

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP873/2016

CATCHWORDS

Return of proceeding, following substantive written reasons handed down 29 January 2019, to hear submissions as to interest and to make final order on the claims of the parties, save as to costs. Amendment of prior written reasons to rectify accidental error. Order for damages, including damages in the nature of interest, in favour of the respondents with costs reserved.

APPLICANT	Oakmont Properties Pty Ltd (ACN 106 786 010)
RESPONDENTS	Duan Lan Zhang and Ling He
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Further Hearing of submissions
DATE OF HEARING	25 March 2019
DATE OF ORDER	28 March 2019
CITATION	Oakmont Properties Pty Ltd v Zhang (Building and Property) [2019] VCAT 431

ORDERS

1. The applicant must pay the respondents \$270,217.
2. Costs reserved.
3. The applicant's application that the proceeding be stayed pending determination of the applicant's appeal to the Supreme Court is adjourned to a date to be set.
4. The respondents' application for costs is adjourned to a date to be set.
5. The respondents' application that Mr Just be joined as a respondent to the proceeding is adjourned to a date to be set.
6. The proceeding is referred to an administrative mention on 31 May 2019 by which date the parties are to:

- a) notify the Tribunal in writing as to the status of the applicant's Notice of Appeal in the Supreme Court with case reference number S ECI 2019 00794, and
- b) notify the Tribunal as to their requests/recommendations in respect of the above-mentioned adjourned applications and as to the future conduct of this proceeding.

Note:

No appearance at the Tribunal is required on 31 May 2019. What is required is written notification.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant: Mr P J Adams of Counsel.

For Respondents Mr T Sedal of Counsel.

REASONS

- 1 On 29 January 2019, I handed down detailed written reasons setting out my findings on the claims brought by the parties in this proceeding. (**‘the substantive reasons’**). The substantive reasons do not include final orders as I considered it appropriate to first hear submissions from the parties as to the question of interest. For this reason, the only order made with the substantive reasons was that the proceeding was adjourned to further hearing before me on 25 March 2019 for the purpose of hearing submissions on the question of interest.
- 2 The parties appeared before me on 25 March 2019. Mr Adams of Counsel represented the applicant (**‘the builder’**) and Mr Sedal of Counsel represented the respondents (**‘the owners’**).
- 3 Prior to the matter returning before me, the builder filed a Notice of Appeal, dated 25 February 2019, in the Supreme Court in respect of the substantive reasons. It is odd that the builder filed the Notice of Appeal before final orders were made in this proceeding. It begs the question as to what order/s is being appealed. In any event, the builder made application that this proceeding be stayed pending the outcome of the “appeal”.
- 4 The owners oppose the application to stay the proceeding. The owners seek final orders as to damages payable to them by the builder, including an allowance for interest. The owners also bring an application for costs.
- 5 I am not sure how the Supreme Court will treat the Notice of Appeal which does not reference any specific order/s being appealed. I am advised that a Summons for Directions in respect of the Notice of Appeal is returnable in the Court on 3 April 2019. It may be that the builder might seek to amend the Notice of Appeal having regard to the orders I make with these reasons. It might be that the builder also makes application to the Court for a stay of this proceeding pending determination of the appeal.
- 6 As discussed with the parties, I am not persuaded, at this time, that I should stay this proceeding pending the outcome of a Notice of Appeal which, on its face, appears problematic in that it specifies no order being appealed. I consider it important that I determine the question of interest and make final order in determination of the proceeding (save as to costs). Such order could properly be the subject of an appeal. As discussed with the parties, I will adjourn the builder’s application for a stay of the proceeding. The builder may, after this decision is handed down, seek to proceed with the stay application. Or, it might be that the stay application becomes redundant because a similar application is made and dealt with in the Supreme Court.
- 7 As also discussed with the parties, I consider the owners’ application for costs to be premature in the circumstance where I have yet to hand down final orders determining the claims of the parties. A final order determining the claims will be provided with these reasons. I will reserve costs. For this reason, the owners’ application for costs will also be adjourned. Again,

after this decision is handed down, the owners may seek to proceed with their application for costs.

- 8 I note in this regard that I have indicated to the parties the difficulty, as I see it, in proceeding with a costs application when there is an appeal before the Supreme Court awaiting determination. A costs' application involves consideration of the matters set out in Division 8 of part 4 of the *Victorian Civil and Administrative Tribunal Act 1998* ('**the Act**'). Such consideration will include consideration of the matters set out in section 109 of the Act, including the relative strengths of the claims of each of the parties. Where offers of settlement have been made, consideration will be given to such offers and such consideration may include determination as to whether section 112 of the Act is enlivened.
- 9 An appeal raises the prospect that the Supreme Court may find error in the decision being appealed, and the Court may substitute its own orders or it may remit the matter back to the Tribunal for further hearing in accordance with the Court's directions.
- 10 Consideration as to the relative strengths of the parties' claims may be fundamentally affected by the Court's findings/orders on appeal. Likewise, the significance and effect of any offers of settlement may be fundamentally affected by the Court's findings/orders on appeal. And, if the matter is remitted back to the Tribunal for further hearing, it is preferable that the Tribunal's further consideration of matters is not fettered, or is not perceived to be fettered, by the Tribunal's consideration of without prejudice offers of settlement.
- 11 Prior to the hearing on 25 March 2019, the owners filed written submissions and supporting affidavit material that included material relevant to their costs application. I note, for the record, that at the hearing before me on 25 March 2019 this material was returned to the owners. A partial copy of such material was retained on the Tribunal's file. The partial copy has had the sections relating to the owners' costs application removed. I note also, for the record, that other than a cursory glance at the material filed in order to confirm the sections of that material relating to the owners' costs application, I have not read the sections relating to the owners' costs application.
- 12 The owners have made one further application - an application that the director of the builder, Mr Just, be joined as a party to the proceeding. As I understand it, the application is made for the purpose only of pressing a claim that Mr Just would be liable to pay any unsatisfied cost order made against the builder. Because the application assumes the making of a cost order against the builder, and the owners' costs application is to be adjourned, the owners accept that the application to join Mr Just as a party to the proceeding should also be adjourned.
- 13 The proceeding will be listed for an administrative mention on 31 May 2019, by which date parties are to notify the Tribunal as to their requests or

recommendations as to the future conduct of the proceeding, including the above-mentioned adjourned applications.

RECTIFICATION OF ERROR IN THE SUBSTANTIVE REASONS HANDED DOWN 29 JANUARY 2019

- 14 The owners submit that there is a slip/error in the substantive reasons which ought to be rectified before the final assessment of damages and interest. The alleged error is at paragraphs 230(d) and 343 in the substantive reasons wherein I state that the total sum of payments made by the owners to the builder was \$2,129,130. The owners say that the correct sum is \$2,180,815 and that I appear to have, by accidental slip, nominated the incorrect sum. They say the correct sum is confirmed by the pleadings and closing submissions of the parties. Rectification of the error will require a number of further consequential amendments to the substantive reasons.
- 15 Having checked the substantive reasons and the pleadings and submissions, I agree with the owners. I have accidentally nominated the incorrect figure at paragraphs 230 (d) and 343. I accept that the correct figure is \$2,180,815. In addition to rectifying the sum referenced in paragraphs 230(d) and 343, there are a number of further consequential amendments required to be made to the substantive reasons where my calculations have been founded on the incorrect figure. Section 119 of the Victorian Civil and Administrative Tribunal Act 1998 allows for the correction of an *order* where there has been a clerical mistake or an error arising from an accidental slip or omission. In my view section 119 is not applicable because, without final orders having been made with the substantive reasons, there is no *order* requiring correction. Instead, it is appropriate that I hereby amend the substantive reasons as follows:
- a) the figure \$2,129,130 in paragraphs 230 (d) and 343 is amended to \$2,180,815;
 - b) the figure \$314,520 in paragraph 280 is amended to \$366,205;
 - c) the figure \$100,130, referenced twice in paragraph 344, is amended to \$151,815;
 - d) the figure \$26,034 in paragraph 344 is amended to \$39,472;
 - e) the figure \$74,096 in paragraph 344 is amended to \$112,343;
 - f) the figure \$74,096 in paragraph 346 is amended to \$112,343;
 - g) the figure \$1,149,096 in paragraph 346 is amended to \$1,187,343;
 - h) the figure \$98,925 in paragraph 347 is amended to \$60,678;
 - i) the figure \$98,925 in paragraph 421 is amended to \$60,678;
 - j) the word ‘builder’ in paragraph 422 is amended to ‘owners’;

- k) the figure \$35,352 in paragraph 422 is amended to \$2,895;¹
- l) the figure \$26,034 in paragraph 424 is amended to \$39,472;
- m) the figure \$980,034 in paragraph 424 is amended to \$993,472;
- n) the figure \$140,332 in paragraph 425 is amended to \$126,894;
- o) the figure \$207,259, twice referenced in paragraph 494, is amended to \$220,957;
- p) the figure \$140,322 in paragraph 494 is amended to \$126,894;
- q) paragraph 495 is replaced the following paragraph (the amendments being underlined):

As set out above, I have assessed an allowance of \$2,895 in favour of the owners in respect of 9 Page Street, and I have assessed an allowance of \$220,957 in favour of the owners in respect of 7 Page Street. The net result is an allowance in favour of the owners in a sum of \$223,852.²

INTEREST

- 16 Pursuant to the substantive reasons, amended as set out above, the owners are entitled to damages in the sum of \$223,852 (**‘the primary damages sum’**). The owners claim interest on this sum.
- 17 Under s53 of the *Domestic Building Contracts Act 1995*, the Tribunal may make any order it considers fair to resolve a domestic building dispute. Under section 53(2)(b)(ii), such orders may include an order for damages in the nature of interest. Section 53(3) provides:
 - 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.
- 8 The owners seek interest on the primary damages sum, with such interest to be calculated at the rate prescribed pursuant to section 2 of the *Penalty Interest Rates Act 1983*. They say that the interest should be applied for the period commencing on the date this proceeding was commenced, 4 July 2016, when the builder filed its application, or alternatively from the date that the owners filed their counterclaim in this proceeding, 3 March 2017.
- 9 The owners submit that it is fair that the award of interest be made having regard to:

¹ For clarity, this means that the result, referenced in paragraph 422 in the substantive reasons, is amended from an allowance in favour of the builder of \$35,352, to an allowance in favour of the owners in the sum of \$2,895

² My original assessments in the substantive reasons were an allowance of \$35,352 in favour of the builder in respect of 9 Page Street and an allowance of \$207,529 in favour of the owners in respect of 7 Page Street. The amended assessments are an assessment of \$2,895 in favour of the owners in respect of 9 Page Street and an assessment of \$220,957 in favour of the owners in respect of 7 Page Street, making a total of \$223,852 assessed in favour of the owners.

- the fact that the builder has had use of the primary damages sum and would obtain an unjustified windfall if it was not ordered to pay damages in the nature of interest;
 - an award of damages in the nature of interest is more likely to place the owners in the position they would have been in had the contracts been performed;
 - an award of interest will partly redress the circumstance whereby the builder has had and retained the benefit of receipt of contractual payments before they were due under the contracts.
- 10 The primary damages sum is a significant sum made up of the applicants' entitlement to delay damages and their entitlement to damages in respect of incomplete and defective building works. In my view, it is fair in this case that an award of interest on the primary damages sum be made as compensation to the owners for the lost benefit of the use of the primary damages sum.
- 11 The builder makes no submission opposing altogether an award of interest, however the builder says the rate of the interest should be less than the rate claimed by the owners. The builder says also that the applicable commencement date for the application of interest should be the date the owners commenced their counterclaim, 3 March 2017.
- 12 As to the rate of interest, the builder submits a rate of 4.4% to 4.5% would be fair. This was the interest rate charge the owners incurred on their construction finance, and the rate referenced by me in the substantive reasons when assessing the owners' delay damages in respect of 7 Page Street.³ The builder submits a similar rate of interest would be a fair rate to apply when assessing the owners' loss of benefit of use of the primary damages sum.
- 13 I do not accept the submission. It assumes a use – the reduction of construction finance outstanding balance – to which the owners would have put the primary damages sum had it been available to them earlier. There is no sound basis to make such assumption. The money, if available earlier to the owners, may have been used for numerous purposes.
- 14 Having regard to the express provision in section 53(3) of the *Domestic Building Contracts Act 1995*, I am satisfied that it is fair to apply the interest rate as prescribed pursuant to section 2 of the *Penalty Interest Rates Act* during the relevant period.
- 15 As to the relevant period, I accept the submission of the builder that the appropriate and fair commencement date is the date the owners commenced their counterclaim, 3 March 2017.
- 16 The owners say that it would be fair to apply the rate from the earlier date when the builder commenced the proceeding, 4 July 2016. They say this

³ See paragraphs 477 to 489 in the substantive reasons

would be fair having regard to the approximate accrual dates of portions of the owners' damages claims, including:

- contractual liquidated damages for delay which had fully accrued as at the date of termination of the contracts, 14 April 2016;⁴
- the cost incurred to complete the construction of 7 Page Street which, on the evidence, had fully accrued by 19 September 2016;⁵
- the cost incurred to complete the construction of 9 Page Street which, on the evidence, had accrued by around mid-June 2016;⁶
- common law delay damages in respect of 7 Page Street, assessed by me as having accrued by 3 November 2016;⁷

17 It is noteworthy that some of the above-mentioned damage accrual dates are later than 4 July 2016, the date the builder commenced the proceeding. In any event, for the purpose of assessing the loss of benefit of use of the primary damages sum, I am not satisfied that it is fair to calculate the interest by referencing the actual or approximate accrual dates of the various components making up the primary damages sum. I think it is fair that the calculation begins with the date the owners commenced their proceeding seeking damages from the builder, that is the date they commenced their counterclaim, 3 March 2017.

18 I assess interest on the primary damages sum, \$223,852, at the rate prescribed pursuant to section 2 of the *Penalty Interest Rates Act*, for the period commencing 3 March 2017 and ending on the date of these reasons, 28 March 2019, as \$46,365 (rounded off to the nearest dollar).

19 The total of the primary damages sum and the interest on that sum is \$270,217.

CONCLUSION

20 In determination of the claims of the parties in the proceeding, save as to costs, I will order that the builder pay the owners \$270,217. I will reserve costs.

21 As noted earlier in these reasons, I will adjourn the builder's application for a stay of the proceeding, and I will adjourn the owners' application for costs and the owners' application to join Mr Just as a party to the proceeding. I will order that the matter be listed for administrative mention on 31 May

⁴ see paragraphs 407 and 468 in the substantive reasons

⁵ See paragraph 475 in the substantive reasons

⁶ see paragraph 416 in the substantive reasons

⁷ see paragraph 485 in the substantive reasons

2019, by which date the parties are to notify the Tribunal as to their requests or recommendations in respect of the adjourned applications and the future conduct of the proceeding.

SENIOR MEMBER M FARRELLY