

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D181/2004

**CATCHWORDS**

*Victorian Civil and Administrative Tribunal Act 1998 – S.109 – unsuccessful interlocutory application – substantial commercial matter.*

[2006] VCAT 1307

**APPLICANT:** Arrow International Australia Pty Ltd

**FIRST RESPONDENT:** Indevelco Pty Ltd

**SECOND RESPONDENT:** Perpetual Nominees Ltd as custodian of the Colonial First State Income Fund

**JOINED PARTY:** John Zervos

**WHERE HELD:** Melbourne

**BEFORE:** His Honour Judge Bowman

**DATE OF HEARING:** 6 July 2006

**DATE OF RULING:** 6 July 2006

**ORDERS**

1. First Respondent and Joined Party pay to the Second Respondent its costs of and associated with the hearing of 6<sup>th</sup> December 2005, such costs to be taxed in default of agreement on County Court Scale “D”, but such costs not to include the costs of the hearing of 6<sup>th</sup> July 2006.
2. Liberty to apply.

**Judge Bowman**  
**Vice President**

**APPEARANCES:**

For Indevelco Pty Ltd & Joined Party:

Mr Noble of Noble Lawyers

For Perpetual Nominees Ltd:

Mr Frenkel of Counsel, instructed by  
Gadens Lawyers

## RULING AS TO COSTS NO. 2

### GENERAL BACKGROUND

- 1 In this matter I gave a detailed ruling in relation to various interlocutory applications on 23<sup>rd</sup> December 2005. On that occasion, I reserved the question of costs. Pursuant to that reservation, the Second Respondent (“Perpetual”) now seeks its costs as against the First Respondent (“Indevelco”) and the Joined Party (“Zervos”), being costs associated with the hearing conducted before me on 6<sup>th</sup> December 2005, concerning which the ruling of 23<sup>rd</sup> December was made. Indevelco and Zervos have a common interest in the proceeding. I shall refer to them collectively as “Indevelco”. Perpetual also seeks its costs of this day.
- 2 This matter has been before me on several occasions. The factual background to the dispute need not be set out here. In relation to this application, Mr Frenkel of counsel appeared on behalf of Perpetual. Mr Noble appeared as solicitor for Indevelco.

### THE CASE FOR PERPETUAL

- 3 The basis for Perpetual’s application is as follows. In the application heard by me on 6<sup>th</sup> December 2005, Indevelco alleged that the Further and Better Particulars of Perpetual’s Amended Points of Claim were deficient. Perpetual disputed this. I rejected the arguments advanced on behalf of Indevelco, and found in favour of Perpetual. The application by Indevelco failed and was dismissed. Advancing Perpetual’s claim for costs, Mr Frenkel highlighted the following:-
  - (i) In making its application, which failed, Indevelco specifically sought costs. It placed costs in issue.
  - (ii) Perpetual had earlier made an application that the proceeding of the Applicant (“Arrow”) against it should be struck out. That application failed. In a ruling delivered 17<sup>th</sup> August 2005, I awarded costs against Perpetual in respect of its failed application. In so ordering, and whilst finding that there was nothing in the nature of a proceeding in the Domestic Building List that would almost automatically justify departure from the presumption contained in s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* and the exceptions to that presumption, there were aspects of this particular case (and of that particular application) that warranted the making of a costs order. These included the complexity of the matter; the fact that it was being conducted very much as if it were a commercial cause and in an adversarial fashion by experienced and capable legal practitioners; that a very considerable amount of money is involved; and that detailed and technical legal arguments had been advanced. All of those factors are again present, and again it is a discrete and quite complex issue that has been determined.
  - (iii) As a matter of general fairness, if Perpetual had costs ordered against it in relation to an interlocutory application which it brought and lost, it should

receive its costs when successful in relation to another interlocutory application in the same proceeding.

- (iv) Perpetual had a complete victory in relation to this application against it by Indevelco. In my ruling, there were none of the caveats or qualifications which were made in relation to the dispute between Arrow and Indevelco dealt with in the same ruling.
- (v) Perpetual should also get its costs of this day. By letter dated 9<sup>th</sup> May 2006, it indicated its intention of seeking the costs reserved on 23<sup>rd</sup> December 2005. Indevelco and Zervos had every opportunity to either consent, or otherwise arrange for the matter to be dealt with on the papers without the necessity for a hearing.
- (vi) The appropriate scale of costs would be County Court Scale “D”.

### **THE CASE FOR INDEVELCO AND ZERVOS**

4 On behalf of Indevelco and Zervos, Mr Noble submitted as follows.

- (i) Costs should be reserved. A variety of outcomes of the litigation is possible. The proceeding insofar as it involves Perpetual and Arrow is a third party proceeding. It would be more appropriate for costs to be ordered at the end of the day when the outcome is known.
- (ii) In relation to Perpetual seeking its costs of this day, the parties were before me by way of a directions hearing on 16<sup>th</sup> March 2006. On that occasion there was discussion concerning the order reserving costs on 23<sup>rd</sup> December 2005, and Arrow’s intention to seek its costs. A time for the filing and serving of written submissions in this regard was fixed. Perpetual was represented at that directions hearing. No mention was made of it seeking its costs. Had it done so, a similar order in relation to written submissions could have been made. Perpetual gave no indication that it was seeking its costs until the letter of 9<sup>th</sup> May 2006.
- (iii) It is agreed that, if a costs order is made, County Court Scale “D” is the appropriate scale.

### **RULING**

5 In my opinion, Perpetual is entitled to its costs associated with the hearing on 6<sup>th</sup> December 2005, and being costs reserved on 23<sup>rd</sup> December 2005. However, I am of the opinion that it is not entitled to its costs of this day. I indicated from the bench after hearing submissions that this was my impression as to the orders that should be made. Upon consideration of the material on the file and of the submissions made, nothing has occurred which has changed my initial impression.

6 Apart from the question of the costs of this day, I accept and prefer the submissions of Mr Frenkel. I do not accept that costs should be reserved. The application by Indevelco was quite discrete. It failed. Whatever might be the outcome of the principal litigation, the result of its failed application remains unchanged. I do not see why the question of costs in relation to such application

should abide the outcome of the principal litigation, or fall to be determined by whoever delivers the ultimate decision. It is more appropriate that the question of costs be dealt with now, and by the person who heard the application.

- 7 As stated, I am of the view that Perpetual should receive its costs. I agree that the same reasons which I set out in ordering costs against it on 17<sup>th</sup> August 2005 remain applicable. Nothing has changed in relation to the litigation itself. It remains complex, being conducted in an adversarial fashion and very much in the manner of a commercial cause, and with a very considerable amount of money being involved. The discrete application before me was also complex and contested in an adversarial fashion by very capable counsel. Whilst this Tribunal places emphasis upon the avoidance of technicality and of legal formality, some matters are presented very much as one would expect in a court of law. This case, and this application, fit into that category. Whilst I am mindful of the presumption contained in s.109(1), a consideration of the operation of s.109(3)(d) and (e) leads me to the conclusion that Perpetual, having been completely successful, is entitled to its costs.
- 8 I am not of the view that those costs should include the costs of this day. There is force in the submissions of Mr Noble in this regard. Had Perpetual joined with Arrow in foreshadowing this costs application on 16<sup>th</sup> March 2006, its application could have been dealt with in the same way as that of Arrow, and today's hearing might have been unnecessary. Accordingly, I make no order in relation to any costs involved in the hearing conducted this day.
- 9 There being no dispute as to the appropriate scale, costs will be ordered on County Court Scale "D". Accordingly, it is ordered that the First Respondent and Joined Party pay to the Second Respondent its costs of and associated with the hearing of 6<sup>th</sup> December 2005, such costs to be taxed in default of agreement on County Court Scale "D", but such costs not to include the costs of the hearing of 6<sup>th</sup> July 2006.

**Judge Bowman**  
**Vice President**