VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP167/2017

CATCHWORDS

Domestic building contract – claim for interest – claim for costs – s.109(3)(c), (d), (e) *Victorian Civil & Administrative Tribunal Act* 1998

APPLICANT	Longbow Constructions Pty Ltd (ACN: 091 043 882)
FIRST RESPONDENT	Mr Alessandro D'Orto (Removed from proceeding by Order made 20 April 2017)
SECOND RESPONDENT	Ms Spyridoula D'Orto (also known as Ms Rula D'Orto)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 September 2018
DATE OF ORDER	10 October 2018
CITATION	Longbow Constructions Pty Ltd v D'Orto (Building and Property) [2018] VCAT 1529

ORDERS

1. The respondent must pay the applicant's costs of the proceeding, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

2. Having regard to section 115B(1) of the *Victorian Civil And Administrative Tribunal Act* 1998 and being satisfied that the applicant has substantially succeeded in its claim, the Tribunal orders the respondent to reimburse the applicant for the fees paid, in the amount of $1673.10.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr J. Ribbands of counsel
For the Second Respondent	Mr N.J. Phillpott of counsel

REASONS

1. This is an application brought by the applicant Builder for the costs of this proceeding and interest.

2. The dispute concerned a claim by the Builder for payment of its final invoice, of $86,535.52. The respondent Owner lodged a counterclaim for defective and incomplete work of approximately $58,000. The matter was heard in May 2018, and final orders were made on 26 June 2018. The Owner was ordered to pay the Builder the sum of $47,570.94[1]. The question of costs, interest and reimbursement of fees was reserved.

3. This application came before me for hearing on 14 September 2018. Mr Ribbands of Counsel appeared for the Builder and Mr. Phillpott of Counsel appeared for the Owner. Each party relied on written submissions they had prepared. I reserved my decision.

4. For the reasons set out below, I allow the application for costs and reimbursement of fees but do not allow interest.

Costs

5. The Builder relies on ss.109(3)(c), (d)and (e) of the *Victorian Civil & Administrative Tribunal Act* 1998 ("the VCAT Act"). The Owner opposes the application, saying there is no reason to depart from the presumption in s.109(1) that each party should bear their own costs.

6. Section 109 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;

[1] *Longbow Constructions Pty Ltd v D'Orto* [2018] VCAT 954

(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.

7. As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group*[2], 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.

8. In relying on ss.109(3)(c) and (d), the Builder refers to the following factors:

a. the Builder's claim was for payment of its final invoice of approximately $80,000, of which $44,408 had been admitted by the Owner, and a further $35,000 (approximately) related to out of pocket costs incurred by the Builder for the air-conditioning, intercom and security system;

b. the Builder was substantially successful in its claim;

c. the Owner had some success in her counterclaim for defective work, although in circumstances where her original counterclaim was for approximately $350,000, the end result was an overwhelming victory to the Builder;

d. although the Owner reduced her counterclaim before the hearing, the Builder had already incurred substantial costs to defend the $350,000 claim that had been brought;

[2] [2007] VSC 117 at [20]

e. although the Owner succeeded in part on her amended counterclaim, the Builder had at all times acknowledged that certain maintenance and rectification work was required, as was acknowledged by the Builder's expert;

f. because of the nature and complexity of the proceeding, the Builder had no option but to follow the path of litigation;

g. the case was complex, as can be seen by the numerous and large witness statements, a Tribunal book, discovery, on-site inspections of the property, six experts and a five-day hearing estimated.

9. In relying on subsection 109(3)(e), the Builder refers to the following factors:

a. The Builder had made an offer on 16 January 2018 to accept $65,000 inclusive of interest and costs. It is submitted that the practical effect of this offer was that the Builder was accepting $40,000 on its final invoice and $25,000 for its costs. The Builder's solicitor, Ms. Ribbands, deposed that the actual costs incurred at that time were $24,946 and that these were "relatively modest given the extent of the work which was involved"[3].

b. Although the amount of $24,946 was an actual figure rather than a taxed figure, Mr. Ribbands submitted that the amounts were reasonable and if they were to be taxed on the standard basis, the taxed sum would be a similar amount. The traditional 'rule of thumb' that costs are often taxed at 1/2 to 2/3 of the amount actually incurred, has no relevance since the commencement of costs being assessed on a 'standard basis', as this means "all costs reasonably incurred and of reasonable amount"[4].

c. It was not suggested that the offer attracted section 112 of the VCAT Act. However, the submission was that the offer should be seen as a fair and rational approach on the part of the Builder to resolve the dispute and this should be taken into account under ss.(3)(e).

10. In response, the Owner submitted:

a. she had made an appropriate concession by reducing the amount of her counterclaim from $350,000 to $57,000 (approximately) and relying only on the opinion of Mr Croucher;

b. the Tribunal found that she was entitled to $32,818.50 for her defects claim, which is a substantial victory and justified the non-payment of the Builder's $44,408 final invoice;

[3] Affidavit Wendy Ribbands sworn 23 July 2018
[4] Rule 63A.30 *County Court Civil Procedure Rules* 2008

c. it would not be fair to depart from s.109(1) as both parties had success, the strengths of the claim were similar, and there were real controversies that needed to be addressed and decided;

d. although the Owner did reduce her counterclaim substantially, this did not cause any new legal issues to arise, and did not prolong the time taken to complete the proceeding;

e. as for the offer made on 16 January 2018, there was no evidence before the Tribunal to show that the offer was more favourable to the Owner than the outcome. There was no evidence or submissions as to whether the Tribunal would have ordered costs under s.109 as at that date. There is no explanation in the offer itself of how it was calculated or why it was reasonable; and

f. moreover, there was no evidence that the builder would actually have been charged by its solicitors, in circumstances where the evidence was that no invoices had been rendered at that time. Instead, Ms. Ribbands deposed that the builder was to be invoiced at the end of the proceeding, which gives rise to the question of whether solicitors were acting on a contingency or some other basis. There was also no break-down of the amount allegedly incurred or how that would be taxed. It was suggested that the traditional 'rule of thumb' would mean the amount of taxed costs would be significantly less than $25,000.

11. The respondent also referred me to a number of well-known and accepted authorities[5], which stand for the proposition that there is no presumption that costs ought to be ordered in favour of successful claimants in domestic building disputes, even in proceedings of a commercial nature.

12. Weighing up the matters put by each party, I am satisfied that it is fair to exercise the Tribunal's discretion under s.109(2) and make an order for costs. The reasons for this include:

a. I accept that the Builder's claim was strong. The Owner had already conceded liability for more than half of it, and the balance was for works carried out at the Owner's request as an extra to the original building contract.

b. The Owner was only moderately successful in her amended counterclaim, having claimed approximately $57,000 and being awarded $32,818.

c. Because the Owner's original counterclaim was not pursued, I am not in a position to make any findings as to whether or not it had no tenable basis in fact or law. However, I do accept, based on the

[5] *Lindsay v Shepp Creative Concrete Pty Ltd* [2014] VCAT 1501 and the cases cited therein

amount of the claim ($350,000) and the amount eventually awarded to the Owner ($32,818), that the original counterclaim was relatively weak, compared with the Builder's claim.

d. Although the Owner reduced her counterclaim before the hearing, the Builder had already incurred substantial costs to defend the $350,000 claim that had been brought.

e. Those are the circumstances which define the nature and complexity of the proceeding, and as a result, extensive expert reports, witness statements, interlocutory steps, a contested hearing and a detailed determination were required.

13. I also accept that the offer made by the Builder on 16 January 2018 was a fair and rational approach on the part of the Builder to resolve the dispute and this should be taken into account under ss.(3)(e). The factors known to the parties at that time included that:

a. the parties had agreed in November 2015 that the balance of the contract of $44,408 would be withheld for three months while the builder carried out rectification and maintenance works;

b. the parties then had several meetings to discuss the final amount due under the contract and for extra costs, culminating in the invoice issued 16 September 2016 for $86,535. The three extra items which were the subject of this proceeding were raised and discussed at the time this invoice was issued;

c. the Owner had been living in the house since November 2015 and receiving the benefit of the works carried out by the Builder, including the air-conditioning;

d. the Builder commenced this proceeding in February 2017 seeking the amount of its final invoice;

e. in May 2017 the Owner issued a counterclaim seeking approximately $350,000;

f. the proceeding had been through many interlocutory steps, including a mediation, a compulsory conference and several directions hearings, and had been listed for a five-day hearing commencing on 7 May 2018;

g. the parties were facing an increased commitment in terms of time and costs by having to obtain further expert reports, prepare witness statements, prepare exhibits and a Tribunal Book of relevant documents, engage Counsel and prepare for the hearing;

h. during the time that the offer was open for acceptance (until 30 January 2018), the Owner had engaged Mr Croucher and had him inspect the property (on 24 January 2018), and so it is more likely than not that she would have been aware that the amount of her counterclaim was likely to be significantly reduced; and

i. although I am not in a position to assess whether the Builder's costs taxed on a standard basis as at 16 January 2018 would have been $25,000 or less, the Owner would have been aware that the Builder had incurred legal costs and disbursements (given the interlocutory steps set out above and the expert reports filed on behalf of the Builder). When making the decision to reject the offer, she had the opportunity to take into account the risks of a potential costs order being made, and $25,000 is not an excessive amount for the work carried out over the previous 11 months.

14. Accordingly, I will order that the Owner must pay the Builder's costs of the proceeding, the sum of such costs if not agreed to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

Interest

15. The Builder also seeks an order for interest. Mr. Ribbands submitted that the claim was made on the basis of the contractual term (at clause 11.10 of the contract) which provided:

> If the Owner should fail to make any payment to the Builder by the due date under this Contract, the Builder will be entitled to interest on all outstanding amounts at the rate specified in Item 15 of the Appendix, payable from the due date until the payment has been made in full.

16. Item 15 of the contract provided that the rate for interest would be pursuant to section 2 of the *Penalty Interest Rates Act* 1983.

17. The Owner opposed the application, and relied on the decision of Member Farrelly (as he then was) in *Stellar Constructions Pty Ltd v Ferguson*[6] at [175-177], where he declined to order interest in a case which was factually similar to the present. In *Stellar*, the owners had conceded that the builder was entitled to the balance of the contract, but counterclaimed for defective and incomplete works. There was a finding that the owners were justified in refusing to meet the builder's demand for full payment of the builder's final payment claim, because of the value of the rectification works the subject of the counterclaim.

[6] [2013] VCAT 2159

18. The Owner submitted that, in the present case, Mr. D'Orto and Mr. Schreuders had agreed that the payment of the final invoice would be withheld while the defects and incomplete works were being attended to. The Owner conceded the amount of $44,408, but the only time the other issues were finally resolved was by the decision of the Tribunal. Accordingly, there should be no order for interest.

19. I agree with the Owner's submission, for the reasons set out in the previous paragraph. Moreover, I note that the Builder was the author of much of the confusion over its final invoice. In circumstances where it issued four versions of the final invoice, and issued documents which purported to make no charge for the air-conditioning but then did make a claim, and where the Builder has conceded there were still defective works outstanding, and where the procedures set out at clause 17 of the contract were not followed (which provides when a final claim may be due and payable), I do not accept that the contractual entitlement to interest has been enlivened.

Reimbursement of filing fee

20. As the Builder has been substantially successful in its claim, it is entitled under s 115B of the *Victorian Civil and Administrative Tribunal Act* 1998 to an order that it be reimbursed by the Owner the fees paid, in the sum of $655.20 (fee paid on issuing) and $497.70 2 x daily hearing fees of $248.85 each) and $520.20 for this application.

SENIOR MEMBER S. KIRTON