

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D879/2006

CATCHWORDS

Costs – s109(3)(a)(iii) and s109(3)(b)

APPLICANT	Brady Constructions Pty Ltd (ACN:055 285 259)
FIRST RESPONDENT	Andrew Lingard & Associates Pty Ltd (ACN:006 146 541)
SECOND RESPONDENT	Philip Chun & Associates Pty Ltd (ACN 007 401 649)
THIRD RESPONDENT	Viviana Floreancig
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs hearing
DATE OF HEARING	29 May 2008
DATE OF ORDER	29 May 2008
DATE OF WRITTEN REASONS	13 June 2008
CITATION	Brady Constructions Pty Ltd v Andrew Lingard & Associates Pty Ltd & Ors (Domestic Building) [2008] VCAT 1178

REASONS

Note: Oral reasons were delivered at the hearing. These written reasons are provided at the request of the second and third respondents and consist of an edited transcription of the oral reasons.

- 1 On 24 April 2008, 3 days before the scheduled commencement date of a 5 day hearing, I heard an application by the applicant for leave to amend its Points of Claim to seek relief against the second and third respondents in the event the tribunal apportioned responsibility for the applicant's claim between the respondents. The first respondent had joined the second and third respondents, as parties to the proceeding, to take advantage of the provisions of Part IVAA of the *Wrongs Act* 1958 in relation to the apportionment of responsibility.

- 2 I reserved my decision due to the complexity of the issues raised by all parties and, as a consequence, the hearing was adjourned. In adjourning the hearing it was clear to me that, if I allowed the application for leave to amend, the second and third respondents would not be ready to proceed, as in the absence of any direct claim against them by the applicant, they had decided not to take an active part in the hearing,.
- 3 My reasons for granting the applicant leave to file and serve amended Points of Claim are set out in my Reasons dated 16 May 2008 (the ‘earlier reasons’).
- 4 The applicant seeks its costs of the application, primarily as I understand it, because it was successful. However, Mr Schlicht of counsel, who again appeared on behalf of the applicant, was unable to refer me to anything in s109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* which would cause me to depart from the usual rule, as set out in s109(1), that each party bear its own costs. The first respondent seeks its costs of the application and its costs thrown away as a result of the adjournment of the hearing. The second and third respondents seek their costs of the application and their costs thrown away of the hearing.
- 5 At the hearing of the application for leave to amend there was some debate about whether or not there was any requirement under Part IVAA for an applicant to seek relief against respondents who had been joined by another respondent seeking to take advantage of the apportionment provisions of Part IVAA. This has been one of the fundamental questions that has been discussed, but not previously decided, since this legislation was introduced.
- 6 As I set out in my earlier Reasons, I consider it was a very bold move by the second and third respondents to decide not to take an active part in these proceedings. Their interests would clearly be affected by the outcome particularly if there is an apportionment of responsibility between the first respondent and both or either of them.
- 7 As I mentioned in my earlier Reasons, one would have thought that in any subsequent proceedings the applicant would simply seek judgement for the amount of that percentage of responsibility apportioned to the second and third respondents (if any). The applicant had also taken, in the words of Mr Roberts of counsel (on behalf of the first respondent), ‘a punt’ by not making a direct claim for relief against the second and third respondents until the application for leave to amend was made a few days before the scheduled commencement date of the hearing.
- 8 Having said that the adjournment of the hearing for any significant period was caused by the second and third respondents’ failure to take appropriate steps to protect their interests, there may not have been an adjournment had the applicant not made a more timely application for leave to amend.
- 9 The first respondent has been the “innocent party” in relation to this Part IVAA stoush. I make no comment about the first respondent’s position in

relation to this litigation generally. Having regard to s109(3) I am satisfied it is appropriate I should exercise my discretion under s109(2) in favour of the first respondent, but not otherwise. Both the applicant and the second and third respondents have been responsible for causing an adjournment of the hearing (s109(3)(a)(iii)) and for unnecessarily prolonging the proceeding (s109(3)(b)).

- 10 It is my view that the applicant and the second and third respondents should pay the costs of the first respondent of the application and any costs thrown away caused by the adjournment. The applicant given the lateness of the application for leave to amend, and in view of the previous history as set out in my earlier Reasons, having been successful in obtaining an indulgence should pay its own costs of the application and any costs thrown away. The second and third respondents who '*took a bold, and potentially risky, move*'¹ in not taking steps to protect their interests should also pay their own costs of the application and any costs thrown away by reason of the adjournment and I will so order.
- 11 Although I am urged to order that the first respondent's costs be assessed on Supreme Court Scale, I am not persuaded that there is any reason for me to depart from County Court Scale 'D'. This tribunal is regularly faced with interesting questions of law that have not been decided elsewhere, and if every time one was to take the view that Supreme Court costs should be awarded then that would not be in the spirit s109 and the objectives of the *VCAT Act*. So I shall order that the applicant and the second and third respondents pay the first respondent's costs of the application and costs thrown away of the adjournment and in default of agreement to be assessed by the principal registrar on County Court Scale 'D'. I am not minded to apportion the payment of those costs as between the applicant and the second and third respondents as I was urged to do by them.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr Schlicht of Counsel
For the First Respondent	Mr Roberts of Counsel
For the Second and Third Respondents:	Mr Wajszel, Solicitor

¹ [22] Reasons dated 16 May 2008