

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D609/2004

CATCHWORDS

Domestic building – costs – factors to be considered.

APPLICANTS	Tony Brien, Robynne Brien
FIRST RESPONDENT	Brighton Pool Shop Pty Ltd (ACN 005 786 872)
SECOND RESPONDENT	Terrence Bernard Keyhoe
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	28 November 2006
DATE OF ORDER	4 December 2006
CITATION	Brien v Brighton Pool Shop (Domestic Building) [2006] VCAT 2457

ORDER

- 1 Order the First Respondent pay the costs of the Applicants of the proceedings (including any reserved costs) on a party/party basis according to the appropriate County Court Scale “C”. In default of agreement by 22 December 2006 I refer the assessment of such costs to the Principal Registrar.
- 2 Order the First Respondent to pay the Applicants’ damages by way of interest in the sum of \$10,892.00.
- 3 I make no other orders for costs.
- 4 I order the Applicants to pay the First Respondent interest on a sum to be entered by consent.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants

Mr P. Baker of Counsel

For the Respondents

Mr B. Reid of Counsel

REASONS

- 1 I delivered Reasons for Decision in this matter on 29 August 2006.
- 2 I made orders on that occasion that there be an –
 - a Order on the claim for \$42,847.45 with interest to be calculated.
 - b Order on the counterclaim for \$4,000.00 with interest to be calculated.I also reserved costs.
- 3 When I published those Reasons I indicated misgivings about making costs orders, in general terms, considering the history of the proceedings and their protracted nature. However, I reached no final position in the matter and on this day I have heard submissions from both parties regarding costs issues.
- 4 My misgivings then, and now, are reinforced by the terms of s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* itself. The commencing position is that costs should lie where they fall. I should depart from that position under s109(2) only if I am satisfied it is fair to do so, having regard to s109(3).
- 5 The submissions of the parties were directed to my discretion to depart from s109(1).
- 6 The Applicants apply for their costs and cite in that regard various authorities.
- 7 The Respondents, on the other hand, also citing various authorities, oppose this and submit that the Second Respondent should not be liable for any costs and that the Applicants and the First Respondent should each bear their own costs. This is subject to a caveat regarding costs of an amended pleading.
- 8 In the end, the question of costs is for me to decide. I may inform myself from past decisions and rulings but they can serve as guides only. The discretion given under s109 is dependent on the facts of each case and cannot be fettered.
- 9 Applying that principle to this case, I am quite satisfied that, in the exercise of my discretion, it is fair to depart from s109(1), under s109(2), having regard to s109(3), to order costs in favour of the Applicants.
- 10 My reasons for doing so include these:
 - a The Applicants have succeeded on the initiating claim.
 - b The Applicants have not only succeeded but have done so to an amount nearly 10 times that which was ordered on the Counterclaim.
 - c The proceedings were long, complex, detailed and very expensive.
 - d Fundamentally, the First Respondent was proven to be at fault in law.

- e The First Respondent's activities in building a wall without a permit were extremely hazardous and the illegal removal of equipment from the Applicants' premises was wrong headed and unjustified.
 - f It is apparent that the Applicants made many attempts at reasonable compromise (very reasonable compromise as it turns out, in my view) but the First Respondent, I am clear, was obstinate and unreasonable. This is the factor of major significance.
- 11 In such circumstances I think it would be unfair not to depart from s109(1). I consider that the Applicants have throughout – so it is now clear to me, to the requisite degree – acted responsibly and, more importantly, reasonably.
 - 12 I order party/party costs in their favour for the whole proceedings (including the appearance today) on the appropriate County Court Scale “C”. I consider that is the appropriate scale given the nature of the proceedings.
 - 13 I do not take up the invitation to order indemnity costs in their favour. The case is not sufficiently “exceptional” in my view.
 - 14 Nor do I make any discount for the length of the proceedings. That it seems to me was unfortunate and inconvenient and irritating. But it is not unusual for some cases to exceed their allotted time limits. In any event the case would not have had to proceed at all if it had been compromised – as it should have been – by the First Respondent.
 - 15 Considering the terms of s53(2)(b)(ii) of the *Domestic Building Contracts Act* 1995 I think it is appropriate to order damages in the nature of interest be payable to the Applicants by way of damages in the sum of \$10,892.00. I think it is appropriate to calculate that amount from the date of issue to today's date. I accept as correct the calculations which have been made. I do not allow the further sum of \$1,244.00 claimed on the judgment.
 - 16 I do not intend to order costs in favour of the Second Respondent although the case against him did not succeed, for the reasons I gave. He has been the guiding mind, for most purposes, of the First Respondent – and it is the First Respondent which, acting reasonably, should have compromised, instead of obstinately requiring the Applicants to proceed to judgment, if they were to effect any recovery at all. As well, there is the conduct of his son, Matthew Keyhoe, I regard as on behalf of the First Respondent (of which the Second Respondent is director) in wrongfully entering the Applicants' premises and removing items. I do not consider that Matthew Keyhoe was on a frolic of his own on that occasion. There is, also, the fact that a large wall was built without a building permit as required by law. That is deplorable conduct and dangerous, in my view, no matter what excuses might be proffered. Further, I note the judgement amount (ordered on 29 August) has not been paid. That indicates some disdain or, at the least, disregard.

- 17 Because I order costs in favour of the Applicants, I reject the submission I should order each party pay their own costs.
- 18 Specifically I reject the notion I should divide up aspects of the proceedings, after their conclusion, and order some costs in favour of one party or another on some minor issue in the overall process.
- 19 I am prepared to order interest on the Counterclaim in favour of the First Respondent from the date of its issue as mentioned in my Reasons. I do not, however, appear to have been given an amount to specify. The amount to be specified (on a figure of \$4,000.00 not a figure of \$248.80) should be able to be agreed.
- 20 I so order.

SENIOR MEMBER D. CREMEAN