VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D700/2013

CATCHWORDS

DOMESTIC BUILDING DISPUTE – s 108 of *Victorian Civil and Administrative Tribunal Act 1998* - apprehension of bias – whether Tribunal should be reconstituted to hear costs application. Costs – s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*; whether complexity of proceeding, of itself, makes it fair to order costs – whether costs should be ordered where wilful disregard of known facts is shown - relevant principles.

FIRST APPLICANT	Advaland Pty Ltd (ACN 144 477 994)
SECOND APPLICANT	Kitchener Crespin
FIRST RESPONDENT	Spencer John Bitcon
SECOND RESPONDENT	Alan Richard Gaskell
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Costs Hearing
DATE OF HEARING	6 March 2014. Written submissions last filed on 21 March 2014
DATE OF ORDER	26 May 2014
CITATION	Advaland Pty Ltd v Bitcon No 2 (Domestic Building) [2014] VCAT 614

ORDER

The costs of and associated with the preliminary hearing heard on 5 to 9 January 2014 are reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr Crispen, director (and in person)
For the First Respondent	Mr A Kirby of counsel
For the Second Respondent	No appearance

REASONS

THIS APPLICATION

1. On 13 January 2014, I commenced hearing an application, framed as a preliminary hearing, to determine certain factual matters central to the dispute comprising the main proceeding. In essence, that preliminary hearing focused on establishing the identity of the contracting parties to a domestic building contract, the subject of the main proceeding. This issue arose because the First Respondent (**'the Owner'**) contended that the claim brought against him by the First Applicant (**'Advaland'**) was ill-conceived because he had no contract with Advaland. The Owner claimed that he had contracted with the Second Applicant, Mr Crespin, who was and is the sole director of Advaland.

2. The preliminary hearing was conducted over a five day period, at the conclusion of which, I reserved my decision. On 4 February 2014, I found and declared that Advaland was not the party which had contracted to undertake the building works, the subject of the proceeding, and that the contracting party was Mr Crespin.

3. The proceeding was returned before me at a directions hearing on 6 March 2014 to enable the Tribunal to make further orders as to the future conduct of the proceeding, having regard to the findings and declarations made on 4 February 2014. At that directions hearing, Mr Crespin was joined as the Second Applicant. Further orders were then made requiring the parties to complete various other interlocutory steps relevant to the main proceeding.

4. At the conclusion of that directions hearing, the Owner, through his counsel Mr Kirby, made an application that his costs of and associated with the preliminary hearing be paid by Advaland and Mr Crespin. Written submissions were filed in support of that costs application. Given that the costs application was made without notice and that the Applicants were not represented at that directions hearing, orders were made giving the Applicants leave to file and serve any written submissions on the question of costs in response to the submissions made by Mr Kirby. In accordance with those orders, the Applicants filed written submissions on 21 March 2014, to which I have had regard.

THE RESPONDENTS' SUBMISSIONS

5. The preliminary hearing was listed as a result of an application by the Owner under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**) for an order that the claim made against him be struck out on the ground that Advaland was not the contracting party. It should be noted that at the time when the application was made, Advaland was the sole applicant in the proceeding. As I have indicated, Mr Crespin was joined after my determination of the preliminary hearing.

6. Mr Kirby submitted that the preliminary questions were vigorously contested during the five day hearing, as each party contended that the written contract held by the other was a fabrication. Mr Kirby argued that as Advaland lost the preliminary question, the allegation of fabrication or fraud ought to be seen as a paradigm reason to open up the Tribunal's jurisdiction to make an award of costs under s 109(3)(a), (b), (d) and (e) of the Act. He further argued that the making of false allegations of fraud and the telling of untruths, in wilful disregard for the true facts, normally enlivens the discretion to make an enhanced costs order: *Colgate Palmolive Company v Cussens Pty Ltd*,[1] *Luong v Du (No.2)*.[2]

7. The matters which Mr Kirby submitted were falsehoods and untrue comprised:

   (a) The building contract exhibited to Mr Crespin's affidavit, which the Tribunal ultimately found was not the true contract between the parties.

   (b) The evidence of Mr Crespin and Ms Scholtes as to a meeting which occurred on 6 August 2010, which evidence was not accepted by the Tribunal.

   (c) The false allegations of fraud and fabrication alleged against the Owner and other witnesses called to give evidence on his behalf in the preliminary hearing.

   (d) The Second Applicant's ulterior motive to shift any liability to his company, instead of him personally.

8. Other matters which Mr Kirby submitted justified an order for costs included:

   (a) The complexity of the proceeding, including the fact that it comprised five hearing days.

   (b) Both parties were legally represented.

   (c) The parties had diametrically different versions of events.

   (d) The amount claimed.

THE APPLICANTS' SUBMISSIONS

9. I have assumed that the *Applicant's Submissions* have been filed on behalf of both applicants, even though they state that they have been prepared by Mr Crespin *as agent for* Advaland. This assumption is reinforced by the fact the substance of the submissions address the question of costs as claimed against both applicants. The *Applicant's Submissions* raise a number of points in opposition to the Owner's application for costs:

[1] (1993) 46 FCR 225.
[2] [2014] VSC 37.

(a) Having regard to the Owner's attempt to adduce evidence concerning allegations of criminal activity on the part of Advaland or Mr Crespin, I should recuse myself from making any further determinations in the proceeding because I am *unable to bring an impartial mind to the resolution of the relevant question*.

(b) The failure on the part of the Owner to make the application for costs with adequate notice given to the applicants.

(c) The fact that no mediation is yet to be conducted.

(d) The futility of the preliminary hearing, given that the terms of each of the contracts held by the parties were identical, save and except for the named builder.

(e) The actual builder of the building works, the subject of the dispute, is yet to be determined.

(f) The proceeding brought by Advaland was not frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process.

(g) The claim made by Advaland is made on a quantum meruit basis.

(h) There is no allegation of fraud made by Mr Crespin in any of the affidavit material filed in support of the preliminary hearing.

(i) The mention of a fabricated contract was first coined by the independent expert engaged by Advaland, rather than Advaland itself.

(j) The expert evidence relied upon by Advaland supported its contention that Advaland's version of the contract had not been fabricated or tampered with.

(k) The Tribunal failed to explain legal terminology used by Mr Kirby during the costs hearing.

(l) The preliminary hearing was convened at the request of the Owner.

(m) The Owner's application under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* was dismissed.

SHOULD THE COSTS APPLICATION BE DETERMINED?

10. A number of the grounds raised by the Applicants lie at the very heart of whether I should even consider exercising my discretion under s109 of the Act. It is appropriate that I consider these grounds before turning to the question of whether it would be fair to order costs of the preliminary hearing.

Application for the Tribunal to be reconstituted

11. I understand the submission made by the applicants to constitute an application under s 108 of the *Victorian Civil and Administrative Tribunal Act 1998* that the Tribunal be reconstituted for the purpose of hearing the costs application. That application is made on the ground that I am unable to bring an impartial mind to the determination of the costs application.

12. In *Comcare v John Holland Rail Pty Ltd (No 3)*,[3] Bromberg J reviewed a number of authorities in dealing with an application that he recuse himself on the ground that there existed an apprehension of bias. He stated:

> Where consideration is given to whether a judge should recuse him or herself for apprehended bias because some information or knowledge has been independently acquired, the question posed in *Re Media Entertainment and Arts Alliance* should be borne in mind in the application of the well-established test for apprehended bias of whether:
>
> > a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide: *Ebner v Official Trustee* (2000) 205 CLR 337 at [6].
>
> In *Ebner* Gleeson CJ, McHugh, Gummow and Hayne JJ identified that the "question is one of possibility (real and not remote), not probability": at [7]. Their Honours acknowledged at [8] that the apprehension of bias principle admits of the possibility of human frailty and that its application is as diverse as human frailty. Their Honours continued:
>
> > Its application requires two steps. First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[4]

13. It would appear that there are two grounds upon which the applicants contend that I should recuse myself from determining the costs application:

    (a) Paragraph 43 of the Tribunal's *Reasons* dated 4 February 2014 disclose an apprehension of bias; and

    (b) During the preliminary hearing, an attempt was made by the Owner to lead evidence alleging criminal activity on the part of the First Respondent. Consequently, I am unable to bring an impartial mind to the resolution of the question of costs.

14. Paragraph 43 of the *Reasons* dated 4 February 2014 state:

> In my view, it is reasonable to draw an inference that these documents reflect the actual documents that were exchanged between the parties, given that it is unlikely that the Owner would have fabricated or altered a document in circumstances where there is no dispute or disagreement

[3] [2011] FCA 164.
[4] [2011] FCA 164 at 11.

between the parties. Indeed, it defies logic that the Owner would alter the documents so that they reflected the name of Mr Crespin, rather than Advaland, given that both the building permit and certificate of warranty insurance both named Advaland as the relevant builder.

15. I do not accept that the drawing of an inference based upon evidence and logic discloses an apprehension of bias. It is simply a finding of fact made in the course of the proceeding based on the material before the Tribunal. In the present case, there were two competing versions of the facts, as presented by each of the parties. Ultimately, the factual question was decided based upon the evidence, the documents and what could be logically inferred as being the more likely outcome. I do not accept that this discloses any apprehension of bias. I reject this ground.

16. The applicants further contend that the mention of criminal activity on the part of Mr Crespin in witness statements filed by the Owner creates an apprehension of bias in the mind of the Tribunal member, privy to those witness statements. I reject that contention. In particular, the evidence sought to be adduced by the Owner raising allegations of criminal activity on the part of Mr Crespin was the subject of an objection by the legal representative of Advaland. Ultimately, I ruled that the evidence was not relevant to any issue in the preliminary hearing and I excluded that evidence.

17. In my view, even if the evidence was allowed, I do not consider that factor creates an apprehension of bias against either of the applicants. Indeed, it is not unusual for there to be evidence adduced during the course of a hearing which, although not strictly relevant to any issue in dispute, may be prejudicial to one party over the other. It is the task of the judicial officer to ignore or pay little weight to such evidence in the determination of the issues before him or her. In the present case, the *Reasons* make no mention of any criminal activity on the part of Mr Crespin and that is because those allegations were not taken into consideration in the determination of the preliminary questions.

18. Further, no objection was raised by the legal representative of Advaland that I should continue to hear the preliminary question. In my view, there is no basis upon which to contend that the mere attempt to introduce evidence alleging criminal activity on the part of Mr Crespin consequently gives rise to an apprehension that I might not bring an impartial mind to the resolution of the costs hearing.

19. Moreover, I am of the view that the Tribunal is best placed for me to hear and determine the costs application, given that I heard the preliminary hearing. In that regard, any concern about me hearing the preliminary hearing after I ruled on the 'prejudicial material' should have been raised at that time and not belatedly raised for the first time in written submissions filed two weeks after I heard the costs application.

20. Accordingly, I do not consider that the grounds relied upon in any way give rise to an apprehension of bias. Therefore, I decline to recuse myself from hearing the costs application. The application to reconstitute the Tribunal is dismissed.

Application without notice

21. I accept that the application for costs was made without giving Advaland prior notice. Nevertheless, I was conscious of the fact that Advaland and Mr Crespin were not legally represented when the application for costs was made. As a result, I reserved my decision on the question of costs to give the applicants 14 days to obtain legal advice and a copy of the transcript of the proceeding, before having to respond.

22. I note that the applicants stated in their written submissions that insufficient time was afforded to them in order to obtain a copy of the transcript in order to seek legal advice. However, no application was made for an extension of time in which to submit written submissions. Indeed, nothing was raised as to any difficulty the applicants may have had in obtaining a transcript of the proceeding (which has ultimately been obtained). In my view, sufficient opportunity has been given to the applicants to reasonably respond to the written submissions filed on behalf of the Owner. I am not persuaded that the applicants have been prejudiced in being able to respond. I reject this ground.

23. Similarly, the applicants contend that I failed to explain legal terminology during the course of the costs hearing. Having read the transcript of the costs hearing, I reject this contention. Further, there are no examples given by the applicants of this occurring and I am unable to identify any from my reading of the transcript. Moreover, as I have already indicated, the submissions made by Mr Kirby were written. Ample time was afforded to the applicants to show those written submissions to their legal representatives if they so chose. Therefore, I reject this ground.

SHOULD COSTS BE ORDERED?

24. Section 109 of the Act states:

> **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 it is 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-

...

(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 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.

25. In *Vero Insurance Ltd v The Gombac Group Pty Ltd*,[5] Gillard J set out the steps to be taken by the Tribunal when considering an application for costs pursuant to s 109 of the Act:

(i) The prima facie rule is that each party should bear their own costs of the proceeding;

(ii) The Tribunal should 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 central 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 s109(3)…

26. Mr Kirby submissions point to two factors, which he contends justify an order for costs under s 109(3) of the Act;

(a) the nature and complexity of the proceeding, and

(b) the making of false allegations and the telling of untruths.

The nature and complexity of the proceeding

27. I accept that there are factors which added complexity to the preliminary hearing, evidenced by the fact that the preliminary hearing occupied five hearing days. However, the mere fact that the preliminary proceeding may have had some complexity does not, in itself, necessarily mean that costs should follow the event.

28. This proposition was discussed by President Morris J in *Solid Investments Australia Ltd Pty v Greater Geelong City Council*,[6] where he said:

4 The power of the tribunal to order that a party pay costs is discretionary; and because it turns upon fairness the discretion is a broad, sweeping one. For this reason, and because every case is different, it is difficult to articulate clear principles that promote predictability in relation to costs, notwithstanding the obvious attraction of promoting certainty….

…

[5] [2007] VSC 117 at [20].
[6] [2005] VCAT 244 at 3.

> 8 … It is true that the proceeding was complex, but that will rarely be enough, in itself, to justify an order as to costs…

29. In my view, the complexity arose because both parties pursued every viewpoint with vigour, even if that viewpoint was not directly relevant to the issues to be determined. For example, evidence was thought to be introduced alleging criminality on the part of Mr Crespin. Ultimately, I ruled that that evidence was irrelevant.

30. Accordingly, I am not persuaded that the mere fact that the preliminary hearing comprised some complex issues makes it fair that an order for costs should follow the event.

Making of false allegations and the telling of untruths

31. Mr Kirby submitted that the findings made by me led to the conclusion that Advaland had made false allegations of fraud and told untruths in wilful disregard for the true facts.

32. Mr Kirby referred to me a recent decision of the Victorian Supreme Court in *Luong & Anor v Du (No 2)*,[7] where Emerton J made the following comments:

> [9] In *Li v Xing (No 2.)*, Habersberger J considered the costs implications of the court disbelieving the plaintiff as to an essential part of the plaintiff's claim. His Honour described the proceeding before him as "an unusual case in that the decision revolved around determining who was telling the truth and who was not telling the truth as the competing versions of what had occurred with respect to the purchase of the property could not sit with each other. One side or other had to be telling complete falsehoods". Justice Habersberger said that the conclusion that he had reached, namely that the plaintiff and his witnesses were telling the truth and the defendant and her witnesses were not, pointed to the case fitting into the category of fraud. His Honour said:
>
> > One can hardly get a better example of fraud than telling complete falsehoods about circumstances of the purchase, as to whether or not it was purchased beneficially by the defendant or on trust for the plaintiff with the plaintiff's family making all the payments.[8]

33. His Honour then referred to *Colgate-Palmolive Company v Cussens Pty Ltd* and said:

> In *Colgate Palmolive Company v Cussens Pty Ltd*, Shepherd J identified a number of circumstances that may warrant a special costs order, including 'commencing or continuing proceedings be some ulterior motive … or in wilful disregard of known fact will clearly established law'. If the plaintiffs conduct in bringing a proceeding based on the evidence in question does not amount to bringing a proceeding on the basis of

[7] [2014] VSC 37.
[8] Ibid at [9].

> falsehoods then (at the very least) amounts to bringing (and continuing) a proceeding in wilful disregard of known facts.[9]

34. Mr Kirby submitted that the present case fell within the same circumstances because reliance on the competing versions of the contract could not sit with each other. Therefore, one party must have been bringing or continuing the proceeding in wilful disregard of known facts.

35. I do not accept that submission, even though it is difficult to reconcile the Owner's and Ms Molan's evidence with that of Mr Crespin and Ms Scholtes. However, it does not necessarily follow that Advaland continued in wilful disregard of known facts. In particular, the evidence before me indicated that neither party paid much attention to the identity of the builder at the time of contract. For example, the Owner gave evidence indicating that he had little understanding of the distinction between Advaland, the company and Mr Crespin, the person. He said that he understood them to be one and same. Therefore, if the white labels had been removed from Advaland's version of the contract, it is possible that by the time that contract was engrossed, it was done so ignorant or forgetful of the fact that the version held by the Owner still named Mr Crespin as builder. This scenario becomes more feasible when one considers that there may have been a significant passage of time before Advaland eventually engrossed its counterpart and that this occurred during a period when Mr Crespin was transitioning his building business to Advaland, from what was previously Mr Crespin as a sole trader.

36. Although one may speculate one way or the other, the fact remains true that people's memory of past events often becomes reconstructed through the passage of time. This observation was made by McClelland CJ in *Watson v Foxman*:

> Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes and litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions of self-interest as well is conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.[10]

37. Therefore, I am not persuaded that the circumstances in the present case justify the making of a costs order based on the submission that Advaland had told an untruth in wilful disregard of known facts.

38. Moreover, I do not accept that Advaland ever prosecuted its claim premised on an allegation of fraud on the part of the Owner. The claim made by Advaland was based on establishing that it undertook certain

[9] Ibid at [12].
[10] (2000) 49 NSW LR 315 at 318-319.

building work under a contract entered into with the Owner. Although the preliminary hearing has established that Mr Crespin was the contracting party to the contract with the Owner, no finding has been made that the building work, the subject of the dispute between the parties was undertaken by Mr Crespin in his personal capacity. In that regard, the applicants point to a number of factors in support of their contention that the works were carried out by Advaland and not by Mr Crespin.

39. In my view, the circumstances surrounding the preliminary hearing do not justify that an order for costs be made at this stage in the proceeding. In that respect, I accept the submission made by the applicants that the utility of the preliminary hearing may well be questionable. In particular, Advaland's claim is also made on a quantum meruit basis and importantly; no finding was made dispelling the allegation that Advaland undertook the works, even if it did so absent any written contract. Therefore, Advaland's claim may still be arguable, even if it did not sign a written contract with the Owner, albeit that its *Points of Claim* may have to be amended to reflect the findings made by me in the preliminary hearing.

ORDERS

40. Having regard to my observations set out above, and importantly, to the fact that Advaland's quantum meruit claim is yet to be determined, I consider it is appropriate that the costs of the preliminary hearing should be reserved. Who should pay those costs (if at all) can be revisited after the main proceeding has been determined. In my view, it would not be fair to require either of the applicants to pay the Owner's costs of the preliminary hearing at this interlocutory stage in the proceeding.

SENIOR MEMBER E. RIEGLER