VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1443/2016

CATCHWORDS

Domestic Building Dispute–Costs–section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*–whether costs should follow the event–consideration of relevant factors–whether the respondent substantially succeed in the proceeding so as to attract the benefit of a reimbursement of fees order under section 115B *Victorian Civil and Administrative Tribunal Act 1998*–damages in the nature of interest under section 53 *Domestic Building Contracts Act 1995*.

APPLICANT	Dejan Vlahovic trading as VTN Homes (ABN 98 361 470 601)
RESPONDENT	Jasmina Jovanovic
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Costs Application
DATE OF HEARING	9 November 2018
DATE OF ORDER	3 April 2019
CITATION	Vlahovic v Jovanovic (Building and Property) (Costs) [2019] VCAT 483

ORDER

1 Having regard to section 109 of the *Victorian Civil and Administrative Act 1998*, and finding for the reasons given in writing that it is fair to do so, the applicant must pay 75% of the costs of the respondent in the proceeding including 75% of the costs of the respondent's costs application, and including 75% of the reserved costs.

2 Costs payable by the applicant pursuant to order 1 are to be agreed between the parties, failing which they are to be assessed by the Victorian Costs Court on the County Court Scale on the standard basis.

3 Pursuant to section 53 of the *Domestic Building Contracts Act 1995*, and because it is considered fair do so, the applicant must pay interest of $37,855.24 to the respondent for the period from 19 October 2016 to 9 November 2018, and interest thereafter at law.

4 Pursuant to section 115B of the *Victorian Civil and Administrative Tribunal Act 1998* and because the respondent is adjudged to have substantially succeeded against the applicant within the meaning of section 115C of the

Victorian Civil and Administrative Tribunal Act 1998, the applicant must reimburse the respondent with the application and hearing fees paid by her to the Tribunal in the amount of $3,738.45.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr D Vlahovic, in person.
For Respondent	Mr B Carr, Counsel.

REASONS

1 I heard the proceeding over a 10-day period. I published my decision on 19 July 2018.[1]

2 Taking into account the respective proven claims of each party against the other, I ordered that the builder pay the owner $185,078.71.

3 The respondent (the "**owner**") has applied for an order for costs against the applicant (the "**builder**").

4 I heard costs submissions during a further hearing on 9 November 2018.

5 The owner submits, in reliance on section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**Act**"), that it would be fair that an award of costs in her favour should be made, given her success in the proceeding.

BACKGROUND

6 The disputes between the parties arose out of the construction by the builder of a 3 town-house development for the owner at a property in Faye Street, Reservoir.

7 The parties entered into a building contract dated 3 February 2015 ("**the contract**") for a contract price of $660,000 including GST.

8 It was common ground that the owner had limited funding to undertake the development, and this led to the builder agreeing to pay many of the development costs which would otherwise have been the responsibility of the owner. This arrangement was referred to in a "loan agreement" entered into between the parties dated 20 April 2016 (the "**loan agreement**").

9 At the time of the contract, the owner lived in an apartment in Marine Parade, St Kilda (the "**St Kilda property**"), which she sold in about August 2016 to assist in her funding of the works.

10 The owner purported to terminate the contract on 18 October 2016 pursuant to clause 43.3 of the contract, for a claimed substantial breach by the builder, having given a substantial breach notice to the builder requiring rectification by the builder within 10 days.

11 The builder submitted that the owner's termination was improper. He alleged that at the time of her service of the substantial breach notice, the owner was in breach of the contract, as amended by an alleged oral term of the contract made by the owner in late 2015, alternatively at about the time of the loan agreement. The alleged oral term was that the owner would, upon the sale of the St Kilda property, repay to the builder the borrowings referred to in the loan agreement. The builder alleged that the owner failed to do so. The builder alleged that the owner had therefore repudiated the

[1] See *Vlahovic v Jovanovic* (Building and Property) [2018] VCAT 1095.

contract by purporting to terminate when she did. The builder claimed damages.

12 The owner denied the existence of the alleged oral term of the contract. I found in the owner's favour in this respect, and therefore found that there was no impediment, by reason of the alleged oral term of the contract, to the owner being entitled to terminate when she did.

13 The gist of the owner's counterclaim was that the builder made progress claims for "lock-up" and "fixing" stages of the works when he was not entitled to make them,[2] giving her a right to terminate the contract for substantial breach pursuant to the terms of the contract. I found in favour of the owner on her counterclaim.

PARTIES' SUBSEQUENT AGREEMENT ON AMOUNTS PAYABLE BY THE OWNER

14 The amount of the builder's claim against the owner, put by the builder on day 1 of the hearing, was $328,154. This had been previously particularised on page 4 of a report by Mr Trevor Jeffery, Registered Building Practitioner and Quantity Surveyor dated 21 May 2017 (the "**Jeffery Report**") obtained by the builder.

15 One of the components of the builder's claim was for $151,870.15. The builder abandoned this claim during the hearing, recognising that it was not supportable by reference to the provisions of the contract, and substituting in its place a claim for only $3,960. This reduced the builder's total claim to $180,244.

16 Another one of the elements of the builder's reduced claim was $28,994.29,[3] being a claim for repayment of the loan monies advanced by the builder to the owner. The exact amount payable by the owner was in dispute. The parties agreed during negotiations on day 6 of the hearing that the amount payable by the owner in this respect stood at $19,094.29.

17 The builder also made a claim for variations in the amount of $36,770,[4] but on days 6 and 7 of the hearing, the parties agreed that the amount payable by the owner in this respect was $13,826. That left only 2 variations claimed by the builder in a total amount of $9,636 still in contention.

18 The third sum agreed between the parties during negotiations as due and owing by the owner to the builder was $21,521 being the total amounts by

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2 The owner paid a deposit of $15,000 by way of deposit (not the required $16,500), $118,579.35 on 6 October 2015 for "base stage" (not the required $138,600), $138,600 on 28 October 2015 for "frame" stage, $211,200 on 26 November 2015 for "lock-up" stage and $135,300 on 22 April 2016 for "fixing" stage.

3 "Claim 5" described in the Jeffery report.

4 "Claim 2" described in the Jeffrey report.

which the owner short-paid the builder in respect of his progress claims for the deposit and base stages.[5]

19 The three agreed amounts added up to $54,441.29. The owner sought to set off this amount against her counterclaim.

Builder's revised claim

20 The balance of the builder's reduced claim, and which remained in contention between the parties, was $100,875 being made up as follows:

Claim 2 in the Jeffery report Variations Claim 2.05 $3,443.00 Claim 2.06 $6,193.00	$9,636
Retaining wall works **Claim 3 in the Jeffery report** Payment of respondent's sub-contractors and suppliers in connection with retaining wall works	$14,165
Retaining wall works **Claim 4 in the Jeffery report** Other costs incurred to complete retaining wall	$38,573
Claim 6 in the Jeffery report Liquidated damages for delay	$11,500
Claim 7 in the Jeffery report Damages for wrongful termination by the owner (20% of unpaid completion stage payment of $19,800)	$3,960
Claim 8 Interest on late progress claim payments	$3,241
Outstanding progress payment Completion stage	$19,800
	$100,875

21 The owner counterclaimed in the total sum of $291,958, calculated as follows:

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[5] "Claim 1" described in the Jeffrey report, comprising a $1,500 shortfall in the deposit and a $20,021 shortfall in the base stage progress payment.

ITEM	Description	Amount Claimed	Particulars
1	Alleged completion and rectification costs	$269,500	($245,000 plus GST) Amount required to pay completing builder Mr Durovic under a contract dated 10 November 2016 allegedly to complete the works and rectify allegedly defective work.
2	Liquidated damages	$9,900	Payable by builder from 28 July 2016 to 18 October 2016. 82 days = 11 weeks at $900 per week
3	Interest on premature progress payments wrongly demanded by the applicant	$12,558	Lock up stage payment of $211,200 paid on 26 November 2015. Lock up allegedly not achieved until after 20 April 2016 (exhibit R8). $211,200 less $21,520 = $189,680 for 147 days at 9.5% = **$7,242** Fixing stage payment of $135,300 paid on 22 April 2016. Fixing allegedly not achieved before termination on 18 October 2016. $135,300 less $21,520 = $113,780 for 180 days at 9.5% = **$5,316.**
	TOTAL	**$291,958**	

ISSUES

22 The issues for determination in the proceeding were as follows:

(a) Was the builder entitled to be paid any, and if so what, amount in respect of his construction of a retaining wall?

(b) Because it is relevant to whether the owner properly ended the contract, did the owner agree to repay to the builder any, and if so what, amounts owing to the builder upon her sale of her St Kilda property?

(c) Was the builder in "substantial breach" on 26 September 2016, and if so, did the owner properly terminate the contract on 18 October 2016 pursuant to clause 43.3 of the contract?

(d) If yes to (c), did the builder owe any and, if so, what amount to the owner pursuant to clause 44 of the contract?

(e) Did either party owe the other party liquidated damages for delay caused to the works?

(f) Did the builder owe the owner damages for his prematurely claiming stage payments, and if so, how much?

(g) Did the owner owe the builder $9,636 for alleged variations to the works?

(h) Did the owner owe $3,241 to the builder pursuant to clause 31 of the contract for late payment of progress claims?

Outcome of the proceeding

23 Of the builder's amended claim for $100,875, I found that the owner was obliged to pay the builder $52,738 being for retaining wall works carried out by the builder.

24 Together with the amount of $54,441.29 payable by the owner to the builder by consent, the total amount therefore found to be due to the builder was $107,179.29.

25 I also found, though, that the builder was in substantial breach of contract on 26 September 2016, and that the owner properly terminated the contract by letter to the builder dated 18 October 2016. In consequence, I ordered that the builder must pay to the owner $292,258 (comprising $269,500 damages to the owner to complete the works and rectify defects, $12,558 damages for other breaches of the contract and $10,200 as restitution of monies overpaid in respect of the amended contract sum).

26 The setting off in respect of the respective adjudged liabilities resulted in a final order that the builder pay $185,078.71 to the owner.

THE LAW

27 The Tribunal's powers in respect of making orders for costs are constrained by Section 109 of the Act, which provides:

> **109**. **Power to award costs**
>
> (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 sub-section (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.

28 It is apparent from the terms of section 109(1) of the Act that the general rule is that costs do not follow the event, and that each party is to bear its own costs in a proceeding.

29 By section 109(2) of the Act, the Tribunal is empowered to depart from the general rule, but it is not bound to do so, and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in section 109(3).

Costs – General approach required

30 In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[6] Gillard J set out the steps to be taken when considering an application for costs under section 109 of the Act:

> In approaching the question of any application to costs pursuant to section 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows-
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may 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 paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.[7]

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6 [2007] VSC 117.
7 Ibid at [20].

THE OWNER'S SUBMISSIONS

31 The owner relies on sub-sections 109(3)(c), 109(3)(d) and 109(3)(e) of the Act, as the basis for submitting that the builder should pay her costs of the proceeding.

32 The builder submitted that there should be no order as to costs.

Section 109(3)(c) of the Act – the relative strength of the parties' claims

33 In respect of his reliance on sub-section 109(3)(c) of the Act, Mr Carr for the owner submitted that:

(a) the builder abandoned $151,870 of his $328,154 claim during the hearing (as discussed above), recognising that it was not supportable by reference to the provisions of the contract, and substituted in its place a claim for only $3,960;

(b) given the owner's agreement to pay $13,826 in respect of certain of the claims included in the builder's variations claim for $36,770.40, and the failure of the builder to prove his entitlement to the $9,636 variation claims with which the builder persisted to determination, almost two-thirds of the variation claims were therefore shown to have had no tenable basis in fact or law;

(c) the claims with which the builder persisted for $11,500, $3,960, $3,241 and $19,800 were also shown to have no tenable basis in fact or law; and

(d) many of the line items on page 10 of the Jeffery report, included in the builder's claim for $28,994.29 for development costs, were withdrawn by the builder.

34 I am not prepared to find that the abandoning by the builder of his claim for $151,870 should of itself result in an order for costs. Being a straightforward question of the proper construction of the contract, it would have occupied little preparation time for the owner, and I calculate that it took less than 15 minutes of the 9-day hearing time to dispose of it.

35 My analysis of the outcome of the $36,770 variation claims made by the builder is that, as submitted on behalf of the owner, the builder only recovered just over one-third, that is to say:

(a) in respect of $27,134.40 of the total variations claims, the owner agreed to pay $13,826 of them; and

(b) in respect of the balance of the variations claims 2.05 and 2.06 in the total amount of $9,636 with which the builder persisted to determination, the builder failed.

36 I am not able to conclude, however, that almost two-thirds of them were shown to have had no tenable basis in fact or law. The reason why the builder accepted only $13,826 in respect of $27,134.40 of his variation claims was known only to the parties, and was arrived following a

commercial negotiation between them when any number of factors may have encouraged the builder to accept a lesser amount for the relevant variations than that claimed by him.

37 Mr Carr submitted that when considering the relative strengths of the parties' claims, it should be noted that all of the owner's claims were upheld, except her defence to the retaining wall claim made by the builder. Mr Carr observed that the outcome of this issue turned on the proper construction of the loan agreement which, it was submitted – and I accept– was a challenging process.

38 The builder was at all times resolute about his claimed entitlement to be paid for the costs of the retaining wall, and my decision in this respect demonstrates that his position was justified.

39 I find that each party was justified in adopting its position in respect of the retaining wall claim made by the builder. The outcome was dependent on the proper construction of the poorly drafted loan agreement.[8]

40 My analysis of the outcome of the $28,994.29 development costs claim made by the builder is that the owner agreed to pay $19,094.29, being a little under three-quarters of his claim, and that therefore the builder could also be seen as justified in making this claim.

41 I note that all of the owner's claims were upheld, with the exception of her claim that she was not liable to pay the cost of the retaining walls.

42 I have concluded, from these outcomes, that each party had meritorious claims against the other.

43 I find however, for the reasons I gave,[9] that the builder's case that the owner was not entitled to terminate the contract, on account of her being in breach, at the time of her purported termination, of her alleged obligation to repay development costs upon the sale of the St Kilda property, had little prospects of success. This is particularly so, given the plain words of the loan agreement in regard to when the owner was obliged to repay loan monies advanced by the builder, and the weakness of the evidence led by the builder as to an oral term said to contradict the terms of the loan agreement. I consider that this aspect provides a reasonable basis for a finding of costs in favour of the owner, as much of the evidence was concerned with this issue.

Section 109(3)(d) of the Act – the nature and complexity of the proceeding

44 Mr Carr submitted that:

(a) the nature of the proceeding, being a domestic building dispute between a developer and an inexperienced builder;

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8 See *Vlahovic v Jovanovic* (ibid) at [35]-[55].
9 See *Vlahovic v Jovanovic* (ibid) at [56]-[73].

(b) the quantum in dispute between the parties, being over $300,000 claimed by the builder and a similar amount claimed by the owner, with an eventual award of about $185,000 in favour of the owner, indicates that this was complex litigation, where the parties were justified in engaging counsel and experienced solicitors;

(c) the 9-day hearing duration, with both lay and expert witnesses is further evidence of the matter's complexity; and

(d) my Reasons, comprising 43 pages of adjudication on difficult and interrelated questions of fact and law (concerning the proper interpretation of the contract and the loan agreement, but there were also, he submitted, issues of delay, liquidated damages and the assessment of multiple variation claims)

all provide an indication of the nature and complexity of the subject matter of the proceeding, therefore justifying an order for costs in favour of the owner.

45 I agree with these submissions, and find that these matters also support the proposition that it is fair to make an order for costs in favour of the owner.

Section 109(3)(e) of the Act – any other matter the Tribunal considers relevant

46 Mr Carr also submits that the Jeffery Report, being the expert report relied on by the builder, did not comply with the Tribunal's Practice Note PNVCAT 2 (the "**Practice Note**"), in that it was not "soundly based, complete, impartial, dispassionate, and within the scope of [his] expertise."

47 I agree with Mr Carr's submission that although the builder's expert produced a report that purported to provide an independent opinion on the validity of all the builder's claims, in a number of respects it simply repeated the builder's claims without any independent assessment as required by the Practice Note.

48 Further, Mr Carr submitted that the expert report appeared to endorse a claim by the builder for $151,870.15 being 20% of an adjusted contract value on account of the owner allegedly wrongfully terminating the contract. As explained above, this claim was not supportable by reference to the provisions of the contract, as properly construed. It was, however, maintained from the date of the Amended Points of Claim of the builder dated 16 June 2017, until it was all but abandoned during the hearing.

49 It is well accepted that an expert must not simply act as a mouthpiece for the person by whom the expert is engaged. Where it occurs, it will often follow that the costs and duration of litigation are increased, because the party relying on the expert is likely to consider that their position is validated by a third party expert. I agree with Mr Carr's submission that there is a reasonable basis for my finding that this has occurred.

Fair to make an order for costs

50 Having regard to sections 109(3)(c) and 109(3)(d) of the Act, I consider that my discretion should be exercised in favour of making a costs order in favour of the respondent. Having regard to the above matters, but having regard also to the fact that the retaining wall claim of the builder was found to have been meritorious, I find that it is fair that the builder should pay 75% of the costs of the owner.

Interest

51 The owner makes a claim for interest.

52 Section 53 of the *Domestic Building Contracts Act 1995* provides:

> **53**. **Settlement of building disputes**
>
> (1) The tribunal may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, the tribunal may do one or more of the following-
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> …
>
> (b) order the payment of a sum of money–
>
> …
>
> (ii) by way of damages (including exemplary damages and damages in the nature of interest);
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> (3) 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 any lesser rate it thinks appropriate

53 In his judgment in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3)*[10] Gillard J stated:

> 61. There are three main objectives of an award of interest. First, as compensation to the judgment creditor for being out of funds from the date of the commencement of the proceeding until judgment; secondly, to deter judgment debtors from delaying proceedings and thereby having the use of the money for a longer period; and finally, to encourage defendants to make realistic assessments of their liability in a case and take bona fide steps to compromise the claim.
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> 62. Speaking of s.79A (the predecessor of s.60 [of the Penalty Interest Rates Act], Barwick CJ in *Ruby v Marsh* had this to say -
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> "The purpose of giving courts the power to award interest on damage is to my mind twofold, and neither aspect of the purpose should be lost sight of. In the first place, the successful plaintiff, who by the verdict has been turned into an investor by the award of a capital sum, and whose claim in the writ has been justified to the extent of a verdict returned, ought in justice to be placed in the position in which he would have been had the amount of the verdict been paid to him at the date of the commencement of the action. In the second place, the power to award interest on the verdict from

[10] [2003] VSC 244 per Gillard J at [61] and [62].

> the date of the writ is to provide a discouragement to defendants, who in the greater number of actions for damages for personal injuries are insured, from delaying settlement of the claim or an early conclusion of the proceedings so as to have over a longer period of time the profitable use of the money which ultimately the defendant agrees or is called upon by judgment to pay."

54 Although these comments were made in relation to litigation in the Supreme Court of Victoria, these observations provide useful guidance when considering an application for interest under section 53 of the *Domestic Building Contracts Act 1995*.[11]

55 The following findings of fact are relevant when determining whether it is fair to award interest to the owner:

(a) The owner properly ended the contract on 18 October 2016;[12]

(b) The owner was properly entitled to make a claim thereafter under clause 44 of the contract for the reasonable cost of completing the building works and fixing any defects;[13]

(c) The owner's entitlement under clause 44 was found to be $269,500;[14]

(d) The builder's breach of clause 29 of the building contract caused the owner loss and damage in the amount of $12,558;[15]

(e) The owner overpaid the builder $10,200 and was found to be entitled to an order for recovery of this amount.[16]

56 Taking into account the cross-liabilities between the parties, the builder was ordered to pay $185,078.71 to the owner. I was informed by Mr Carr during the costs hearing that this amount then remained outstanding notwithstanding the owner's demands.

57 I consider that the builder should not profit from holding on to money that he should have paid the owner upon her valid termination of the building contract, and I find it fair that she be awarded damages in the nature of interest.

58 I accept Mr Carr's submission that the rates fixed under the *Penalty Interest Rate Act* should apply. Those rates are 9.5% from the date the building contract was terminated on 18 October 2016 to 31 January 2017, and 10% thereafter.

59 I calculate interest payable on the amount of $185,078 by the builder to the owner, to the date of the costs hearing, at $37,855.24 calculated as follows:

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11 See *TCM Building Group Pty Ltd v Mercuri* (Building and Property) [2017] VCAT 1057 per Senior Member Walker at [20].
12 See my Reasons at [145].
13 See my Reasons at [147].
14 See my Reasons at [176].
15 See my reasons at [192].
16 See my reasons at [178].

Start Date	End Date	Days	Rate	Amount per day	Total
19 October 2016	31 January 2017	105	9.5%	$48.0782	$5,048.21
1 February 2017	9 November 2018	647	10%	$50.7063	$32,907.03
TOTAL		752			**$37,855.24**

Fees reimbursement to the respondent

60 I also find that the owner has substantially succeeded against the builder within the meaning of section 115C of the *Victorian Civil and Administrative Tribunal Act 1998*. The first reason for this is that after the claim and counterclaim were considered, the owner was found entitled to be paid $185,078.71. The second reason is that the prime factual and legal contest – whether the builder was in substantial breach on 26 September 2016 justifying termination of the contract by the owner on 18 October 2016 – was determined in favour of the owner.

61 It follows that the owner is entitled to be paid the filing and hearing fees paid by her, which I calculate at $3,374.35, as follows:

Application fee on counterclaim	
Application fee on counterclaim	$751.40
Fee on costs application	$364.10
SUB-TOTAL A	$1,115.50
Hearing fees paid by parties	
Hearing days 1-4 at $348.40 per day	$1,393.60
Hearing days 5-9 at $696.80 per day	$3,484.00
Hearing fee day 10	$1,062.10
SUB-TOTAL	$5,939.70
Divided by 2 for respondent's share	$2,969.85
Less half the hearing fee for day 5, when the hearing was adjourned	$346.90
HEARING FEES SUB-TOTAL (**SUB-TOTAL B**)	$2,622.95
TOTAL	**$3,738.45**

62 I make the orders attached.

AT Kincaid
Member