

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D80/2009

CATCHWORDS

Domestic Building, interest and costs, determination on the papers.

APPLICANT	Structx Pty Ltd (ACN 132 017 700) t/as Bizibuilders
RESPONDENT	Coralee O'Keefe
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Determination on the papers without hearing
DATE OF ORDER	22 July 2009
CITATION	Structx Pty Ltd tas Bizibuilders v O'Keefe (Domestic Building) [2009] VCAT 1442

ORDER

- 1 The Respondent must pay the Applicant \$1,179.00 forthwith.
- 2 There is no order as to costs.
- 3 I direct the Principal Registrar to send the Applicant a certified copy of this order.

SENIOR MEMBER M. LOTHIAN

REASONS

- 1 The question is what, if anything, the respondent, Ms O’Keefe, owes the applicant. The applicant is Structx Pty Ltd, trading as Bizibuilders. Both Bizibuilders and Ms O’Keefe are located at Woodford near Warrnambool, Ms O’Keefe has suffered various health problems that have made it very difficult for her to attend to matters before the Tribunal.
- 2 The original claim of \$14,616.00 is within the “small claim” category for Domestic Building proceedings, and like such claims, was set down for a one day hearing in Melbourne for 22 April 2009. The claim was for \$12,976.00 owing under a contract between the parties, \$540.00 for interest to the date of filing the claim on 18 February 2009 and \$1,100.00 in costs.
- 3 On 22 March Ms O’Keefe wrote to the Tribunal to say that her medical treatment would make attendance at the Tribunal impossible and also that there were aspects of the work which were incomplete or defective. I have since conducted three directions hearings, all by telephone.
- 4 On 21 April 2009 I ordered, among other things, that Ms O’Keefe should file and serve points of defence and any counter claim by 12 May 2009 and set the proceeding down for hearing in Warnambool on 11 June 2009. On 13 May 2009 Mr John Dwyer of Bizibuilders sent a fax to the Tribunal, stating that Ms O’Keefe had not filed her defence or counterclaim by 12 May 2009 and seeking an order for \$14,616.00.
- 5 I conducted the second telephone directions hearing on 29 May 2009. On 25 May 2009 Ms O’Keefe advised the Tribunal by letter that the outstanding sum under the contract, or \$12,976.00 had been paid. She had paid \$10,000.00 on 27 April 2009 and \$2,976.00 on 12 May 2009. She did not answer her telephone, and the relevant orders were:
 2. The Tribunal notes that the Respondent has indicated in her letter that she does not intend to file any points of defence or counterclaim and she may not now do so without leave of the Tribunal.
 3. The Tribunal notes that the Respondent has now paid the outstanding principal sum and the Applicant’s claim up to today is \$2,750.00 being:
 - * interest on \$10,000.00 from 19 December 2008 to 27 April 2009 (129 days) at 25% being \$149.00[sic],
 - * interest on \$2,976.00 from 28 April 2009 to 12 May 2009 (15 days) at 25% being \$30.00, and
 - * Applicant’s time for preparation of the case – 13.75 hours @ \$80.00 = \$1,100.00
 4. By 12 June 2009 the Applicant must file at the Tribunal and serve on the Respondent a statutory declaration setting out the

basis upon which the claim is made and attaching any relevant supporting documentation.

5. By 26 June 2009 the Respondent must either write to the Tribunal to state that she requires the proceeding to go to a hearing, or file at the Tribunal and serve on the Applicant any statutory declaration in opposition to the Applicant's statutory declaration.
 6. Should the Respondent fail to comply with order 5 by 26 June 2009, the proceeding will be determined on the Applicant's statutory declaration alone.
- 6 On 12 June 2009 the Tribunal received Bizibuilders' fax, to which was attached Mr Dwyer's statutory declaration seeking:

\$1,149 129 days interest 25% @ \$8.91 per day 19-12-2008 to 27-4-2009 (\$10,000)

\$30 15 days interest @ \$2.04 per day 28-4-2009 to 12-5-2009 (\$2,976)

\$1,179 interest

\$291.70 VCAT application fee

\$1,100 13.75 hrs @ \$80ph (invoice attached)

\$2,570.70 order claimed

The cover page also included the words:

Copy delivered to respondent

- 7 On 23 June 2009 the Tribunal received a letter from Ms O'Keefe dated 19 June 2009. It said among other things that she had not received Bizibuilders' documents of 12 June 2009, complaining of various alleged defects and stating that she would not be seeking a hearing. By orders in chambers of 24 June 2009, the Principal Registrar was directed to send a copy of Mr Dwyer's statutory declaration to Ms O'Keefe and extending time for her response to 7 July 2009.
- 8 A further statutory declaration was received from Mr Dwyer dated 29 June 2009, confirming under oath that he had personally delivered his earlier statutory declaration to Ms O'Keefe's letter box. A statutory declaration in response was received from Ms O'Keefe dated 8 July 2009, stating that she had not received Mr Dwyer's statutory declaration of 12 June 2009.
- 9 I am not able to determine whether one of the deponents is inaccurate or whether, which seems unlikely, some mysterious third person has removed the documents from Ms O'Keefe's letter box. Nothing turns on it and I take it no further.

INTEREST

- 10 Bizibuilders' claim for interest is based on the default interest clause in the contract between the parties, fixed at item 7 of the schedule at 25%. Ms

O'Keefe's only criticism of the claim for interest is that Bizibuilders appeared to be claiming \$149.00 whereas the original claim was for \$540.00. However the sum of \$149.00 which appeared in my order of 29 May 2009 was clearly an error for 25% interest on a principal sum of \$10,000.00 for 129 days and if the amount were only \$149.00, the total claim would be \$1,279.00, not \$2,750.00 which was shown as the total claim.

- 11 I allow the amount claimed for interest by Bizibuilders. Ms O'Keefe must pay \$1,179.00 forthwith.

COSTS

- 12 The whole of Bizibuilders' claim for costs is for Mr Dwyer's time, and the whole sum is for time before the proceeding commenced. I decline to make an order for costs on three grounds. Costs are for the legal (and some other independent professional) fees incurred by parties (*Cachia v Haines* (1994) 179 CLR 403). They are for the cost of conducting the proceeding, rather than for most of the expense of chasing a debt before the proceeding commences (*Re Murray and Bayside CC* [1999] VCAT 1327) and under s109 of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal commences with the assumption that each party will bear their own costs.
- 13 Although Bizibuilders made references to parts of s109(3) which might have entitled them to costs if they were legally represented, they were not and no claim was made for costs relevant to that sub-section.

SENIOR MEMBER M. LOTHIAN