VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP1198/2017

CATCHWORDS

Claim for costs – s.109(3)(c) *Victorian Civil & Administrative Tribunal Act* 1998

APPLICANT	Spectrum Design Group Pty Ltd ACN 600 431 623
FIRST RESPONDENT	North Nut Brown Pty Ltd ACN 609 980 216
SECOND RESPONDENT	Azrene Abdullah
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	In chambers
DATE OF HEARING	Respondents' submissions dated 19 August 2019, applicant's submissions dated 2 September 2019
DATE OF ORDER	22 October 2019
CITATION	Spectrum Design Group Pty Ltd v North Nut Brown Pty Ltd (Building and Property) [2019] VCAT 1649

ORDER

1. Pursuant to section 109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998, each party must bear its own costs of the proceeding.

SENIOR MEMBER S. KIRTON

REASONS

1. This is an application brought by the respondents for their costs of this proceeding. The applicant's claim was for payment for services allegedly rendered to the respondents, as property consultants. Final orders were made on 20 June 2019 dismissing the claim[1]. The question of costs was reserved, and the parties then agreed to provide written submissions and for the costs application to be determined on the papers.

2. The respondents rely on s.109(3)(c) of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act). Section 109 provides relevantly:

> 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.

[1] *Spectrum Design Group Pty Ltd v North Nut Brown Pty Ltd* [2019] VCAT 926

3. As emphasized 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.

4. The respondents submit that the applicant's claim had no tenable basis in fact or law, within the meaning of s.109(3)(c). They refer to the following factors:

    a. the evidence of Mr Anthony Bruno, for the applicant, that the services provided were for a company other than the respondents;

    b. the finding that the parties did not enter into a stage 2 contract;

    c. in alleging a quantum meruit basis for the claim, the applicant did not provide evidence of the value of the services provided or of any benefit to the respondents;

    d. the applicant failed to provide invoice number 1015 nor lead any evidence about it; and

    e. the applicant therefore had no tenable basis in fact or law for its claim for $17,507.88 of unpaid fees against the respondents.

5. Further, the amounts actually charged by the respondents' solicitors were reasonable and the respondents are not seeking the costs they have incurred in giving evidence, including flying from overseas to attend the hearing, which they say demonstrates it would be fair to make the costs order sought.

6. In response, the applicant submitted that it had a bona fide belief that it had a valid legal claim when it commenced the proceeding. The Tribunal agreed that it had entered into a contract with the respondents and that the applicant had undertaken design tasks and provided services in accordance with its Fee Proposals.

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

7. Further, the Tribunal devoted 20 paragraphs of the decision to the existence of a contract for Stage II services, and rejected the respondents' defence that they had been induced by the applicant to complete the purchase of the property.

8. On that basis, the applicant contends that the claim had a "tenable basis in fact or law". Further, "it would be incongruent with notions of fairness for a costs order to be ratified in favour of the second respondent on the basis that where a party has a bone fide legal claim, as is the case for the applicant, they would be dissuaded to pursue the claim in the event that they would be penalised … A Costs Order against the applicant would be disconcerting having regard for the right of private citizens and entities to pursue and enforce what they believe their legal rights to be".

9. Weighing up the matters put by each party, I am not satisfied that it would be fair to depart from the prima facie position that each party should bear their own costs under s109(1).

10. I do not accept that the claim was so hopeless as to be untenable, for reasons including the following:

    a. I was satisfied that the applicant entered into a contract with the respondents for the Stage I services;

    b. the correspondence passing between the parties demonstrated that the respondents understood that the applicant was carrying out work necessary to obtain a planning permit prior to the settlement of the purchase of the land;

    c. the respondents' evidence was that having a planning permit in place was critical to their decision to purchase the land, which supports the applicant's understanding that the respondents would value the services it was providing;

    d. I accepted that the applicant provided further services for the respondents after the settlement of the purchase, albeit that the claim failed due to a lack of evidence from the applicant; and

    e. the respondents defended the claim on the basis that they were induced or misled into completing the purchase of the property by Mr Bruno, but I did not accept Ms Abdullah's evidence on this point.

11. Accordingly the application for costs is dismissed.

SENIOR MEMBER S. KIRTON