

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.D182/2014

CATCHWORDS

Section 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*; application for indemnity costs allowed; Applicant successful in her claims; relative strengths of the matter are heavily in the Applicant's favour; Respondents pursued hopeless defence; deliberate lies and false documents relied upon by the Respondents; unnecessary disadvantage to Applicant and prolonging proceeding unreasonably; exceptional circumstances; fair to award indemnity costs.

APPLICANT	Ms Lin Lin
FIRST RESPONDENT	P & T Constructions (Vic) Pty Ltd (ACN 152 314 648)
SECOND RESPONDENT	Mr Wenbiao Lin
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	In Chambers
DATE OF ORDER	19 December 2014
CITATION	Lin v P & T Constructions (Vic) Pty Ltd (Costs) (Building and Property) [2014] VCAT 1619

ORDER

- 1 The Respondents, jointly and severally, shall pay the Applicant's costs of the proceeding on an indemnity basis, such costs to be determined in accordance with the provisions of the *County Court Civil Procedure Rules 2008*, and fixed by the Costs Court in default of agreement

Judge Jenkins
Vice President

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REASONS

NATURE OF APPLICATION

- 1 On 10 September 2014 the Tribunal made Orders with written Reasons whereby the Applicant was awarded \$48,065.49 in damages plus an additional award of \$5,000 in exemplary damages, jointly and severally from the Respondents. In addition, the Applicant was granted liberty to apply for costs.
- 2 The Applicant has now provided comprehensive written submissions on the question of costs. She seeks her costs of the proceeding on an indemnity basis.
- 3 The Respondents have not responded to the opportunity given to them either to make written submissions in reply or to seek a further hearing.
- 4 The Reasons which follow draw upon the Applicant's submissions and should be read in conjunction with the Reasons for orders dated 10 September 2014.

RELEVANT LEGISLATION

- 5 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* clearly prescribes the general rule in proceedings before the Tribunal that each party bears their own costs. Nevertheless, the Tribunal may order a party to pay all or a specified part of the costs of another party, but only if the Tribunal is satisfied that it is fair to do so having regard to the matters set out in subsection (3).

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.

111 Amount of costs

If the Tribunal makes an order for costs, the Tribunal—

- (a) may fix the amount of costs itself; or
- (b) may order that costs be assessed, settled, taxed or reviewed by the Costs Court.

Note

See section 146 of the Supreme Court Act 1986 which deals with transitional matters relating to the Costs Court.

- 6 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*¹, Gillard J sets out the step by step approach to be taken by this Tribunal when considering an application for costs pursuant to s 109:
 - (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).
- 7 In its discretion, the Tribunal may order that costs be paid on a party-party, solicitor-client or indemnity basis. However, it is well settled that an order for indemnity costs will only be made by the Tribunal in the most exceptional circumstances.
- 8 In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*² Nettle JA observed:

I also agree ... that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity

¹ [2007] VSC 117.

² [2005] VSCA 165 at [91-92]

costs pursuant to Rule 63.28(c) of the *Supreme Court (General Civil Procedure) Rules* 1996.

- 9 The circumstances in which an order for indemnity costs might be made were considered by the Tribunal in *Milankovic v Binyun Pty Ltd and Ors.*³ In refusing an application for indemnity costs, Lothian SM referred to *Sholl Nicholson Pty Ltd v Chapman (No 2)*⁴ and summarised the matters Balmford J set out to be taken into account when considering whether to order indemnity costs:
- i. Whether a party has been forced to take legal proceedings entirely through the wrongful or inappropriate conduct of the other party;
 - ii. Whether an action has been commenced or continued in circumstances where the applicant, properly advised, should have known he had no chance of success;
 - iii. Where a party persists in what should, on proper consideration, be seen to be a hopeless case;
 - iv. Whether the party against whom indemnity costs are sought has made a false allegation of fraud;
 - v. Particular misconduct that causes a loss of time to the Court and the parties;
 - vi. Commencing or continuing proceedings for an ulterior motive or in wilful disregard of known facts or clearly established law;
 - vii. Making allegations which ought never to have been made or undue prolongation of a case by groundless contentions, and
 - viii. An imprudent refusal of an offer of compromise.
- 10 For the reasons set out below, I am satisfied that the matters outlined above at sub paragraphs i, iii, v, vi, and vii are present in this case.

FINDINGS

Grounds (a) and (b): unnecessary disadvantage and prolonging unreasonably

- 11 Throughout the proceeding, the Respondents not only put the Applicant to her proof on nearly every relevant issue, but also concocted and relied upon a series of elaborate lies, which were conceded only when faced with compelling evidence to the contrary.
- 12 For instance:
- (a) In their defence, the Respondents denied the existence of defects in the works, only to accept on the first day of trial the findings contained in the expert report obtained by the Applicant; and
 - (b) The Respondents maintained other matters throughout the trial, only to have Mr Lin recant from them under cross-examination once the

³ [2010] VCAT 538 at [26]

⁴ 2001 VSC 462.

Applicant had led clear evidence to the contrary. This included Mr Lin's concessions that:

- i. He could speak English;
 - ii. He had never been an employee or contractor of Metricon Homes,
 - iii. The Applicant had not drafted the contract by herself; and
 - iv. He had forged the permit email from Roxanne Griffin of Inform Building Permits.
- 13 In addition, Mr Lin maintained his position on the following matters, in face of strong circumstantial evidence to the contrary:
- i. Mr Lin's denial that he had attempted to take opportunistic advantage of Dr Chan's signing of a permit application form in the incorrect place; and
 - ii. That he had told the Applicant that he was a registered builder with appropriate insurance.
- 14 If Mr Lin had acted truthfully from the outset, little, if any, of his defence would have remained. Instead, the Applicant has been put to considerable cost in addressing repeated acts of wilful deception.

Ground (c): relative strengths

- 15 The Applicant was wholly successful in her claims, save that she was awarded \$48,065.49 against the First Respondent and not the \$87,630 figure that she had claimed. The difference in the amount of damages awarded and the amount claimed reflected the difference in the quoted price obtained by the Applicant to construct the works. However, the damages awarded were equivalent to the amount which the Applicant had offered to accept from the Respondents prior to issuing proceedings in the Tribunal.⁵
- 16 The Respondents, on the other hand, relied on a defence which, save for quantum, had no tenable basis in fact or law.
- 17 The relative strengths of the matter are heavily in the Applicant's favour.

Ground (d): the nature and complexity of the matter

- 18 This matter concerned a dispute in relation to defective building work, the contract price for which was \$65,000.
- 19 It also concerned matters of potential legal and factual complexity, including multiple lay witnesses; the potential (up to the first day of trial) for two expert witnesses; and issues of quantum and personal liability under the Australian Consumer Law. The matter properly called for legal representation and would not likely have been completed within three hearing days had the parties not been represented.

⁵ Exhibit L, letter from Applicant's Solicitor to the First Respondent dated 10 February 2014.

Ground (e): any other reason

- 20 As outlined in the Reasons for judgement dated 10 September 2014, this was not a simple case of a builder performing defective building work. The misconduct of Mr Lin extended to:
- (a) The initial false representations made to the Applicant, which induced her to engage him to perform major domestic building work, in reliance upon his stated experience; and his status as a registered builder covered by the requisite insurance;
 - (b) The subsequent deceitful actions of Mr Lin in concocting correspondence for the purpose of deceiving the Applicant that a building permit had been approved;
 - (c) Making false claims in the defence filed on behalf of the Respondents, which had the effect of requiring the Applicant to prove matters which otherwise should have been readily admitted; and
 - (d) Giving false evidence before the Tribunal, which also had the effect of unreasonably protracting the hearing and requiring the Applicant to call additional witnesses.

CONCLUSION

- 21 In my view, the conduct of the Respondents caused the Applicant unnecessary and unreasonable expense. The Applicant attempted to resolve the dispute, on a reasonable basis, prior to instituting proceedings. The conduct of the Respondents, as evidenced by their elaborate and prolonged deceitful conduct in trying to defend an otherwise hopeless case, constitutes exceptional circumstances. In this context, I am satisfied that it is fair to award costs against the Respondents on an indemnity basis. I also take into account that, by reason of the dishonest conduct of Mr Lin:
- (a) The Applicant was put to the expense of obtaining expert reports; engaging lay witnesses; investigating Mr Lin's English language competency; and having numerous documents translated from Chinese into English; and
 - (b) The Tribunal engaged an interpreter, for the benefit of Mr Lin, in circumstances where, during the course of the hearing, it became apparent that Mr Lin was perfectly capable of giving evidence in the English language.
- 22 The Respondents will pay the Applicant's costs of this proceeding on an indemnity basis.

**Judge Jenkins
Vice President**