

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1032/2013

CATCHWORDS

Domestic building, interest, application under s78 of the *Victorian Civil and Administrative Tribunal Act* 1998 (“VCAT Act”), costs, service of offer to which s112 of the VCAT Act responds, address for service by email under s140 of the VCAT Act.

FIRST APPLICANT	Mr Suhail Mir Mohamed
SECOND APPLICANT	Ms Amela Mahmic
RESPONDENT	Ms Aurora Pollara
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	19 December 2014
DATE OF ORDER	20 January 2015
CITATION	Mohamed v Mahmic (Building and Property) [2015] VCAT 55

ORDER

The Respondent must pay the Applicants’ interest and costs fixed at \$1,567.58 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants

Mr M. Dean of Counsel

For Respondent

Mrs A. Pollara in person,
with her son Mr J. Pollara

REASONS

- 1 This decision concerns the Applicants' application for interest and costs. However first I must consider the Respondent's application to have the Applicants' costs application struck out.
- 2 On 17 October 2014 I ordered that the Respondent pay the Applicants \$32,231.55. The second order was:

Costs are reserved with liberty to apply until 30 January 2015. Any application for costs should be accompanied by a brief outline of facts and contentions. I direct the Principal Registrar to list any costs hearing before Senior Member Lothian with an estimated duration of 2 hours.
- 3 On 12 November 2014 the Applicants' solicitors wrote stating that the Applicants wished to apply for costs. On 17 November 2014 I ordered that the costs hearing be set down for 19 December 2014. The second order was:

By 5 December 2014 the Applicants must file and serve a brief outline of facts and contentions.
- 4 On 3 December 2014 Mr J. Pollara, the Respondent's son, sent an email to the Tribunal, addressed to me, requesting that I "reconsider the costs hearing". I did not read the email, but referred it to a member of the Tribunal's registry who deals with complaints and similar matters.
- 5 On 8 December 2014 Mr Pollara sent another email to the Tribunal, requesting that the Tribunal send him "the Applicants contentions and applications for cost by express post by close of business Tuesday 9th December". Mr Pollara appears to have copied the email to the Attorney-General for Victoria, and to the Premier, but not to the Applicants or their solicitors.
- 6 The Tribunal responded to Mr Pollara by email on the same day, sending a copy of the application for costs and advising "... the Applicant is yet to file its [sic] contentions."
- 7 On 9 December 2014 the Applicants' solicitors sent the Tribunal a document dated 5 December 2014 entitled "Applicants Outline of Interest & Cost Submissions". A copy was received by facsimile on 9 December 2014 and by mail on 12 December 2014.
- 8 On 11 December 2014 Mr Pollara sent an email to the Tribunal with a copy to a solicitor who had previously acted for the Respondent, but without a copy to the Applicants or their solicitors. He noted that the Applicants had not complied with the orders of 17 November and concluded:

Therefore accordingly under section 75 of the VCAT act for strike out application must be exercised immediately as the applicant is now the party in default and therefore this case must be dismissed according to this legal act. [sic]

- 9 The Tribunal responded by email the same day but appears not to have sent a copy to the Applicants.
- 10 On 16 December 2014 the Applicants' solicitors sent a cost assessment from Blackstone Legal Costing, copies of Counsel fee slips and copies of disbursement receipts, each dating from 28 March 2014. The letter concluded:

We confirm that these documents will also be served on the Respondent.

S78 OF THE VCAT ACT

- 11 The Respondent's application to dismiss was expressed to be under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"), but it was obvious that the section she and Mr Pollara meant to apply under was s78 – the same section under which the proceeding was substantially determined against her on 22 July 2014.
- 12 I said I would reserve my decision and heard both parties concerning the s78 application, and both parties concerning the application for costs and interest. I said that if the Respondent's application under s78 were successful, it would not be necessary for me to further consider the application for costs and interest.
- 13 I turn first to s75 of the VCAT Act. It provides for summary dismissal or striking out of unjustified proceedings where the proceeding itself is:
 - (a) frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.
- 14 I am not satisfied that the application for costs, which was permitted in the orders of 17 October 2014, falls into these categories. Neither am I satisfied that an application for interest falls into these categories.
- 15 The parts of s78 of the VCAT Act referred to by the Respondent during the hearing are:

78 Conduct of proceeding causing disadvantage

- (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as-
 - (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or

...

- (e) attempting to deceive another party or the Tribunal;
or
 - (f) vexatiously conducting the proceeding.
- 16 Having regard to s78(1)(a), Mr Pollara stated that the Applicants were ordered to file their outline by 5 December 2014 but they did not do so until 10 December 2014. He also said that the only documents he and the Respondent received were from the Tribunal. Mr Dean of Counsel for the Applicants said in answer (although not on oath) that there was an attempt to serve the Respondent's previous solicitors, who advised that they did not have instructions to accept service.
- 17 Mr Pollara submitted that as I had made orders under s78 against the Respondent, I should do the same concerning the Applicants. I am satisfied that the Applicants did not strictly comply with the order to file and serve their outline by 5 December 2014, but I accept Mr Dean's submission that the outline was filed only one business day late.
- 18 I am not satisfied that one short delay by the Applicants is sufficient to amount to a course of "conducting" the proceeding adversely to the Respondent. This one breach is in stark contrast to the repeated breaches of the Respondent, summarised at paragraph 42 of the Reasons of 22 July 2014.
- 19 The Respondent's and Mr Pollara's submission regarding s78(1)(e) and (f) concerned matters relevant to the hearing of the substantive case, not matters relating to the application for costs and interest.
- 20 The Respondent's application under s78 of the VCAT Act is dismissed.

INTEREST

- 21 The Applicants seek interest on amounts they paid prior to commencing the proceeding, as distinct from amounts they were yet to incur for works after the date of the substantive determination. The interest sought is \$674. It is sought on the total of \$4,893.40 allowed for amounts spent, listed in the reasons of 17 October 2014. It is for the period from commencement of the proceeding on 9 September 2013 to 19 December 2014 at the rates set from time to time under the *Penalty Interest Rates Act* 1983 ("PIR Act").
- 22 Section 53 of the *Domestic Building Contracts Act* 1996 ("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.

23 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...

24 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”.

25 I am satisfied that it is fair that the Applicants receive interest on the amounts they incurred before the proceeding was commenced; interest to be calculated from the date the proceeding commenced. I am satisfied that in this proceeding the appropriate rate of interest is the rate set from time to time under the PIR Act.

26 I accept Mr Pollara’s evidence that the Respondent sent a cheque for the sum ordered, of \$32,231.55, to the Applicants on 22 October 2014 but it “took about a week to get into their trust account”. Mr Dean explained that the cheque was accompanied by a letter stating that payment was “in full and final settlement” and that this issue had to be dealt with before the cheque was banked. Nevertheless, Mr Dean expressed the Applicants’ willingness to accept interest to 22 October 2014.

27 Having regard to the Applicants’ calculations at paragraph 22 of their written submissions, I allow interest as follows:

Start date	End date	Days	Rate	Amount per day	Total
9/9/13	6/10/13	28	10.5%	\$1.4076	\$39.41
7/10/13	2/2/14	119	10%	\$1.3405	\$159.53
3/2/14	10/8/14	189	11.5%	\$1.5416	\$291.37
11/8/14	22/10/14	62	10.5%	\$1,4076	\$87.27
		398			\$577.58

28 The Respondent must pay the Applicants interest of \$577.58.

COSTS

29 The Applicants seek costs of the directions hearing of 11 March 2014, which was convened because of the Respondent’s failure to comply with

orders regarding her counterclaim. They also seek costs on a solicitor and client basis since they made an offer of settlement on 28 March 2014.

Directions of 11 March 2014

30 Deputy President Aird conducted a directions hearing on 11 February 2014. Orders 3 and 4 were as follows:

3. By 17 February 2014 the Respondent must send to the Tribunal and to the Applicant fully itemized particulars of her counterclaim including the amounts claimed. The Respondent must pay the application fee for the counterclaim.

NOTE:

The Tribunal notes the Respondent says she has paid the application fee for the counterclaim but that enquiries of the Tribunal reveal that such payment has not been processed. If a duplicate payment is processed the extra fee will be refunded.

4. The date by which the Applicant must file and serve Points of Defence to counterclaim is extended to 3 March 2014.

31 The Applicants' solicitors wrote to the Tribunal on 21 February 2014, stating that the Respondent had failed to provide fully itemized particulars of her counterclaim that would enable them to respond. They sought an order that they need not file a defence to counterclaim.

32 The Tribunal arranged the directions hearing for 11 March 2014, which was also conducted by Deputy President Aird. Order 3 was:

The applicant is not required to file Points of Defence to the respondent's counterclaim. The Tribunal notes the application fee for the counterclaim is still to be paid and unless it is paid or a fee waiver granted before the commencement of the hearing the hearing will only concern the application file by the applicant.

33 The costs of that directions hearing were reserved. After the directions hearing the Respondent sought, but was not granted, a fee waiver. The fee was never paid and the counterclaim was abandoned on 19 March 2014.

34 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* 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.

35 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.

36 The Applicants submitted that they were entitled to costs of the directions hearing of 11 March 2014 under s109(3)(a)(i) and/or 109(3)(a)(c).

s.109(3)(a)(i) Failing to comply with an order or direction of the Tribunal without reasonable excuse

37 The Respondent failed to comply with orders of the Tribunal in two respects. She did not file points of counterclaim that related to anything other than her costs, time and medical expenses. More importantly she failed to pay the filing fee, but led the Tribunal to believe she had done so. I find her behaviour in this respect is vexatious.

38 The Respondent could have abandoned her counterclaim before the directions hearing of 11 March 2014, but failed to do so. I am satisfied that the Respondent's action regarding her counterclaim caused the Applicants to waste costs for the day.

S 109(3)(a)(c) The relative strengths of the claims made by each party

39 The Respondent's counterclaim revealed no basis upon which she would have been able to recover from the Applicants.

Conclusion regarding the costs of 11 March 2014

40 I am satisfied that the Respondent's vexatious conduct in failing to properly particularize her counterclaim and failing to either pay the filing fee for the counterclaim or abandon her counterclaim before the directions hearing, led to costs wasted by the Applicants. I am satisfied that \$990 is a reasonable sum for the Applicants' costs of the day.

41 The Respondent must pay the Applicant \$990 costs for the directions hearing of 11 March 2014.

Settlement offer of 28 March 2014

42 Mr Chris Hughes of the Applicants' solicitors gave evidence that a without prejudice settlement offer, expressed to be pursuant to Part 4, Division 8 of the VCAT Act, was served on the Respondent by post and on Mr J Pollara by email. He stated that an employee of his firm posted the offer to the Respondent at 189 Napier Street, Strathmore, Victoria 3041.

43 At the date of posting the offer, the Respondent's address for service was not 189 Napier Street Strathmore 3041, but 189 Napier Street, Essendon 3040. The street is the same, but there are two different properties, each numbered 189. I am not satisfied that the Respondent received the posted offer and I am not satisfied that it was sent to her address for service.

44 I accept Mr Hughes' evidence that he sent a copy of the offer by email to jcpollara@optusnet.com.au.

45 I am satisfied that, with the exception of the address, the settlement offer is in accordance with the provisions of sections 113 and 114 of the VCAT Act with respect to its form.

46 As to the contents of the offer, s112 provides:

Presumption of order for costs if settlement offer is rejected

(1) This section applies if

(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and

(b) the other party does not accept the offer within the time the offer is open; and

- (c) the offer complies with sections 113 and 114; and
 - (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
- (2) If this section applies and unless the Tribunal orders otherwise a party who made an offer referred to in subsection 1(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.
[Underlining added]
- 47 The offer of 28 March 2014 was to accept \$30,000 inclusive of interest and costs. I am satisfied that in accordance with s112(1)(d) the orders made on 17 October 2014, that the Respondent pay the Applicants \$32,231.55 (excluding costs) is not more favourable to the Respondent than the offer.
- 48 The only factor that prevents me from making the orders sought is the evidence on oath from both the Respondent and Mr Pollara that they did not receive the offer. I note the Respondent's evidence that she suffered what she described as a nervous breakdown early in 2014, and her memory of that time is poor.
- 49 Mr Pollara's email address changed from time to time but I note that he wrote to the Tribunal from the address used by Mr Hughes on 20 March 2014 and on 6 April 2014. It was an address actively used by Mr Pollara at the time the offer was copied to him, but there was no response from Mr or Mrs Pollara that proved they had received the offer by mail or email.
- 50 Section 140(1)(a)(ii) of the VCAT Act provides:
- (1) For the purpose of this Act, a notice, order or other document may be served on or given to a person-
 - (a) if the person is a natural person-
 - ...
 - (ii) by sending it by post, facsimile or other electronic transmission to the person at his or her last known residential or business address; [underlining added]
- 51 Mr Pollara consistently assisted his mother, but his addresses were never declared to be her addresses for service, and specifically, there was no order that the Respondent could be served at Mr Pollara's email address.
- 52 Mr Hughes was unable to provide evidence that contradicted the Respondent's and Mr Pollara's evidence that neither received the offer, although I note the surprising coincidence that the Respondent transferred her property at 189 Napier Street, Essendon to Mr Pollara as a gift on 28 March 2014.
- 53 I cannot be satisfied that the Respondent received the offer, particularly as it was not sent to her address for service. I decline to make an order for costs under s112 of the VCAT Act.

Orders sought in the absence of a successful offer

54 I asked Mr Dean what orders were sought by the Applicants if I was not satisfied that the Respondent had been served with the offer of 28 March 2014. His response was that they sought interest and the costs of \$990 for the directions hearing of 11 March 2014.

Costs court

55 At the costs hearing I indicated that if I made an order for costs I would order that the amount be fixed by the Costs Court. As only one sum has been allowed, and the cost of appearing in the Costs Court would be disproportionate to the amount to be fixed, I have fixed it myself.

CONCLUSION

56 The Respondent must pay the Applicants interest of \$577.58 and costs of \$990, a total of \$1,567.58. Payment must be made forthwith.

SENIOR MEMBER M. LOTHIAN