VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D916/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s 109 - application for an order for costs – not satisfied that it would be fair to do so – application dismissed.

APPLICANT:	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
RESPONDENT:	Giuseppe De Simone
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge I J K Ross
HEARING TYPE:	Hearing
DATE OF HEARING:	20 March 2009
DATE OF ORDER:	30 March 2009
CITATION:	Bevnol Constructions & Developments Pty Ltd v De Simone (Domestic Building) [2009] VCAT 546

ORDER

1. The application is dismissed.

His Honour Judge I J K Ross
Vice President

APPEARANCES:

For Bevnol Constructions & Developments Pty Ltd:	Mr B Archer, solicitor
For Mr De Simone:	In person

REASONS FOR DECISION

Background

1 The substantive proceeding to which this application relates concerns a dispute about the development of a retirement village at Ocean Grove ('the site'). Seachange Management Pty Ltd ('Seachange') is the registered proprietor of the site and is in the property development business. Bevnol Constructions and Development Pty Ltd (Bevnol) is a builder.

2 Bevnol has filed a counterclaim against, relevantly, Seachange and Mr Guiseppe De Simone. Bevnol claims loss and damages by reason of Seachange's wrongful termination of the contract.

3 Mr De Simone applied for a stay of Bevnol's counterclaim insofar as it related to him. In support of the stay Mr De Simone submitted that defending Bevnol's counterclaim may require him to forego or waive his right to silence such that his interests may be adversely affected in the subsequent criminal proceedings.

4 In a decision dated 25 November 2008 I dismissed Mr De Simone's application for a partial stay of Bevnol's counterclaim.

5 After the decision was handed down Mr De Simone sought a suppression order in relation to both the decision and the transcript of the stay proceedings. As I was on leave at the time Mr De Simone's application was referred to the President. On 11 December 2008 Justice Bell issued the following orders:

"The tribunal orders that:

1. Pursuant to ss 101(4) and 146(4)(b) of the Victorian Civil and Administrative Tribunal Act 1998, until 19 January 2009 or further order, the disclosure or publication of:

    (a) the decision of Vice President Judge Ross dated 25 November 2008

    (b) the transcript of the hearing conducted on 24 July and 26 September 2008

    is prohibited to all persons other than the parties to these proceedings and their legal representatives, the tribunal constituted to hear these proceedings, and the staff of the tribunal, however, may be used for the purposes of prosecution of, and in opposition to, any appeal from the decision of Vice President Judge Ross dated 25 November 2008.

2. The request of the second respondent to counterclaim is otherwise referred to Vice President Judge Ross immediately upon his return from leave."

6 Upon my return from leave I listed Mr De Simone's application for orders pursuant to s 101(3) of the *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT Act) to prevent the disclosure or publication of my decision of 25 November 2008.

7 I dismissed Mr De Simone's suppression application and issued reasons for my decision on 15 January 2009.

8 The matter presently before me is an application by Bevnol for costs in respect of Mr De Simone's suppression application.

The s 109 Application

9 The general rule in the Tribunal, as reflected in s 109(1), is that each party bears their own costs.

10 Section 109(2) provides that the Tribunal may order a party to pay the costs of another party if satisfied that it is 'fair to do so', having regard to the matters set out in s 109(3). Sub section 109(3) makes reference to the following matters:

> "(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."

11 Mr Archer, solicitor for Bevnol, initially contended that the matters identified in sub paragraphs 109(3)(a)(i), (ii), (iii), (iv) and (vi) and sub paragraph 109(3)(c), were relevant in the circumstances of this matter.

12 Bevnol's reliance on the matters specified in s 109(3)(a)(i) and (iii) was not pressed. Mr Archer was unable to point to the particular order or direction with which Mr De Simone was said not to have complied and nor could he identify any disadvantage said to flow from such non compliance. In

relation to s 109(3)(a)(iii) Mr Archer abandoned the proposition that Mr De Simone had sought an adjournment as a result of what was said to be a failure to comply with the rules[1].

13 As a consequence of the concessions made by Mr Archer during oral argument it emerged that the only matters in s 109(3) which were pressed were:

- Failure to comply with the rules relating to proceedings in the Domestic Building List (s 109(3)(a)(ii)).
- Causing an adjournment (s 109(3)(a)(iv)).
- Vexatiously conducting the proceeding (s 109(3)(a)(vi)).
- The relative strength of the claims made by each party (s 109(3)(c)).

14 I propose to deal with each of these matters in turn.

Failing to comply with the rules

15 Mr Archer contended that Mr De Simone's failure to make a formal application and to provide affidavit material in support of the application constituted a failure to comply with the Victorian Civil and Administrative Tribunal Rules 2008 (the VCAT Rules). Mr Archer submitted that in the Domestic Building List the rules require that an urgent application must be supported by an affidavit. He submitted that:

> "We had no idea of the basis on which the application was made – had no submissions in that regard… a person is surely entitled to know what the argument – I guess the argument that we had to meet."[2]

16 There is no substance to Mr Archer's reliance on s 109(3)(a)(ii), for three reasons:

(i) At the hearing of the suppression application I expressly dispensed with the need for Mr De Simone to comply with any of the requirements of the VCAT Rules that related to his application (see rule 1.06).

(ii) The 'rule' to which Mr Archer refers is set out in paragraph 17 of Practice Note DBI (2007) of the Domestic Building List. Even if the practice note applied to the suppression proceedings, which I doubt, any non compliance with the practice note is <u>not</u> a matter which is contemplated by s 109(3)(a)(ii). That provision speaks of a failure to comply with 'this Act, the regulations, the rules or an enabling enactment'. Practice notes do not fall within the enumerated instruments.

[1] Transcript of the proceedings of 20 March 2009, p1 at lines 21-31; p2 at lines 1-10; p3 at lines 25-31, p4 at lines 1-15; p18 at lines 22-31 and p19 at lines 1-8.
[2] Transcript at p5

(iii) I am not persuaded that Bevnol has been 'unnecessarily disadvantaged' by the absence of a written application accompanied by an affidavit in support. The Tribunal is required to conduct each proceeding with as little formality and technicality as a proper consideration of the matters before it permits (s 98(1)(d)). Consistent with this obligation many of the matters before the Tribunal are not supported by affidavit material. At the hearing of the suppression application on 12 January 2009 Mr De Simone clarified the nature and scope of his application and advanced submissions in support of the orders sought. Bevnol then replied to those submissions and indeed tendered a written submission which anticipated some of the matters advanced by Mr De Simone. At no stage did Bevnol seek an adjournment on the basis that they had been denied a reasonable opportunity to consider and respond to Mr De Simone's submissions.

Causing an adjournment

17 Mr Archer contends that the entirety of Mr De Simone's application could not be dealt with on 12 January 2009 because Mr De Simone had failed to read the transcript which he was seeking to suppress.

18 Mr De Simone's application was directed at suppressing the Tribunal's decision in relation to his stay application and the transcript of some of the proceedings relating to that matter. In particular he was seeking to suppress parts of the transcript of the hearing conducted on 24 July and 26 September 2008.

19 At the time of the hearing on 12 January 2009 the transcript of the proceedings on 26 September 2008 had not been prepared. There was also some confusion as to whether the transcript of 24 July 2008 had been released (it had in fact been released).

20 Clearly Mr De Simone had to be given the opportunity to have the proceedings of 26 September 2008 transcribed and released so that he could identify those parts of the transcript he wished to have suppressed.

21 It follows that Mr De Simone's application had to be split.

22 The Tribunal heard and determined the application to suppress the stay decision. The application to suppress the transcript was adjourned at the hearing on 12 January 2009, to enable the preparation of a transcript of the 26 September 2008 hearing and to provide Mr De Simone with an opportunity to consider which aspects of the transcript he was seeking to have suppressed.

23 Ultimately Mr De Simone decided not to pursue his application to suppress parts of the transcript of the stay proceedings.

24 I accept that Mr De Simone should have taken steps to review the transcript prior to the hearing on 12 January 2009. But I am not persuaded that his

failure to do so resulted in any disadvantage to Bevnol because ultimately the application to suppress the transcript was not pursued.

Relative strength of the claims made/vexatiously conducting the proceeding (s 109(3)(a)(vi) and s 109(3)(c))

25 There was a degree of overlap in Mr Archer's submissions in relation to s 109(3)(a)(vi) and (c).

26 It was submitted that the suppression application had no reasonable prospect of success and Mr Archer also relied on an email from Mr De Simone dated December 2006 which is said to 'clearly support the vexatious nature of the litigation and the way its been pursued'[3].

27 The reference in s 109(3)(a)(vi) to 'vexatiously conducting the proceeding' is concerned with the manner in which the proceeding was conducted. A proceeding may be said to have been conducted in a vexatious way 'if it is conducted in a way productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging'[4]. I am not persuaded that Mr De Simone conducted the suppression proceedings in a vexatious manner. Mr Archer did not point to particular conduct which could reasonably be said to be burdensome, prejudicial or damaging. Nor does the email message of December 2006 assist Bevnol. The email is not related to the proceedings with which I am concerned.

28 In relation to the 'relative strengths of the claims made by each of the parties' I am satisfied that Bevnol had a stronger case than the case advanced by Mr De Simone but I am not persuaded that it had no reasonable prospect of success. I have taken this matter into account in deciding whether I should make a costs order in favour of Bevnol.

Conclusion

29 I have had regard to the elements of s 109(3) upon which Mr Archer relied and I am not persuaded that it would be fair to make the costs order sought.

30 The costs application is dismissed.

His Honour I J K Ross
Vice President

[3] Transcript p7 at lines 19-20
[4] *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813 at [67]