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(1) - application to correct mistakes in order - extent of power- order subject to appeal- whether order correcting mistake should be made?

APPLICANT	TCM Building Group Pty Ltd (ACN 139 290 618)
RESPONDENT	Kristine Mercuri
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing and claim for interest
DATE OF HEARING	23 February 2018
DATE OF ORDER	23 February 2018
DATE OF WRITTEN REASONS	28 February 2018
CITATION	TCM Building Group Pty Ltd v Mercuri (Building and Property) [2018] VCAT 305

ORDERS

1 This application came before me on 23 February 2018. It was brought by the Applicant to correct an order and reasons for decision that I made in this proceeding on 14 July 2017.

2 There were two mistakes said to have been made. The correction of the first was not opposed but the second was opposed. After hearing argument I ordered that the two mistakes be corrected for reasons that I gave orally at the time. I was requested by counsel for the respondent for written reasons and these are now provided.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant	Mr G. Hellyer of Counsel
For Respondents	Mr R. Andrews of Counsel

REASONS

Background

1. The applicant seeks an order pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act* 1998 to correct an order and reasons for decision made by me on 14 July 2017.

2. The matter came before me hearing on 23 February 2018. Mr G. Hellyer of Counsel appeared on behalf of the applicant and Mr R. Andrews of Counsel appeared on behalf of the respondent.

3. The application was brought pursuant to s.119. The relevant parts of that section are as follows:

> "(1) The Tribunal may correct an order made by it if the order contains-
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> (a) a clerical mistake; or
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> (b) an error arising from an accidental slip or omission; or
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> (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
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> (d) a defect of form."

4. In support of his application, Mr. Hellyer refer to the following passage from my decision in *Riga v Peninsula Home Improvements* [2000] VCAT 56 (at para.20 et seq.):

> "20 When a proceeding is determined by a court or tribunal the court or tribunal is then 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 it 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 judgment or order or an error arising in a judgment or order from an accidental slip or omission.'
>
> 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):-
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> > '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). '

5. General correctness of this statement of principle was not disputed and it still represents my own view as to the extent of the power and the manner in which it ought to be applied.

The first mistake

6. The first mistake is the more obvious one. In paragraph 97 of the reasons for decision, I said

> "There will therefore be an order that the Owner pay the Builder's costs of the proceeding, including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court on the County Court Scale on a standard basis up to and including 29 October 2014 and thereafter on an indemnity basis."

and yet in the order I said:

> "Order the Respondent to pay the Applicant's costs of this proceeding including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court in accordance with the County Court Scale on the standard basis up to and including 29 August 2014 and thereafter on an indemnity basis."

7. The relevance of the date 29 October 2014 is that that was the date upon which an offer was made by the applicant to accept the sum of $80,000.00. In paragraph 96 of the reasons for decision, I said that the respondent should have known that she had no chance of bettering the offer of $80,000 and that by continuing the proceeding thereafter she acted recklessly and cause needless expense to herself and the applicant.

8. The date 29 August 2014 is an obvious mistake and must be corrected to 29 October 2014 Mr Andrews did not oppose that correction.

The second mistake

9. Paragraph 60 of the reasons for decision, was as follows:

> "Mr Hellyer relied on the following factors which he said indicated that the relative strengths of the parties' claims favoured the making of an order for costs in favour of the Builder. He said that:
>
> (a) the amount recovered according to the original decision was 90% of the amount claimed in its Points of Claim, before taking into account the amount of the Owner's counterclaim.

(b) the Owner claimed an amount of $127,706 with respect to defects which was later revised to $232,789, whereas in closing submissions, the amount sought on behalf of the Owner for the cost of rectification was $65,549.00. The amount awarded for cost of rectification was $33,649.54.

(c) the Owner claimed credits of $47,941.69 in regard to 21 items and the credits then progressively increased to an amount of $86,987.90 for 36 claimed credits. In the final determination, I allowed credits of $18,833.21 of which the Builder had conceded $15,683.20.

(d) the total allowed on the counterclaim with respect to defects and credits was $52,482.75, being less than a quarter of the amount claimed by the Owner."

10. It is clearly apparent from the wording of this paragraph that its purpose was to set out the factors relied upon by Mr Hellyer which he said indicated the relevant strengths of the parties' claims. The figures were taken from Mr Hellyer's submission except for the figure of $232,789, which, in his submission, is $132,789, not $232,789. The latter figure was never mentioned by Mr Hellyer.

11. Mr Andrews submitted that I could not be satisfied that the figure was a mistake able to be corrected under s.119 because I could not be expected to remember why I put that figure in the reasons and not $132,789. I could therefore not be satisfied that it was a mistake falling within one of the descriptions to be found in subsection 119(1).

12. Quite obviously, if I inserted that figure deliberately into the paragraph it would not have been a mistake but the mere fact that I cannot recall how that figure came to be in the paragraph does not mean that it was not a mistake.

13. In order for the section to apply I must first make a finding that a mistake of the relevant character has been made. To do that I may draw on my own recollection but I can also have regard to the surrounding circumstances and context in which the alleged mistake was made.

14. The figure of $232,789 does not appear anywhere in the material. It was not derived from any of the evidence. It is not a figure upon which I based any conclusions and I did not refer to it anywhere else in the extensive reasons that formed part of the decision. The figure purports to be one provided by Mr Hellyer in his submission and yet Mr Hellyer did not provide such a figure. The figure that he provided was $132,789. There is no doubt in my mind that the figure is a typographical error and that what was intended to be inserted was the figure that Mr Hellyer referred to namely, $132,789.

The Supreme Court appeal

15. Mr Andrews submitted that I ought not to make the correction because the matter is on appeal to the Supreme Court of Victoria and the presence of this figure in the reasons forms part of the grounds for appeal.

16. I do not think that that is a reason not to make the correction. One of the functions of this section is to avoid parties having to go to the expense of an appeal in order to put right a simple error of the description referred to. It is the intention of Parliament that mistakes of this nature should be corrected under the section, not by wasting the time of the Supreme Court of Victoria.

17. If this mistake had been pointed out to me at the time the decision was made I would have corrected it immediately. Consequently I will make the correction.

Orders to be made

18. Pursuant to S119(1) of the *Victorian Civil and Administrative Tribunal Act 1998* the order made on 17 July 2017 is corrected as follows:

    (a) By altering the date 29 August 2014 in paragraph 2 of the orders to 29 October 2014;

    (b) By altering the figure $232,789 in paragraph 60(b) of the reasons for decision to $132,789.

    (c) No order as to costs.

SENIOR MEMBER R. WALKER