | \$5,200.00 |
| VCAT Daily Fee | \$2,346.45 |
| Parking | \$268.54 |
| Stationery - Approx | \$200.00 |

The Owner's Claim

- 10 As mentioned, the Owner's Response, somewhat surprisingly, included a claim for costs as an "alternative", presumably to her rebuttal of the Builder's claim for costs. However, the Owner did not provide a basis under s109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act") that would entitle her to costs. She mentioned an offer made under s 112 of the VCAT Act, but as the award to the Builder was more advantageous to him than the offer made, it is irrelevant.
- 11 The Owner's Submission did not repeat most of the matters in the Owner's Response, but sought an order for her filing fee of \$575.30 and an order that the parties bear their own costs.
- 12 The question of refund of VCAT fees is considered below. There is no order as to costs in favour of the Owner.

HUMILIATION AND LOSS OF INCOME

- 13 This claim is not in the nature of costs and interest. With the exception of costs and interest, my role is "functus officio", or over. This aspect of the Builder's claim is not considered.

ENTITLEMENTS DEPEND ON THE PRINCIPAL DECISION

- 14 A hearing of this nature is not an opportunity to re-open the principal decision, to consider further evidence or to reconsider evidence or arguments. Any entitlements the parties might have depends on the principal decision and conduct during the proceeding.

INTEREST

- 15 In the Builder's Outline he said that the interest sought was "from the time the amount should have been paid (Nov 2014) to the date of payment."

- 16 At paragraph 498 of the reasons I said:
- In accordance with the above reasons I allow \$755.07 for interest on late payments under the first contract.
- 17 The “above reasons” are in paragraphs 484 to 497. They concern various late payments and the interest awarded is for the days that they were not paid, in accordance with the amount payable under the two contracts that governed the works. In each case the payment of the principal, but not the interest, was made before the Builder lodged his claim and paid the filing fee on 6 September 2016.
- 18 I accept the uncontradicted evidence of Mr Larsson on behalf of the Owner that the amount awarded on 20 December 2017 was paid to the Builder without delay after the Owner received those orders and reasons.
- 19 Section 53 of the *Domestic Building Contracts Act 1995* (“DBC Act”) provides in part:
- (1) The Tribunal may make any order it considers fair to resolve a domestic building dispute.
 - (2) Without limiting this power, the Tribunal may ...
 - (b) ...order the payment of a sum of money-
...
 - (ii) by way of damages (including ... damages in the nature of interest);
 - (3) In awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the *Penalty Interest Rates Act 1983* or on any lesser rate it thinks appropriate.
- 20 It is a rule of economy that money now is worth more than the same amount of money paid at some time in the future. However, the DBC Act does not provide that interest is always paid. It does not even provide, like section 60(1) of the *Supreme Court Act 1986* that the Tribunal:
- ...must, unless good cause is shown to the contrary, give damages in the nature of interest...
- 21 Parliament could have chosen to have the Tribunal assume that interest would be awarded where money is awarded, but it did not do so. The test for entitlement to interest is whether it is “fair”, then the rate of interest is the PIR Act rate or any lesser rate I consider “appropriate”.
- 22 This litigation, which I have reason to believe was painful to both parties, was commenced by the Owner seeking a substantial sum from the Builder. It ended with my decision to award a modest sum to the Builder.
- 23 At paragraph 12 of the Owner’s Submissions, she provided a table which she described as having “highlighted the inaccuracies and the incorrect

claim for interest by the [Builder] which were not in accordance with the first building contract”. I do not take this submission into account, as the only matter with which I am concerned is whether interest should be awarded on the sum awarded in the primary decision.

- 24 The difficulties that each of the parties had with the other are described in detail in the Reasons. They describe a Builder whose physical work was good and whose paperwork was usually good but lacking on occasions. They describe an Owner and her husband who took advantage of many technical points to the disadvantage of the Builder, and sometimes to their own disadvantage.
- 25 The result of the primary decision was that the Builder was deprived of the sum awarded (\$8,997.68 for a substantial period.
- 26 In the circumstances I find that it is fair for the Builder to recover interest. In accordance with the PIR Act, I award interest from the date of commencement of the counterclaim being 6 September 2016, to the date of payment of the judgement sum which I will treat as 21 December 2017, the day after the Orders and Reasons in the primary decision were published. I allow interest at the rate provided under the PIR Act.
- 27 The interest which the Owner must pay the Builder is as follows:

Dates	Days	Rate	Amount
From 6 September 2016 to 31 January 2017	148	9.5%	\$345.85
From 1 February 2017 to 21 December 2017	324	10%	\$798.70
Total			\$1,144.55

COSTS

- 28 Section 109 of the VCAT Act says in part:

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);
 - (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.
- [Underlining added]

29 The Builder bases his claim on one or more of s.109(3)(a)(v), 109(3)(a)(vi) and 109(3)(c) of the Act. The passage in s109(3)(a) is underlined because, to succeed under 109(3)(a)(v) or 109(3)(a)(vi) the conduct complained of must be in the course of the proceeding, not conduct committed before the proceeding commenced.

30 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

- (i) The prima facie rule is that each party should bear their own costs of the proceeding.
- (ii) The Tribunal should 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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

s.109(3)(a)(v) – Disadvantaging another party by attempting to deceive another party or the Tribunal

31 The Builder has alleged that the Owner or her husband made various attempts to deceive the Tribunal. There is only one instance to which I refer because it is the only matter considered in the Reasons and airing the other matters can only cause unnecessary embarrassment to the Owner.

32 At paragraph 570 of the Reasons, I discussed a scope of works on the letterhead of Mr Floreani’s company, Emoljac. The Owner relied on Mr Floreani’s evidence concerning the cost to her of completing the works. Mr Larsson said that he had prepared the scope and given it to Mr Floreani. The next day he provided a submission to the Tribunal, as described below:

570 ... Part of that submission dealt with the provenance of the scope of works. Mr Larsson said that he has been a professional advisor to Mr Floreani for about 12 years and that Mr Larsson often prepares letters and documents for Mr Floreani on the latter's letterhead.

571. While I do not question the accuracy of Mr Larsson's statement, such an action would be appropriate when he is not a party, or related to a party, to a dispute for which Mr Floreani's evidence is relevant. In this proceeding, it is surprising that Mr Larsson would take a step that could mislead either the Builder or the Tribunal. If Mr Larsson had sent Emoljac a document or letter from himself or the Owner, there could have been no risk of misunderstanding. The revelation gives cause for concern regarding documents in this proceeding on the Emoljac letterhead. Further, Mr Floreani said under cross-examination that he did not know when the scope of works was printed; it had nothing to do with him.

33 Further, at paragraphs 34 and 35 of the Reasons I discussed some confidently given, but eventually unconvincing evidence by Mr Larsson. The paragraph concludes:

When pressed, Mr Larsson agreed that he did not recall what the Builder said. Nevertheless, I do not consider that Mr Larsson was deliberately inaccurate.

34 Although I have found that Mr Larsson has taken a step that could mislead either the Builder or the Tribunal, and given unreliable evidence, I did not find intentional deception as discussed in *Jordan v Vuletic* [2007] VCAT 1068 at [12].

35 I am not satisfied that the Builder is entitled to an award of costs under s.109(3)(a)(v).

s.109(3)(a)(v) – Disadvantaging another party by vexatiously conducting the proceeding

36 The matters raised by the Builder concerning potentially vexatious conduct include the Owner's failure to attend a mediation and the attempt by the Owner and her husband to introduce Amended Points of Claim on 8 June 2017 when the hearing was due to start on 26 June 2017.

The Owner's failure to attend the mediation

37 I am not satisfied that the Owner's failure to attend the mediation amounts to vexatious conduct.

Amended Points of Claim

38 The Amended Points of Claim were substantial and contained claims of a nature that had not been raised in the previous Points of Claim, filed 19 July 2016.

39 As I ruled at the commencement of the hearing on 26 June 2017:

The Tribunal declines to give the applicant permission to rely on the Amended Points of Claim of 7 June 2017 in circumstances where permission to file it was neither sought nor given, it was only filed on 8 June 2017 and the next hearing days available to these parties is not until April 2018.

40 I accept the accuracy of Mrs Prifitis's comment at the costs hearing that "we were not prepared for the Amended Points of Claim." This is also reflected in paragraph 12 of the Builder's Outline which states in part:

[The Owner] attempted to file a Further Amended Points of Claim [sic], which were not allowed to be filed however, caused the builder to seek legal advice and spend time defending the claims.

41 I am not satisfied that any other part of the Owner's behaviour was vexatious, but I find that filing, serving and attempting to rely on the Amended Points of Claim, was vexatious within the meaning of s 109(3)(a)(v).

42 The Owner must pay the Builder's costs thrown away (if any) accrued because of the Owner's action in filing and serving Amended Points of Claim on 8 June 2017. Failing agreement between the parties as to those costs, they are to be determined by the Costs Court on a standard basis on the County Court scale.

43 By way of clarification, these costs are referable to any legal costs incurred by the Builder concerning the Amended Points of Claim and do not include the time of the Builder or his family.

s.109(3)(c) – The Relative Strengths of the Claims made by each of the Parties

44 The issue of repudiation was a live matter between the parties, and only an extensive and detailed examination of the evidence led me to conclude that it was the Owner and not the Builder who repudiated.

45 For the purpose of an award of costs, I am not satisfied that the claims of the Builder were so strong, or the claims of the Owner were so weak, as to justify an award of costs under this section. This is not a case where the Owner made a claim that had no tenable basis in fact or law.

46 I am not satisfied that the Builder is entitled to an award of costs under s.109(3)(c).

"Costs"

47 As the only costs awarded concern the Owner's attempt to rely on the Amended Points of Claim, it is not necessary to consider whether all the items claimed by the Builder can be considered "costs" under s.109 of the VCAT Act.

VCAT FEES

48 Section 115B of the VCAT Act provides:

- (1) At any time, the Tribunal may make any of the following orders—
 - (a) an order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding, within a specified time;

49 And s.115C provides in part:

Presumption of order for reimbursement of fees to successful party in certain proceedings

- (1) This section applies to the following proceedings—

...
- (b) a proceeding under the Domestic Building Contracts Act 1995;

...
- (2) Subject to subsection (3)¹, a party who has substantially succeeded against another party in a proceeding to which this section applies is entitled to an order under section 115B that the other party reimburse the successful party the whole of any fees paid by the successful party in the proceeding. [Underlining added]

50 The underlying presumption of s.115C is that if a party has substantially succeeded, the Tribunal starts with the assumption that they are entitled to costs. It differs from s.109 which starts with the presumption that parties bear their own costs.

51 A consideration of the mathematical outcome of the claim and counterclaim is that the Owner's claim was \$63,049.89, and the Builder's was \$30,522.30; a total in dispute of \$93,572.19. Both claimed interest and costs as well. I have awarded the Builder interest of \$1,144.55 in this decision, giving a grand total in dispute of \$94,716.74 plus a possible sum for costs.

52 The value to the Builder is that he has protected himself from a claim for \$63,049.89 and is entitled to \$8,997.68, plus interest of \$1,144.55; a total of \$73,192.12 plus an undetermined sum for costs. The determined amount, expressed as a percentage of the sum that was in dispute is more than 77%.

53 I am satisfied that the Builder substantially succeeded in defending the claim against him and prosecuting his counterclaim.

54 The Owner must reimburse the Builder the VCAT Daily Fees claimed by him of \$2,346.35.

¹ I am not satisfied that the considerations in S. 115C(3) upset the presumption that the Owner should reimburse the Owner's fees.

CONCLUSION

55 The Owner must pay the Builder:

Interest of \$1144.55;

Costs (if any) in accordance with paragraph 42 to above; and

VCAT Daily Fees as a reimbursement of \$2,346.35.

SENIOR MEMBER M LOTHIAN