

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D341/2004

CATCHWORDS

Costs – awarded on indemnity basis - relevant matters to be considered – costs orders not punitive – fact that proceeding should never have been brought and was based upon false evidence a relevant consideration

APPLICANT: Avonwood Homes Pty Ltd (In Liquidation) (ACN 056 308 420)

FIRST RESPONDENT: Jozef Milodanovic,

SECOND RESPONDENT: Katharin Milodanovic

WHERE HELD: Melbourne

BEFORE: Senior Member R Walker

HEARING TYPE: In Chambers

DATE OF ORDER: 29 September 2005
[2005] VCAT 2205

ORDERS

Order the Respondents to pay the Applicant's costs of the application pursuant to s.120 of the Act to set aside the Tribunal's order of 15 September 2004 together with this application for costs, save for the costs that were awarded on 24 March 2005, such costs, if not agreed, to be assessed by the Registrar on an indemnity basis, save for any costs that were unreasonably incurred.

SENIOR MEMBER R WALKER

APPEARANCES:

For the Applicant: Mr C. Harrison of Counsel
For the Respondent: Mr M. Champion, Solicitor

REASONS FOR DECISION

Background

1. Judgement was given in this matter against the Respondents on 15 September 2004. They made application pursuant to section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* to set aside that order and that application came before me for hearing on 24 March 2005 and again on 6 July 2005. The application was dismissed and I reserved the question of costs.
2. The Applicant subsequently applied for costs and on 25 July 2005 an order was made in chambers by Senior Member Cremean that the question of costs should be determined by me by way of written submissions to be filed, in the case of the Applicant, on or before 15 August 2005 and, in the case of the Respondents, on or before 29 August 2005.
3. Pursuant to these directions the Applicant filed its submissions on 15 August 2005 but no submissions were received on behalf of the Respondents. On 15 September 2005 the Tribunal received a letter from the Respondents' solicitors stating that they would advise by the end of business on 16 September 2005 whether they intended to file submissions. Submissions were eventually received on 20 September. Although these were well out of time I have considered them because I do not think it is appropriate to decide a claim against parties without considering what those parties have to say even though their submissions are out of time. I did not have the Registrar call the parties to another directions hearing because there was nothing unexpected in the Respondents' submissions and the Applicant is anxious to have the matter disposed of urgently. I therefore proceed to determine the matter.

Costs

4. Costs in proceedings for the Tribunal are dealt with by s.109 of the Act, which (where relevant) is in the following terms:

“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 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.”*

Submissions

5. The Applicant refers to section 109 (3) and says that I should find that the Respondents attempted to deceive the Tribunal. I am satisfied that this was the case. They gave sworn evidence that they had not received numerous items of correspondence that were sent to them by both the solicitors for the Applicant and the Tribunal. I disbelieved that evidence.
6. Mr Champion is quite right that orders for costs are compensatory to the party who incurs them and are not to be made merely to punish the unsuccessful party (*see Williams Supreme Court Practice 1 63.02.55*). However that is not to say that the conduct of that party is not relevant, particularly where that conduct has caused the expenditure.
7. I do not accept Mr Champion’s submission that there was nothing unmeritorious about the way in which the Respondents conducted their case. I found that the judgment against the Respondents arose by reason of their attempting to create the impression, by returning letters sent to them, that they were not at the address to which those letters were directed, perhaps in the hope that by doing so the action against them would not

proceed. Consequently, it was their fault that the order was made against them and they knew that. In addition, in the subsequent application to set aside the judgement which resulted from their own conduct, they gave false evidence.

8. In these circumstances I think it is an appropriate case in which to make an order for costs and I also think that it is appropriate that they should pay the full costs that the Applicant has incurred in resisting an application that is wholly without merit and should never been brought.
9. I accept Mr Champion's submission that all that I am dealing with here are the costs of the application under s. 120 that I have not already dealt with. The costs ordered by Senior Member Davis have already been dealt with and, since that judgment stands, the Tribunal is functus officio in regard to those. Likewise, I have already dealt with the costs of the adjournment that were ordered on 24 March 2005. I cannot go back now and vacate those orders and substitute others.
10. As to the rest of the costs of this application under s. 120, I accept the submission of the Applicant's solicitors that these should be awarded on an indemnity basis. Parties should not be put to the expense of coming to the Tribunal to meet applications founded on false evidence that is known to be false by the persons giving it. Where this occurs they should be indemnified for their costs.

Order

11. I order the Respondents to pay the Applicant's costs of the application to set aside judgement, save for the costs of the adjournment awarded on 24 March 2005, but including the costs of the submissions on costs, such costs, if not agreed, to be assessed by the Registrar on an indemnity basis, save for any costs that have been unreasonably incurred.

Rohan Walker
Senior Member
Domestic Building List