

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. W15/2014

**CATCHWORDS**

**Costs application:** s109 of the *Victorian Civil and Administrative Tribunal Act 1998* considered; s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* considered in relation to reimbursement of fees.

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| <b>APPLICANT</b>   | Mem Nominees Pty Ltd (ACN 104 190 070)  |
| <b>RESPONDENT</b>  | Chun Jian Cheng   |
| <b>WHERE HELD</b>  | Melbourne   |
| <b>BEFORE</b>  | Member C Edquist  |
| <b>HEARING TYPE</b>  | Costs Hearing   |
| <b>DATE OF HEARING</b>   | 5 March 2019  |
| <b>DATE OF RECEIPT OF RESPONDENT'S AFFIDAVIT AND SUBMISSIONS</b> | 12 March 2019   |
| <b>DATE OF RECEIPT OF RESPONDENT'S AFFIDAVIT AND SUBMISSIONS</b> | None received   |
| <b>DATE OF ORDER</b>   | 25 July 2019  |
| <b>CITATION</b>  | Mem Nominees Pty Ltd v Chun Jian Cheng (Building and Property) [2019] VCAT 1101 |

**ORDER**

1. The applicant, Mem Nominees Pty Ltd (ACN 104 190 070) must pay to the respondent, Chun Jian Cheng, costs and disbursements assessed at \$58,941.86.
2. In addition, the applicant must reimburse to the respondent, fees of \$1,951.
3. The total amount to be paid by the applicant to the respondent under these orders is \$60,892.86.

**MEMBER C. EDQUIST**

**APPEARANCES:**

For Applicant: No appearance.

For Respondent: Mr D Cafari, of Counsel.

## REASONS

### INTRODUCTION

- 1 This decision is concerned with a costs application made in a case arising out of a flow of water from an apartment in a two storey apartment block into the apartment immediately below. The property concerned is in Jeffcott Street, West Melbourne. The applicant (“**Mem Nominees**”) is, or was, the owner of the lower apartment. It began proceedings against the respondent (“**Mr Cheng**”), who is the owner of the upper apartment, in February 2014. The gist of the action was that water was flowing down from Mr Cheng’s apartment into Mem Nominees’s apartment as a result of the defective state of Mr Cheng’s balcony. Mr Cheng disputed the allegations, and instead suggested that the damage was consistent with the presence of a roof leak and cracks in the common walls.
- 2 The parties attended a mediation on 16 May 2016, which resulted in the execution of terms of settlement (“**the Terms of Settlement**”). The Terms of Settlement required Mr Cheng to undertake certain works on the balcony in stages. The Terms of Settlement were unusual in that they made provision for financial consequences which were to arise once it became clear whether Mem Nominees’s contention that the water had been leaking from Mr Cheng’s balcony was justified or not. Specifically, if there were no leaks from the balcony into Mem Nominees’s apartment at the expiration of 12 months, Mr Cheng would pay Mem Nominees the sum of \$50,000 for damages, costs and expenses. On the other hand, if there were leaks from the balcony into Mem Nominees’s apartment at the expiration of 12 months, Mem Nominees would pay Mr Cheng for costs incurred by him to carry out the rectification works, plus the sum of \$20,000 for Mr Cheng’s costs.
- 3 After the works had been carried out, Mr Cheng successfully applied in October 2015 to have the proceeding reinstated so that he could seek payment under the Terms of Settlement on the basis that the rectification works to the balcony had been successful. He later filed a counterclaim for damages. After a lengthy interlocutory process, which it is not necessary to traverse here, the proceeding came on for hearing on 10 and 11 October 2018.

### THE HEARING ON 10 AND 11 OCTOBER 2018

- 4 The hearing was concerned with the determination of whether, following the performance of waterproofing works on the balcony, Mr Cheng was entitled to payment under the Terms of Settlement, or whether Mem Nominees was entitled to payment.
- 5 At the conclusion of the hearing, I reserved my decision. Orders were published on 23 November 2018. Mem Nominees’s claim was dismissed. Mr Cheng was awarded \$36,096 on his counterclaim. Costs and reimbursement of fees were reserved.

- 6 Mr Cheng made an application for costs. This was listed for hearing on 5 March 2019. Mr Cafari of Counsel appeared on Mr Cheng’s behalf. There was no appearance on behalf of Mem Nominees. Regrettably, Mr Cheng’s application for costs could not be determined on that day. Mr Cheng’s cause was not advanced by the fact that Mr Cafari had not read in detail the published reasons for the orders made on 23 November 2018. Accordingly, time was wasted as he sought to set out the history of the matter. More importantly, he had no evidence regarding the costs and disbursements actually incurred. For this reason, Mr Cheng was given leave to file and serve affidavit material and short submissions by 12 March 2019, and Mem Nominees was given leave to file response affidavit material and submissions by 19 March.
- 7 Mr Cheng duly filed an affidavit sworn by his solicitor, Michelle Anna Beere. No affidavit was filed on behalf of Mem Nominees.
- 8 Ms Beere’s affidavit referred to costs and disbursements. The receipted disbursements included a fee on filing the counterclaim of \$575.30, two hearing fees of \$505.80 each, and a filing fee in connection with the costs hearing in the sum of \$364.10. Because the issue of reimbursement of fees is straightforward, it is convenient to deal with it first.
- 9 Under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* (“**the VCAT Act**”), the Tribunal may make 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. Mem Nominees’s initial claim was made under the *Water Act 1989*. In such a case, the factors to be taken into account in considering the operation of s 115B of the VCAT Act are to be found in ss 115B(3). The Tribunal must have regard to—
- (a) the nature of, and issues involved in, the proceeding; and
  - (b) the conduct of the parties (whether occurring before or during the proceeding), including whether a party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse; and
  - (c) the result of the proceeding, if it has been reached.
- 10 I consider the nature of the proceeding to have been complex. The counterclaim involved the interpretation of detailed Terms of Settlement, and each party relied on an expert witness. It was a proceeding in respect of which each party saw fit to be represented by Counsel.
- 11 A brief history of the proceeding after the Terms of Settlement were signed was set out in the reasons published on 23 November 2018, at [8-17]. That history discloses that Mem Nominees delayed the ultimate determination of the proceeding by raising as a preliminary question the issue of whether the Terms of Settlement should be set aside. This application was dismissed on 26 April 2018. I highlight that this application was made at a time when Mr Cheng had discharged his part of the bargain contained in the Terms of Settlement. Specifically, he had carried out the relevant works to his

balcony. Mem Nominees only sought to have the Terms of Settlement set aside after it was clear that Mr Cheng indicated that he was entitled to be paid under those Terms. I consider that this conduct on the part of Mem Nominees was unreasonable, and accordingly the delay caused to the ultimate determination of the proceeding was unreasonable.

- 12 I also highlight that the result of the proceeding was a resounding victory for Mr Cheng. Taking all these matters into account, I find that it is fair that Mem Nominees should reimburse to Mr Cheng the fees paid by him. They total \$1,951. I will make an order for reimbursement of that sum.

### **THE TRIBUNAL'S POWER TO AWARD COSTS**

- 13 Before looking at Mr Cheng's submissions, it is relevant to note that the Tribunal's power to award costs is governed by s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("**the VCAT Act**"). Because of its centrality to this decision, the relevant parts are now set out:

(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.

- 14 Guidance as to how to approach s 109 was provided by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd*<sup>1</sup>, where his honour said:

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<sup>1</sup> [2007] VSC 117

18 It can be seen that the general rule to apply in all proceedings is that "each party is to bear their own costs in the proceeding." Despite the general rule, the Tribunal may at any time order a party to pay costs to another party. The general rule expressed in s.109(1) must yield to a finding by the Tribunal pursuant to s.109(3). However, the Tribunal may not make an order unless it is "satisfied that it is fair to do so", and in arriving at that decision the Tribunal is bound to have regard to a series of matters set out in s.109(3). Despite the fact that the various matters are listed, s.109(3)(e) operates to extend the relevant matters if the Tribunal considers that some other matter is relevant. That is, the listed matters are not exhaustive.

19 It follows that the general rule applies and the Tribunal may only make an order for costs if it is satisfied that it is fair to do so. That finding is an essential prerequisite to making an order for costs.

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.

15 I now address the principle that the Tribunal may only make an order for costs if it is satisfied that it is fair to do so having regard to the factors set out in ss 109(3). As already indicated in connection with the issue of reimbursement of fees, the proceeding was complex. I find this enlivens the Tribunal's discretion to award costs under ss 109(3)(d). Furthermore, I have also found above that Mem Nominees acted unreasonably in seeking to have the Terms of Settlement set aside after Mr Cheng had performed his obligations under those Terms. This unreasonably prolonged the time taken to determine the proceeding. Accordingly, I now find that the discretion of the Tribunal to award costs under ss 109(3)(b) is also enlivened.

16 I do not regard these findings as controversial. Mem Nominees has elected not to oppose Mr Cheng's application for costs either at the costs hearing or by filing submissions, even though it must have been clear to Mem Nominees that any award of costs would be substantial. It is very possible that Mem Nominees considers the application for costs is irresistible. In any event, I have no hesitation in finding that it is fair to order that Mem Nominees should pay the costs of the proceeding because its jurisdiction to do so has been enlivened under ss 109(3)(b) and (d).

- 17 The Tribunal has been invited by Ms Beere, at paragraph 12 of her affidavit, to certify Counsel's fees and order that solicitors' and other professional fees be paid on the standard basis pursuant to the County Court Scale, and in default of agreement be assessed by the Registrar.
- 18 The Tribunal is bound by ss 98(1)(d) of the VCAT Act to:
- conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.
- 19 The Tribunal has jurisdiction under s 111 of the VCAT Act to either fix the amount of costs itself, or order that costs be assessed, settled, taxed or reviewed by the Costs Court. Accordingly, if the relevant evidence is available, I will fix costs and disbursements, rather than refer them to the Costs Court. I now turn to the individual items in the order in which they are referred to in Ms Beere's affidavit.

### **SOLICITOR'S COSTS OF ROSE LAWYERS**

- 20 Ms Beere is from Rose Lawyers. She has appended to her affidavit a costs assessment prepared by Ethical Costing & Legal Services of the costs of her firm for the period 6 April 2018-29 January 2019. The amount of the assessment is \$14,669.09. Also appended to the affidavit is a letter from Ethical Costing & Legal Services dated 12 February 2019 confirming that the assessment has been made on the applicable County Court scale on the standard basis. As noted, there is no submission from Mem Nominees. I am prepared to accept the assessment of Ethical Costing & Legal Services, and find that Mr Cheng is entitled to an order for payment of **\$14,669.09** in respect of the costs of Rose Lawyers, as claimed.

### **SOLICITOR'S COSTS OF EALES & MACKENZIE**

- 21 Eales & Mackenzie were Mr Cheng's lawyers for the period 9 May 2017-3 April 2018. Ms Beere has appended to her affidavit an assessment from Ethical Costing & Legal Services in respect of their costs. The letter of 12 February 2019 referred to confirms that this assessment has been made on the applicable County Court scale on the standard basis. The assessment is in the sum of \$14,082.77.
- 22 I initially noted with concern that the costs consultants in their letter stated that "the assessed costs of Eales & Mackenzie are, at best, a guess based on the file presented as there is clearly a deal of the file missing, such as attendance notes." However, reference to the assessment itself indicates that it has been made having regard to specific activities. I infer from this that the "guess" referred to is a reference to a conservative assessment of costs rather than a scientific assessment of costs based on a complete file. This inference is supported by the fact that the Rose Lawyers assessment refers to 258 solicitor attendances for 2018. The Eales & Mackenzie assessment

refers to only 26 attendances in 2017, and 11 in 2018. I am accordingly satisfied that the Eales & Mackenzie assessment, such as it is, is justified by the actual file presented to the costs consultants. In the absence of any submission at all regarding costs from Mem Nominees, I am prepared to allow the assessment of Ethical Costing & Legal Services. I find that Mr Cheng is entitled to an order for payment of **\$14,082.77** in respect of the costs of Eales & Mackenzie.

### **COUNSEL'S FEES**

23 Appended to Ms Beere's affidavit are a set of fees slips from Mr Cafari's clerk. I deal with these in date order.

#### **The first invoice dated 26 April 2018**

24 The first invoice from Mr Cafari's clerk related to the hearing of the preliminary point. The details of work invoiced include reviewing brief - \$990 for 3 hours; further reading and marking up brief- \$990 for 3 hours; conference -\$1,980 for 6 hours; preparation -\$2,640 for eight hours; and appearance fee- \$3,300. I highlight that only one day's brief fee was charged, although the hearing was set down for two days. I calculate the total of the work charged at \$9,900, but note that the amount actually invoice was limited to \$9,810 inclusive of GST. I allow the invoiced sum of **\$9,810** in full.

#### **The second voice dated 23 October 2018**

25 The next invoice for Counsel's fees is dated 23 October 2018 and relates to the substantive hearing on 10 and 11 October 2018. The fees invoiced related to revisiting brief -three hours, no fee; conference with client and instructor -\$840 for 2.5 hours; conference with clients -\$660 for two hours; discussions with Mr Mladichek and instructor -\$660 for two hours; conference with Mr Dudas \$330; preparation-\$3,300 for say 10 hours; preparation following day one of hearing- \$990 for three hours ; appearance fees for 2 days-\$6,600: The total is \$13,380.

26 The hourly rate referred to in this invoice is \$330 per hour inclusive of GST. This is well within the County Court Scale for junior counsel. The brief fee of \$3,300 per day is also well within the County Court scale for junior counsel. I accordingly allow **\$13,380** in full.

#### **The third invoice dated 7 March 2019**

27 The final invoice relates to the costs hearing on 5 March and subsequent work. The fees invoiced are \$550 inclusive of GST for two hours preparation, drafting of submissions-\$550 inclusive of GST, and appearance at the cost hearing -\$1,500; and drafting submissions on 7 March 2019 -\$825 for three hours work, and clarification of the travel claim-\$135 for half an hour's work. The costs claimed total \$3,560 inclusive of GST.

- 28 I comment that the hourly rate implicit in this account is \$270 an hour inclusive of GST which is well within the County Court scale. The appearance fee for a half day hearing claimed of \$1,500 is also within the scale.
- 29 However, I am not prepared to accept the fee relating to the preparation of further submissions (\$825). I say this for two reasons. Firstly, those submissions should have been made at the costs hearing itself on 5 March 2019. I am prepared to allow two hours preparation for that hearing, together with a further two hours for the drafting submissions as well as the appearance fee. I cannot see why Mr Cheng should be allowed the cost of a further three hours work for submissions after the hearing. The second point is that Mr Cheng's solicitor filed her affidavit, but no further submissions. Accordingly, I have not seen them. It is hard to understand why costs should be awarded in respect of submissions which were not filed.
- 30 I am also not prepared to allow the further fee of \$135 claimed in relation to "clarification of the travel claim". Adequate allowance has been made for preparation for the costs hearing on 5 March 2019. I can see no reason for allowing a further fee for preparation after the hearing. In any event, as will be seen below, I am not satisfied that either travel fee claimed is recoverable.
- 31 The upshot is that in respect of the third invoice of 7 March 2019 I will allow \$550 inclusive of GST for preparation, \$550 inclusive of GST for submissions, and the appearance fee of \$1,500 inclusive of GST, a total of **\$2,600**.
- 32 In summary, I have allowed \$9,810, for the first invoice, \$13,380 for the second and \$2,600 for the third, a total of **\$25,790** for counsel's fees.

### **FEES OF MR MLADICHEK**

- 33 Mr Mladichek played an extensive role in supporting Mr Cheng throughout his dispute with Mem Nominees. As chronicled in the reasons for decision, Mr Mladichek prepared an expert witness report dated 16 April 2014 in which he made reference to the Tribunal's orders of 28 March 2014. [Reasons, 82]. Mr Mladichek carried out an inspection of both Mr Cheng's apartment and Mem Nominees apartment on 21 May 2014 and produced a "Building Defect Report). This was not an expert witness's report. [Reasons, 84]. Mr Mladichek's third report was dated 28 August 2014, and was prepared following inspections of the balcony of Mr Cheng's apartment and Mem Nominees's apartment. This report was headed "New Home Inspection Report" and did not purport to be an independent expert witness's report. [Reasons, 87]. The fourth report was dated 17 November 2014, and was headed "Building Defect Report (Reinspection)" and did not purport to be an expert witness's report [Reasons, 90]. The fifth report was dated 7 April 2015 and was headed "New Home Inspection Report" and was not intended to be read as an expert's report [Reasons, 92]. The sixth report was dated 10 March 2017 and was prepared as an expert witness's

report. [Reasons, 98]. The seventh report was dated 13 July 2017 which resulted from a joint inspection of the balcony of Mr Cheng's apartment on 22 June 2017 in the company of others including the expert engaged by Mem Nominees, Mr Macleod. [Reasons, 102]. The eighth and final report was dated 8 October 2018, and was a final inspection of Mr Cheng's unit. [Reasons, 110].

- 34 In assessing Mr Cheng's claim for costs, I am concerned with the fees incurred by Mr Mladichek in his capacity as an expert witness, rather than as a building consultant. Claims for Mr Mladichek's fees in his capacity as a building consultant incurred in May 2014, July 2014, November 2014 and March 2015 were made at the hearing, and addressed in my determination. [Reasons, 241-243]. I accordingly confine my attention to the first report of 16 April 2014, the sixth report dated 10 March 2017, the seventh report dated 13 July 2017 and the eighth report dated 8 October 2018.
- 35 Ms Beere appended the following accounts from Mr Mladichek to her affidavit:
- re-inspection on 10 February 2017 - \$600 inclusive of GST.
  - expert witness at VCAT hearing - \$1,200 inclusive of GST.
  - comparative analysis report - \$1,500 inclusive of GST
  - joint inspection and report - \$600 inclusive of GST.
  - attendances at VCAT as an expert witness on 23 April and 26 April 2018 - \$2,000 inclusive of GST.
- 36 The fee of \$600 incurred on 10 February 2017 appears to be referable to the sixth. report. I allow this fee. The joint inspection report for which \$600 was charged seems to be the seventh report dated 13 July 2017. I will allow this fee. Mr Mladichek attended the hearing as a witness in October 2018. I will allow \$1,200 charged for this, noting that it is well within the County Court scale, i.e. 80% of the Supreme Court scale. I note that Mr Mladichek has invoiced \$1,200 for each of 2 days in April 2018. I note that the hearing scheduled for 26 April 2018 was set down for two days, and I will allow these charges. I do not understand the \$1,500 charge for the comparative analysis report, and note that no date was given for this work in any event. I will not allow this particular charge.
- 37 In summary, I have allowed \$600 for the six report, \$600 for the seventh report, and \$3,200 for attending (or being available to attend) at VCAT. The total allowed accordingly for Mr Mladichek's fees is **\$4,400**.

## **AIRFARES**

- 38 The final claims relate to travel invoices.

### **The directions hearing on 2 November 2016**

- 39 The first travel invoice claimed relates to a directions hearing on 2 November 2016. The costs of this directions hearing were reserved. It is to

be noted that the costs order specifically stated that any application for costs made by Mr Cheng would be heard at the directions hearing on 3 March 2017. Reference of the orders made on that day indicates the costs of 2 November 2016 were reserved again. It is accordingly necessary that I determine whether they are payable.

40 The costs incurred in respect to the hearing of 2 November 2016 are 50% of Mr Cheng's flight from China to Melbourne on 31 October/1 November 2016.

41 Appended to Ms Beere's affidavit is an email sent by Mr Cheng to the Tribunal in connection with the hearing on 2 November 2016. Relevantly, he says:

I already explained the reason that I have to be overseas until 1st November 2015, so that you arranged the following hearing on 2 November 2016 if NOMINEES LTD file the point of Defence by 19 August 2016 (however he didn't!). (Sic)

42 It appears from this email that the Tribunal scheduled the hearing on 2 November 2016 to meet Mr Cheng's convenience. Accordingly, I find that he is not entitled to an award of travel costs, even if such an award could otherwise have been made.

### **The directions hearing on 8 November 2017**

43 The second travel claim relates to a directions hearing that took place on 8 November 2017. A claim is made for 50% of the cost incurred by Mr Cheng in flying back to Australia from China for the directions hearing. The proposition that he came back to Australia specifically for this hearing. However, reference to the introductory notes set out by Senior Member Riegler in the order in late November 2018 indicates the following:

- A. The Tribunal was advised by the solicitor acting on behalf of the Applicant, that the director of the Applicant is terminally ill, with only days or possibly weeks left to live. The condition of the Applicant's director was first communicated to the Respondent's solicitors on Friday, 3 November 2017. However, by that date the Respondent had already arranged to travel to Australia from China in order to appear at the hearing listed for today.
- B. The Applicant seeks an order that the hearing listed for today be adjourned on the ground that the director of the Applicant cannot attend. The Respondent, although initially consenting to the adjournment, now presses for the hearing to proceed today. However, the Respondent's legal representatives have not, given the Applicant's correspondence dated 3 November 2017, arranged for any of the Respondent's expert witnesses to attend the hearing today and on that basis, concede that the Respondent is not ready to proceed, in any event.

- 44 It is to be noted from note B above that it was ultimately conceded by Mr Cheng's solicitor that he was not ready to proceed on that day. Accordingly, this claim will not be allowed.

#### **SUMMARY AND PROPOSED ORDERS**

- 45 I have indicated above that I will allow \$14,669.09 in respect of the costs of Rose Lawyers, \$14,082.77 in respect of the cost of Eales & Mackenzie, \$25,790 in respect of counsel's fees and \$4,400 for Mr Mladichek's fees. However, I have allowed nothing in respect of the two claims for airfares. The total I have allowed for costs and disbursements is accordingly **\$58,941.86.**
- 46 I will make an order that this sum be paid by Mem Nominees to Mr Cheng.

#### **MEMBER C. EDQUIST**