VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D618/2001

DOMESTIC BUILDING LIST

CATCHWORDS

Costs of preliminary hearing – substantive issues still to be determined – costs in the proceeding:

APPLICANT	Age Old Builders Pty Ltd (ACN 068 142 638)
RESPONDENT	Swintons Pty Ltd
JOINED PARTIES:	Edgard Pirrotta & Associates Pty Ltd (ACN 005 529 715)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	28 March 2006
DATE OF ORDER	15 May 2006

[2006] VCAT 870

ORDER

1. The costs of the preliminary hearing on 29 October 2002 are costs in the proceeding.

2. The costs of the preliminary hearing on 13 and 14 September 2005 are costs in the proceeding.

3. The Tribunal's orders of 29 August and 5 September 2005 that the costs of those directions hearings be costs in the proceeding are affirmed.

4. The costs of the hearing on 29 March 2006 and the Respondent's 'costs thrown away' by reason of the amended Pleading are costs in the proceeding.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr J. Shaw of Counsel
For the Respondent:	Mr K. Oliver of Counsel
For the Joined Parties:	No appearance

REASONS

1. This proceeding has had a long history which is set out in detail in my Reasons dated 3 November 2005, and it is not necessary to repeat it here. The proceeding was commenced on 16 August 2001. The proceeding was set down for hearing to commence on 22 April 2002 at which time the Tribunal made various directions including the referral of the proceeding to a directions hearing on 28 May 2002 *'…to determine (inter alia) what matters if any should be listed for a preliminary hearing and to formulate any questions to be answered at such* hearing (Order 4).

2. On 28 May 2002 the Tribunal set aside four questions for preliminary determination, with a further question being included on 22 July 2002. The preliminary hearing was conducted on 29 October 2002, and the decision with Reasons handed down on 6 December 2002. Deputy President Cremean, as he then was, answered the first question in the affirmative obviating the need to answer the further questions and reserved the costs of the hearing. Leave was granted to the Applicant to appeal this decision to the Supreme Court where it was allowed and the following orders made:

> 91. The appeal is allowed for the above reasons and the decision of the Deputy President made on 6 December 2002 is set aside.
>
> 92. Having regard to all the circumstances of the case I am of the view that the proceeding should be remitted to a differently constituted division of the Tribunal in accordance with s148(8) of the *Victorian Civil and Administrative Tribunal Act* 1998.
>
> 93. I will accordingly direct that the matter be remitted for further hearing in accordance with law by a division of the Victorian Civil and Administrative Tribunal constituted by a different member or members from that which made the decision of 6 December 2002.

3. The Respondent's appeal was dismissed by the Court of Appeal on 27 June 2005 with the Reasons being handed down on 2 September 2005. Directions in relation to the conduct of the preliminary hearing were made

by Judge Bowman on 29 August 2005. At the request of the Applicant Question (f) was included at a subsequent directions hearing on 5 September 2005 and the Preliminary Questions ('Questions') set down for hearing commencing 13 September 2005.

4. Following the preliminary hearing I handed down my decision with Reasons on 3 November 2005 whereby Questions (a) (having already been decided by the Supreme Court) (c), (d) and (e) were answered in favour of the Applicant, and I declined to answer questions (b) and (f). Costs were reserved with liberty to apply.

4. The Applicant seeks its costs of the preliminary hearing of 29 October 2002 on an indemnity basis, and the costs of the preliminary hearing on 13 and 14 September 2005 on a party/party basis. The Respondent submits that the costs of both preliminary hearings should remain reserved as the proceeding is effectively part heard. The Applicant was represented by Mr Shaw of Counsel, and the Respondent by Mr Oliver of Counsel.

The Applicant's position

5. Although Question (a) was initially answered in favour of the Respondent, the Tribunal's decision of 6 December 2002 was overturned on appeal. The Applicant submits I should therefore exercise the Tribunal's discretion under s109(2) of the *Victorian Civil and Administrative Tribunal Act* 1998 and order the Respondent to pay the Applicant's cost of that hearing because:

   (i) the hearing clearly involved complex questions of law (s109(3)(d));
   (ii) the overturning of the decision on appeal confirms that the Applicant's position was much stronger than the Respondent's (s109(3)(c));

(iii) The Respondent has unreasonably prolonged the proceeding by claiming that the expert determination was void by operation of ss14 and 132 of the *Domestic Building Contracts Act* 1995 (s109(3)(b)).

6. The Applicant relies on the Tribunal's decision in *Sabroni Pty Ltd v Bogaty* [2002] VCAT 275 and submits it is entitled to costs on an indemnity basis. In *Sabroni* it was held that where a party was successful in arguing that an agreement it voluntarily entered into to resolve a domestic building dispute was void, its conduct had disadvantaged the other party whose costs it should therefore be ordered to pay.

7. The Applicant submits it is entitled to the costs of the preliminary hearing on 13 and 14 September 2005 because those Questions which I was satisfied could be answered, were answered in the Applicant's favour. It is acknowledged by the Applicant that I declined to answer Questions (b) and (f).

8. The Applicant submits that I should exercise the Tribunal's discretion under s109(2) having regard to the following factors:

(i) The Applicant was almost entirely successful as all questions that could be answered were answered in its favour;

(ii) the hearing involved complex questions of fact and law (s109(3)(d));

(iii) the answering of those Questions, which I was satisfied could be answered, in favour of the Applicant indicates that the Respondent's position was 'manifestly weak';

(iv) The Respondent's conduct in voluntarily entering into the expert determination agreement which it subsequently alleged was void, and which it attempted to have set aside (*Sabroni v Bogaty*).

9. The Applicant relies on the decision in *Australian Country Homes v Vasiliou*, unreported (5 May 1999) where Member Young, as he then was, indicated that a successful party in an inter parties commercial dispute could have a reasonable expectation of obtaining an order for costs in its favour. However, I refer to the decision of Bowman J in *Sabroni Pty Ltd v Catalano* [2005] VCAT 374 where at paragraph 5 he said:

> 'Despite the observations of Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (delivered 5 May 1999), I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs aware will be made in its favour. There is nothing in the wording of s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 that warrants such almost automatic expectation. In this regard I prefer the approach adopted by Deputy President Macnamara in Pure *Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31 October 2002). Deputy President Macnamara concluded that there is nothing in the nature of a proceeding in the Domestic Building List that would justify departure from the presumption contained in s.109 and the exceptions thereto, and I am of the same opinion. Each case, whether it be in the Domestic Building List or elsewhere, must be viewed on its merits. It may well be that cases in the Domestic Building List, because of their nature, have a propensity to fall within the exceptions contained in s.109(3), but that does not mean that each case should not be considered on its merits, or that cases in the Domestic Building List automatically fall into a different category when issues of costs arise.'

and to Ormiston JA's comments in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 where he said at paragraph 34:

> '…there should be no presumption, as seems to have been assumed in both the Tribunal and the Trial Division, that costs ought to be paid in favour of claimants in domestic building disputes brought in VCAT…'

The Respondent's position

10. The Respondent submits that the costs of both preliminary hearings should remain reserved. It submits that the hearing on 13 & 14 September 2005 should be regarded as a continuation of the hearing on 29 October 2002, and it would therefore be premature to determine the question of costs of the

preliminary hearings until the final determination of the proceeding. Mr Oliver submitted that there has been no determination as to the efficacy of the expert determination and that if the Respondent is ultimately successful in having it set aside, it would be unfair if the question of costs of the preliminary hearings had been determined. The Respondent has consistently maintained that even if the expert determination agreement was not void (as has been determined by the Supreme Court and the Court of Appeal) there are other reasons why it should be set aside including allegations that the expert failed to take into consideration relevant terms of the building contract. In such circumstances the Respondent submits that there are still substantial questions of fact and law to be determined and that it would be unfair to make any orders for costs of the preliminary hearing until after the final determination.

Discussion

11. It is clear that significant costs have been incurred by both parties in relation to the preliminary hearings. In *Body Corporate No. 1/PS40911511E St James Apartments v Renaissance Assets Pty Ltd (ACN 074 521 010)* [2005] VCAT 963 which concerned an application for costs where the Tribunal's orders were set aside on appeal, Senior Member Cremean held at paragraph 11:

> In any event, I am not satisfied that I do have powers to make the orders which are now sought, should they be orders which, in the exercise of my discretion, should be made at all. His Honour on 9 November 2004 not only allowed the appeal but he set aside the "decisions" and the "rulings" I had made on the dates in question. It would seem to me that that includes the orders I made reserving costs (5 September 2003 and 17 December 2003) and the orders I made ordering compensation (28 January 2004). If they are set aside then it seems to me that costs are no longer reserved and compensation is no longer payable.

and at paragraph 19

> the appeal having been allowed and my decisions and rulings having been set aside, I agree with the First Respondent that I do not have, any longer, power to order costs in respect of the occasions in question. Costs are no longer reserved and the compensation order no longer applies. In my

> view, it is, as if, the entirety of my decisions given on the dates in question has been expunged. It is as if no part of them remains standing for any purpose whatever.

12. The current situation is entirely analogous in relation to the decision of 6 December 2002 – the orders made on that day by the Tribunal were set aside on appeal. The orders made on 6 December 2002 include the order reserving costs and consequently the costs of the hearing on 29 October 2002 are no longer reserved. I agree with Senior Member Cremean that the Tribunal does not have power to make any order in relation to the costs reserved on that occasion. However, I am of the view that s109(2) empowers the Tribunal to make orders at any time during a proceeding if persuaded it should exercise its discretion under s109(2). The costs incurred by the parties of and incidental to the hearing on 29 October 2002 are clearly costs in the proceeding.

13. I reject the Respondent's submissions that the hearing of 13 & 14 September 2005 should effectively be considered a continuation of the preliminary hearing held on 29 October 2002. Not only was the Tribunal differently constituted for each of the preliminary hearings, but the matter was remitted to the Tribunal by the Supreme Court for further hearing by a differently constituted tribunal to that which made the decision on 6 December 2002, and an additional Question was before the Tribunal on 13 & 14 September 2005.

14. The Respondent submits that the Applicant sought the preliminary hearing in the anticipation that, if the Questions were answered in its favour, it would be entitled to what Mr Oliver describes as 'summary judgement' for the amount of the expert determination. This expectation is apparent from the orders sought by the Applicant as set out in its submissions for both preliminary hearings, and the oral submissions made to me on 14 September 2005.

15. The Respondent maintains that it has consistently opposed the preliminary hearing being of the view that determination of the Questions would not finally dispose of the proceeding. I certainly recall that submissions to this effect were made to me by Mr Oliver at the commencement of the hearing on 13 September 2005. However, by that time, it was, in my view, too late to stop the process which had been ongoing for approximately three years.

16. I accept that the Applicant has been most concerned that the Questions proceed to a preliminary hearing and determination. It is, however, in my view, extraordinary to suggest that the Respondent has been responsible for unduly prolonging the proceeding because of its allegations as to the application and effect of ss14 and 132 of the *Domestic Building Contracts Act* 1995. This may properly be described as a 'test case' as to the interpretation and effect of s14 of the *Domestic Building Contracts Act* 1995. Although subsequently overturned on appeal, Deputy President Cremean, after an exhaustive analysis and consideration of the legislation and relevant authorities concluded that the expert determination agreement was void. His coming to that conclusion and its subsequent overturning on appeal, confirms in my view that it was not an argument or position totally lacking in merit.

17. Although it is submitted on behalf of the Applicant that Question (d) was answered in its favour this is to misconstrue my answers and the accompanying Reasons where at paragraph 39 I said:

> "As I have found the Applicant did not repudiate the Agreement by commencing this proceeding this question is not applicable …"

18. Accordingly, my answer to question (d) was 'not relevant'. Therefore of the five Questions before me only two were answered in favour of the Applicant.

19. Further, most of the two day hearing in September 2005, was concerned with submissions from the parties in relation to Questions (b) and (f), both of which I declined to answer. These two Questions were also the primary focus of the written submissions filed on behalf of both parties. Although I answered the Questions that I was satisfied could be answered in favour of the Applicant, I am not persuaded that I should exercise the Tribunal's discretion under s109(2) as it is clear that in answering those Questions the substantive issues have not been disposed of.

20. I accept the Respondent's submission that until determination of all the issues in this proceeding it would be unfair to make any order for costs. It would seem premature to make any order for costs prior to the Tribunal determining whether the expert determination should be enforced, other than confirming that the costs of the preliminary hearing on 29 October 2002 are costs in the proceeding. In relation to the preliminary hearing in September 2005 I consider it appropriate to determine that they be costs in the proceeding. Until final determination of the substantive issues it is impossible to give due and proper consideration to the factors set out in s109(3) about which the Tribunal must satisfy itself before concluding it is appropriate to exercise its discretion under s109(2).

The costs of the directions hearings of 29 August and 5 September 2005

21. The Applicant seeks its costs of the two directions hearings on a party/party basis. Both directions hearings were conducted by Bowman J and in both instances he ordered that the costs of those directions hearings 'are costs in the proceeding'. He did not reserve the costs and I note by reference to the transcript of the directions hearing on 5 September 2005 (page 53) he said:

> "But I think I'd prefer – rather than reserving the costs which may have to be dealt with by someone else … I think costs in the cause is the more appropriate order". The Tribunal is *functus officio* in relation to the costs

of the two directions hearings and I am clearly in no position to review those orders.

The Respondent's costs 'thrown away' and the costs of the hearing of 28 March 2006

22. The Respondent seeks its costs "thrown away" of the Further Amended, Points of Claim including what it describes as 'the directions hearing of 28 March 2006'. The Further Amended Points of Claim were filed in accordance with the directions made on 8 February 2002.

23. I am not satisfied that the Respondent has incurred any significant 'costs thrown away' by reason of the Amended Pleading – the amendment being minimal, and will therefore order that such costs be costs in the cause.

24. The hearing of 28 March 2006 was primarily concerned with the Applicant's application for costs of the two preliminary hearings. Submissions in relation to the Further Amended Points of Claim were brief – from my recollection no more than 15 minutes of a total hearing time of approximately two hours. Although I have found it is premature to determine the question of costs until final determination of the substantive issues, it seems to me that the hearing on 29 March 2006 is closely related by its very nature to the preliminary hearings and the costs of such hearing should therefore also be costs of the proceeding..

DEPUTY PRESIDENT C. AIRD