VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D69/2014

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.119 - clerical mistake or accidental slip or omission - what is - no power to amend order made intentionally - circumstances to which section applies *Domestic Building Contracts Act* 1995 – s.53 - damages in the nature of interest - discretionary - when awarded - right to interest under contract - no discretion

APPLICANT	TCM Building Group Pty Ltd (ACN 139 290 618)
RESPONDENT	Kristine Mercuri
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	28 October and 10 December2015 Further submissions received by 21 December 2015
DATE OF ORDER	17 February 2016
CITATION	TCM Building Group Pty Ltd v Mercuri (Building and Property) [2016] VCAT 205

ORDER

1. Pursuant to section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998 and on the application of the Applicant, the Tribunal's Reasons for Decision accompanying the order of 1 July 2015 in this proceeding are corrected as follows:

   (a) In paragraph 545:

   (i) by changing the figure for Variation 46 from $1,754.50 to $1,694.00;

   (ii) by changing the reference to Variation 8.8 to 8.9;

   (iii) by inserting as additional variations in favour of the Applicant, being Variation 8.8 for $780 and Variation 8.10 $605;

   (iv) by substituting as the figure for the total adjustments for variations, the figure of $40,065.17;

(v) by adding the line: "Plus variations already paid $57,150.18" and totalling the figures to $97,217.35.

(b) In Paragraph 546, by changing the figure allowed for Item 1 from $1,000.00 to $350.00 and adding as Item 4, "Flashing above the master bedroom and above bedroom five, $1,000.00."

(c) By increasing the figure specified for total damages and defects assessed to $25,734.50.

2. The respective applications by the Applicant and the Respondent to vary the order pursuant to s.119 the *Victorian Civil and Administrative Tribunal Act* 1998 are otherwise dismissed.

3. Order the Respondent to pay to the Applicant the sum of $206,081.95 plus interest of $52,319.15, pursuant to both the contract and s.53 of the *Domestic Building Contracts Act* 1995.

4. This order shall be partly satisfied by the Respondent doing all things necessary to release to the Applicant the retention monies held by the parties in the joint account number 961389459 at the Macquarie bank.

5. Costs are reserved for further argument.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr G. Hellyer of Counsel
For the Respondent	Mr B. Reid of Counsel

REASONS

Background

1. This proceeding was determined by me on 1 July 2015 following a lengthy hearing and extensive written and oral submissions from counsel on both sides. There were a great many issues to be decided and the Reasons for Decision occupied 73 pages. At the conclusion of those reasons I invited the parties to make submissions as to the final orders to be made.

2. The parties were unable to agree upon final orders and both sides sought amendments to the reasons for decision given, pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998.

3. Further written submissions were provided and I heard additional oral submissions from counsel on both sides on 28 October 2015 and also on 10 December 2015. On the latter occasion I direct the filing and service of

answering submissions which were filed just before Christmas. Having now considered these I am in a position to make final orders.

The applications for amendment under Section 119

4. The applications for amendments are made pursuant to s.119(1) of the *Victorian Civil and Administrative Tribunal Act* 1998, which states (where relevant):

> "(1) the Tribunal may correct an order made by it the order contains: –
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> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
>
> (d) a defect of form."

6. As to the manner in which the section is to be applied, Mr Hellyer referred me to the following passage in my earlier decision of *Riga v. Peninsula Home Improvements* {2000} VCAT 56 where I said (at paragraphs 20 to 22):

> "20. When a proceeding is determined by a court or tribunal the court or tribunal is functus officio and generally has no power to revisit the matter or undo what it has done in the absence of some provision in the statute or rules authorising it to do so. Section 119 sets out what is commonly called the "Slip Rule" and a similar provision is to be found in the rules of civil procedure, Chapter 1, 36.07, which provides:
>
> > "The court may at any time correct a clerical mistake in a judgement or order or an error arising in a judgement or order from an accidental slip or omission."
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> 21 The extent of the jurisdiction conferred by this rule is extensively discussed in "Williams Civil Procedure Victoria" I. 36.07.55. A reading of the authorities gathered in that reference shows that the operation of the rule is very wide indeed. The learned authors refer to the case of *R. -v.- Cripps ex parte Muldoon* [1984] QB 686 at p. 695 where Donaldson MR said (citations omitted):-
>
> > "It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely, to allow the court to amend the formal order which by accident or error does not reflect the actual decision of the Judge. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of Counsel to ask for it. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended."
>
> "22. The test as to whether a mistake or omission is accidental is, in my view: 'If the matter had been drawn to the court's attention, would the correction at once have been made?' (see *Williams* 1.36.07.65 and the cases there cited)."

7. I am still of the opinion that that is how the section ought to be applied. Mr Hellyer also referred me to *Batagoll and McGill v. Monk and the City of Port* Phillip [2000] VSC 48.

The Applicant's requested changes

8. As to the corrections sought by the Applicant to paragraphs 545 and 546 of the Reasons for Decision, Mr Reid agReid to the proposed corrections and, having considered the submissions made, I am satisfied that those are errors that need to be corrected in the manner set out in the above order.

9. Mr Hellyer submitted that there were errors to be corrected in regard to the credits that I allowed for electricity and water and the skylights. These were disputed by Mr Reid.

10. Concerning the figure that I calculated for electricity and water due to the Respondent, Mr Hellyer submitted that I had failed to take into account a credit of $650.00 that is found in the Applicant's Progress Claim 13C. I did not deduct that amount from the figure that I allowed because Progress Claim 13C was not paid by the Respondent and so in effect, the credit was never given. In his submission, Mr Reid supported that reasoning. I am not satisfied that a mistake was made in the figure allowed.

11. Mr Hellyer further submitted that the figure of $3,547 in regard to the credit skylights should have been $1,047, since $2,500 had already been allowed as a credit in Item 9.2 of Final Claim. Again, since the Final Claim is not been paid the Respondent has not received the benefit of the credit and so the full sum needs to be allowed. I am not satisfied that a mistake was made in the figure that I allowed.

The Respondent's requested changes

12. Mr Reid submitted that the assessment that I made in regard to the provisional sum and prime cost adjustments was wrong and that the alleged mistake could be corrected under s.119. Having read the reasons for decision in regard to this matter (Paragraphs 359-373) I am by no means satisfied that the mistake was made. The decision that I made was deliberate and, I believe, in accordance with paragraphs K2 and K4 of the contract. If I am wrong the remedy is to appeal.

13. Mr Reid pointed out that, in calculating the allowance for the supply of tiles, I said that, although there was an allowance of $100 per square metre for porcelain tiles, there was no overall provisional sum or prime cost figure. That is so, and that is the finding that I made.

14. Mr Reid pointed to agenda number 35 and 36 and to an annotation made by the Applicant. He said that the Applicant cannot therefore assert that there is no prime cost allowance in the contractual documents. He said that the drawings were to scale and the various areas that were to be tiled could be calculated. This submission is a complaint about a finding of fact that I have made, namely that there was no prime cost or provisional sum allowance for the supply of tiles. I am satisfied as to the correctness of that finding but even if it were wrong, there

is no accidental slip or omission that could be corrected under s.119. The decision that I made was deliberate and the remedy is to appeal.

Fireplace inserts

15. In making the allowance for the fireplace inserts I deducted the amount expended by the Applicant for labour and materials from the amount allowed in the contract. Mr Reid said that, there was only one fireplace indicated in the contract to be supplied and installed by the Applicant within the new construction and that a prime cost allowance was made, both in the addenda modification document of $6,000 and in section 07610 of the specifications followed by the words "(refer PC sum $4,500)". It was not suggested at the hearing that these words in the specifications increased the prime cost allowance by a further $4,500. I am not satisfied that a mistake has been made that even if it has been, the remedy is to appeal because the decision that I made was deliberate.

Prime cost and provisional sum calculations

16. These were calculated according to my interpretation of the terms of the contract and I am satisfied that the calculations are correct. Mr Reid submitted that my interpretation of the contract was incorrect invited me to revisit my reasoning. I cannot do that under s.119 of the Act. If I have made a mistake, and I do not believe that I have, the remedy is to appeal.

Contingency sum

17. The contingency sum allowed in the contract was $15,000. Mr Reid submitted that the allowance should be $15,000 plus GST. However the Contract (Specification 00870 – bottom of page) provided that the Contingency of $15,000.00 was inclusive of GST and that is the finding that I made. Mr Reid invites me to reconsider the matter on the ground that elsewhere in specification 00870 and in paragraph 7(i) of the contract there is a suggestion that the provisional sum excludes GST. The references that he relies upon relate to the list of provisional sums and a contingency is not a provisional sum. The reference to contingencies at the foot of Specification 00870 as including GST is specific and clear. I am not satisfied has been any error but even if there was, the remedy would be to appeal.

Preliminaries and margin

18. In assessing the allowance for defective and incomplete work I did not allow any preliminaries figure apart from an allowance for insurance. Mr Reid asks me to reconsider that on the basis that the cost of rectification is significant and would warrant a figure for preliminaries as well as a margin. I am satisfied with my reasoning and that no error has been made but even if it has been, the remedy is to appeal.

Findings concerning defects and other matters

19. Mr Reid also invited me to reconsider numerous other findings that I made. These were, the storm water on the footpath (Item 7), the finding that the

aluminium louvres were not included in the contract (Item 10.2), the wrapping of the waste water pipes (Item 37), the drainage of the rear walkway (Item 47), the north building gutter (Item 49), the tanking of the pool wall (Item 56), the front wall on the south boundary (Item 59), the barbecue area lights (Item 60), the garden lighting (Paragraphs 438 - 441 of the Reasons), the credit of the skylights (Paragraph 456 of the Reasons), the allowance to be made for foreign exchange on the purchase of the kitchen (Paragraphs 495 to 498 of the Reasons) and the claim for liquidated damages by the Respondent (Paragraphs 515 - 543 of the Reasons).

20. Mr Reid offers further submissions in regard to each of these cases but the decision that I made was carefully reasoned and based upon the facts as I found them to be. I am not satisfied that there has been any accidental slip or omission that could be corrected under s.119. If I have made an error in regard to any of these matters the remedy has to be by way of appeal.

21. For the foregoing reasons, the only corrections that I can make to the previous order are those set out above. I now turn to the final orders to be made.

The calculation of the amount due to the Applicant

22. Although Mr Reid went to a great deal of trouble to calculate the amount for which an order should be made, his calculations were dependent upon my acceptance of his submissions in regard to the Respondent's application under s.119.

23. Further, in order to calculate the final figure for total variations, regard must be had to the variations that have already paid, which amount to $57,153.18. That figure should appear at the end of paragraph 545, giving a total figure for variations of $97,217.35.

Final amount due for defects

24. With the corrections made in this order, the amount due to defects is calculated as follows:

Total defects, including insurance		$25,734.50
less	Insurance	$ 1,000.00
		$24,734.50
add	Margin of 32%	$ 7,915.04
		$32,649.54
and	Insurance	$ 1,000.00
Total allowance for defects		$33,649.54

Final amount due to the Applicant

25. As a consequence of the findings made, the amount due to be paid to the Applicant by the Respondent is calculated as follows:

Contract price	$1,425,370.00
less Contingency	$ 15,000.00
	$1,410,370.00

add	Variations		$ 97,217.35
	Provisional sum prime cost adjustments		$ 18,898.04
			$1,510,870.39
less	Amount paid		$1,252,305.69
			$ 258,564.70
less	Amount due for defects	$ 33,649.54	
	Amount allowed as credits	$ 18,833.21	$ 52,482.75
Balance due to the Applicant			$ 206,081.95

The Applicant's claim for interest

26. The Applicant claims interest on the amount awarded. The claim is made pursuant to Clause N15 of the contract and Item 22 of Schedule 1 of the building contract or alternatively, it is sought pursuant to statute.

27. By Clause N15.01, each party must pay interest on any money that it or she owes to the other but fails to pay on time. In the case of the Respondent, this includes any delay caused by the failure of her architect to issue a progress certificate on time. The interest rate shown in Item 22 of the Schedule is 10% per annum. Interest compounds monthly.

28. Apart from the contract the tribunal may award interest under s.53(3)(b)(ii) of the *Domestic Building Contracts Act* 1995. The rate of interest may be that fixed under s.2 of the *Penalty Interest Rates Act* 1983 or on any lesser rate is appropriate.

29. Whereas the right to interest under Clause N 15.01 is contractual, the power to award interest under s.53 is discretionary Mr Hellyer referred me to a number of authorities concerning the award of interest. Generally, damages in the nature of interest are in compensation for the loss suffered because the successful party has been deprived of the use of the money.

30. Mr Hellyer referred to various findings I made concerning the merits of the matter. In general, I was dissatisfied with the failure of the Respondent to pay the amounts that she owed to the Applicant. It appeared that she interfered with the role of the architect in regard to the assessment of Progress Claim 13 and also the Final Claim. The Applicant was also induced to carry out further work by promises of payment that never materialised. It has been deprived of the use of a substantial amount of money from the times when those amounts should have been paid until the date of this order. It was contemplated by the contract that, in the event of late payment, the aggrieved party should receive interest. For all these reasons I think that it is appropriate to award interest on the amount that I have found to be due, quite apart from the contractual entitlement.

Interest under the contract

31. Under the Contract, money did not become due until such time as the architect issued a certificate which was then presented to the Respondent together with a tax invoice for payment. The Respondent was then required to pay the amount of

the certificate within the period specified in Item 4 of Schedule one, which was seven calendar days.

32. In the present case, since no certificate was ever issued the basis of a claim for interest under Clause N15 can only be the failure of the architect to issue a certificate "on time".

33. There were three iterations of Progress Claim 13 and the architect failed to assess any of them. The first two iterations were withdrawn and since the amounts claimed by them were progressively reduced and they were ultimately withdrawn, no interest should be awarded on either of them. However I think it could fairly be said that any delay in assessing Progress Claim 13C would be caught by Clause N15 and interest should be allowed for the period commencing seven days from the date upon which it ought to have been assessed.

34. Since Progress Claim 13C was submitted on 14 December 2012, it should have been assessed within 10 working days. That period contains three public holidays as well as two weekends, making 17 days. That would have expired on 1 January 2013 which was a public holiday. I accept Mr Hellyer's submission that it ought to have been assessed by 2 January 2013. Allowing seven calendar days for payment would bring the due date of payment to 9 January 2013. The amount of Progress Claim 13C was $163,390.43 and the period up to the date of final order is three years and 43 days at 10% interest. That amounts to $50,942.01.

35. The Final Claim was similarly not assessed but the claim for interest here is much more difficult.

36. The balance of the award beyond Progress Claim 13C is $42,691.48. Of this, $36,231 is in the retention account, earning interest for the Applicant. That leaves a balance of $6,460.48 that ought to have been paid as the final payment.

37. However the assessment of the final payment is not a simple matter and it is impossible for me to find when the architect ought to have finally reconciled the figures. However I think the Applicant ought to have interest on the small balance and since I cannot make any finding as to the contractual entitlement to interest on it, I will allow interest pursuant to s.53 of the *Domestic Building Contracts Act* 1995 from the date of commencement of these proceedings until the date of this order. That amounts to $1,377.14. Adding the two figures the total interest to be allowed to the Applicant on both bases is $52,319.15.

The retention sum

38. I am informed that the retention sum of $36,231.03 is still held in the Macquarie Bank in a joint account in the names of the parties. Since the final amount of the award includes that sum of the order shall be partially satisfied by the release of it to the Applicant.

SENIOR MEMBER R. WALKER