

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D681/2005

CATCHWORDS

Domestic Building, Costs - relevant considerations, partial costs, s109(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998*

FIRST APPLICANT	John Marriot
SECOND APPLICANT	Lisa Marriot
RESPONDENT	Techcor Developments Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	1 June 2006
DATE OF ORDER	3 August 2006
CITATION	Marriott v Techcor Developments (Domestic Building) [2006] VCAT 1603

ORDER

The Respondent shall pay the costs of the Applicants, including all reserved costs, up to and including the first day of the hearing of the substantive matter, and of and associated with the hearing of the costs matter. In default of agreement, such costs are to be assessed by the Principal Registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act 1998* on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr Klemens of Counsel
For the Second Applicant	Mr Klemens of Counsel
For the Respondent	Mr J. Forrest of Counsel

REASONS

- 1 On 7 March 2006 I ordered that the Respondent Builder pay the Applicant Owners \$31,096.00, and gave leave to apply for costs.
- 2 The Owners' claim was for \$55,542.00 for the rectification of water leaks associated with balconies in their home. The hearing was conducted over three days and at the beginning of the first day the Respondent abandoned its defence that it was not liable for the leaks and contested quantum alone. The contest concerned the necessary scope of works and whether it was reasonable for the Respondent to be entitled to undertake the work, or whether the Applicants were entitled to the cost of having another builder undertake the work.
- 3 I found that the Builder was not entitled to an order that it return to rectify the work and that they were entitled to the reasonable cost to them of having a new builder undertake the work.
- 4 The Owners did not get an order for the cost of all the work that they claimed was necessary. In particular, the damages ordered to be paid to them did not include any sum for the replacement of windows and doors. This largely accounts for the difference between the amount sought and the amount ordered. On the other hand, the amount ordered was approximately \$8,000.00 more than the amount which the Builder submitted was the reasonable cost of having the work undertaken by another builder, again, largely due to a greater scope of works than the Builder said was necessary.
- 5 Mr Klemens, counsel for the Owners, submitted that an order for costs is justified on the basis of my findings that it was not appropriate for the Builder to return to site and rectify, and also because if no order for costs is made, the award to the Owners will be absorbed by the cost of running the case.
- 6 Mr Forrest, Counsel for the Builder, submitted that this is a case in which neither party should receive their costs.

Settlement offers

- 7 At the commencement of the hearing of the substantive matter, Mr Forrest of Counsel for the Builder announced that two alternate "with prejudice" offers had been made by the Builder on 27 January 2006. One was to undertake a scope of works which was less advantageous to the Owners than the basis upon which damages were calculated. The other was to pay the cost to the Builder of doing so, which was also less advantageous than the result achieved by the Owners.
- 8 At the costs hearing, the Owners revealed that on 22 November 2005 they made an offer under sections 112 to 114 of the *Victorian Civil and Administrative Tribunal Act 1998* to accept \$49,000.00 and their costs on a party-party basis on County Court scale "D"; to be assessed in default of agreement. This offer was less advantageous to the Builder than the order.

- 9 Because all offers were less advantageous to the parties receiving them than the orders made, section 112 of the Act is irrelevant to the determination of whether the Owners are entitled to costs.

The Legislation

- 10 Section 109(1), (2) and (3) of the Act provides:
- (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.

Previous decisions

- 10 Although I am not bound by previous decisions of the Tribunal, it is desirable that decisions regarding costs be consistent and, as far as possible, predictable. I was referred by Mr Klemens to the decision of Judge Bowman in *Sabroni v Catalano* [2005] VCAT 374. At paragraph 5 His Honour said:

“Each case, whether it be in the Domestic Building List or elsewhere, must be viewed on its merits. It may well be that cases in the Domestic Building List, because of their nature, have a propensity to fall within the exceptions contained in s.109(3), but that does not mean that each case should not be considered on its merits, or that

cases in the Domestic Building List automatically fall into a different category when issues of costs arise.”

- 11 It is noted that the Applicant in *Sabroni* did obtain an order for costs in circumstances where there was substantial and complex legal argument, and that His Honour’s point in the passage quoted was to dispel any suggestion that the Domestic Building List is in itself a special case where the winning party can have a reasonable expectation of being awarded costs.
- 12 Mr Forrest referred me to paragraph 7 of Senior Member Cremean’s decision in *Filonis v Orbit Homes* [2006] VCAT 875, where he said:

“As is clear now from a number of decisions the starting point under s109 is to be found in s109(1): each party must bear their own costs. The Tribunal is able to depart from this position under s109(2). It may do so, however, under s109(3) only if satisfied it is fair to do so having regard to the criteria mentioned in sub-paragraphs (a) to (e).”
- 13 Again, the Applicants succeeded in their application for costs because of the difficult factual and legal matters involved in the dispute.

Discussion

- 14 Although the hearing was of three days and my task was made easier by the presence of counsel, the matter was not particularly legally complex, and was mainly a factual dispute. Similarly, although it is regrettable that the value of the Owner’s claim should be dramatically diminished by costs expended, I am not convinced that this is a matter I can take into consideration when contemplating any costs to which they might be entitled.
- 15 Nevertheless, it is reasonable that the Builder should pay part of the Owners’ costs under s109(3)(c). It was not until the first day of the hearing that the Builder abandoned its defence on liability, and the evidence regarding the appropriate cost and method of repair indicated that it had no hope of winning the liability argument. It is therefore reasonable that the Builder pay the Owners’ costs up to and including the first day of hearing on a party-party basis on County Court scale D. The remainder of the hearing attracts no order for costs, with the exception of the application for costs itself, upon which costs are also awarded on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN