

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D627/2004

CATCHWORDS

*Repudiation – claim for interest under contractual provision after repudiation accepted – work incomplete –
alternate claim for statutory interest – amendment of order*

[2005] VCAT 1301

APPLICANT	Vuka Homes Pty Ltd
FIRST RESPONDENT	Adele Ellen Couty
SECOND RESPONDENT	Patrice Hans Couty
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 June 2005
DATE OF ORDER	6 July 2005

ORDER

1. Pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal's order of 31 March 2005 is amended by inserting a further paragraph 1A as follows:

“1A Further order that the Respondents pay to the Applicant damages in the nature of interest of \$855.30.”

2. The Applicant's application for the costs of the proceeding and of this application is refused.

SENIOR MEMBER R WALKER

APPEARANCES:

For Applicant	Mr D Pumpa of Counsel
For 1 st and 2 nd Respondents	Mr P Couty, In person

REASONS FOR DECISION

Background

1. The Applicant applies for costs and interest following the delivery of the decision in this matter on 31 March 2005.
2. In its Points of Claim the Applicant claimed an amount of \$21,125.00 which was said to be due pursuant to a building contract entered into between the parties. It also claimed interest at the contract rate of 15% per annum on the outstanding monies or alternatively interest pursuant to statute. The Respondents counterclaimed for liquidated damages for alleged delay, damages for defective and incomplete work and alleged that the work was not in accordance with the plans. They queried a number of variations sought by the Applicant and also sought a number of credits. The Respondents' claimed that an amount of \$1,625.00 was due to them after allowing for the balance due under the contract.
3. In my decision I awarded the Applicant an amount of \$14,230.34, which took account of the extent to which the Respondents succeeded in their counterclaim.

Amendment of the order

4. In my reasons for decision I neglected to deal with the claim for interest. This was an oversight and Mr Pumpa for the Applicant asks that I amend the order in this respect pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act 1998*. That section provides as follows:-

“Correcting mistakes

- (1) *The Tribunal may correct an order made by it if the order contains—*
 - (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.*
- (2) *The correction may be made—*

- (a) *on the Tribunal's own initiative; or*
- (b) *on the application of a party in accordance with the rules.*”

5. The breadth of this provision has been said in a number of cases to be very wide (see *Riga v Peninsula Home Improvements* [2000] VCAT 56; re *Stahle and Camberlea Properties Pty Ltd* [2000] VCAT 1883 and the cases there cited). The error must arise from an accidental slip or omission but it would cover a situation where the Tribunal failed to make an order as a result of an accidental omission by Counsel to ask for it or where the Tribunal made an order when, had its mind been turned to the true position, it would have not made such an order (see *University of Ballarat v. Deborah Bridges and Equal Opportunity Board* (No. 7134 of 1993 – Court of Appeal 23 February 1996 – Unreported).
6. The claim for interest was made in the Points of Claim and by Counsel in submissions and would have been dealt with in the decision but for an oversight by me. I should now consider what I would have done had I not overlooked the matter at the time of preparing the order and the accompanying reasons for decision.

The interest claim

7. As I pointed out in argument to Mr Pumpa, the contractual entitlement to interest of 15% is on the amount of any progress payment or final payment falling due under the contract and it is calculated from 7 days “*after it becomes due.*”. The difficulty with such a claim in the present case is that, since the appliances were never fitted to the house the final payment never became due. I acknowledged in my reasons for decision that there was a practice amongst builders in Victoria not to fit appliances until the owner is about to move in and payment of the balance is imminent. Even so, until such time as the work is completed, the final payment is not due under the terms of the contract. Further, by reason of s.42 of the *Domestic Building Contracts Act 1995* a builder must not demand final payment

until the work carried out under the contract has been completed and it cannot be said to be complete if the appliances have not been fitted.

8. Further, in the present case I found that the Respondents had repudiated the contract and the Applicant was entitled to damages. The contract does not provide that interest at any particular rate is to be payable on any damages the builder might be awarded in subsequent proceedings. In addition, upon the acceptance of the Respondents' repudiation by the Applicant, the whole of the contract was at an end and this included the clause requiring payment of interest. What the innocent party is left with in such a situation is a claim for damages for the breach of the former contract, not a claim to enforce one of its provisions.
9. For these reasons I am not satisfied that, if I had not overlooked the question of interest, I would have made an order in favour of the Applicant for interest at the contract rate. However, I am satisfied that I would have made an order for interest in accordance with the *Supreme Court Act*. Power to award damages in the nature of interest is conferred on the Tribunal in regard to matters heard in the Domestic Building List by s.53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*. Section 53(3) provides that 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 on any lesser rate it thinks appropriate.
10. By s.60(1) of the *Supreme Court Act* damages in the nature of interest must generally be awarded from the commencement of the proceeding to the date of judgment or order. That applies to the Supreme Court and is the practice in my experience in other jurisdictions. In any event, I think it would be "fair" within the meaning of s.53(1) of the *Domestic Building Contracts Act 1995* to award interest for this period at the statutory rate.

11. I am satisfied that, had I not overlooked the matter, I would have awarded damages in the nature of interest in addition to the other sums awarded, pursuant to s.53(2)(b)(ii) of the *Domestic Building Contracts Act 1995*. The proceeding was issued on 17 September 2004 and judgment was given on 31 March 2005. That is a total of 195 days on the sum of \$14,230.34 at the penalty interest rate for that period, which was 11.25%. This results in a figure of \$855.30.

Costs

12. The question of costs is more difficult. At various times throughout the proceeding the Respondents had legal assistance but generally they prepared their own documents and attended the Tribunal themselves. The case was not a large one and there was a legitimate dispute to be aired. I found that there were a number of credits due to the Respondents that the Applicant was not willing to recognise and these were upheld at the hearing. There were no offers of compromise on either side. At the directions hearing on 14 December 2004, which Mr Couty attended in person, directions were given only for Points of Claim and Points of Defence and the matter was set down for hearing “*as if it were a small claim proceeding...*” In small claims hearings in this list, costs are usually not awarded. The parties’ legal representatives were also directed in the order to draw their clients’ attention to the provisions s.109 of the *Victorian Civil and Administrative Tribunal Act 1998*. That section provides as follows:

“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.”*

14. The hearing proceeded for about a day and a half. Both Respondents attended to represent themselves on the first day and Mr Couty attended alone on the second day. There was nothing about the manner in which they presented their case which calls for any criticism and although it must be said that the Applicant had a stronger case and greater success in the proceeding than they did, they vindicated their position on a number of points. In all the circumstances I do not think that this is an appropriate case in which to make an order for costs.

Conclusion

15. Pursuant to s.119 of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal's order of 31 March 2005 is amended by inserting a further paragraph 1A as follows:

Further order that the Respondents pay to the Applicant damages in the nature of interest of \$855.30.”

16. The Applicant's claim for costs of the proceeding is dismissed. Costs were also sought for the hearing on 14 June but in view of the decision I have made I do not think I should award costs with respect to that day either.

SENIOR MEMBER R WALKER