

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D855/2005

CATCHWORDS

Costs – relevant considerations – conduct of the parties

FIRST APPLICANT	Martin Browne
SECOND APPLICANT	Greenleaf Nominees Pty Ltd
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND TO THIRTEENTH RESPONDENTS	Brett Andrew King, Rebeckah King, Christopher Teston Lane, Dee Christine Lane, Wendy Elizabeth Brown, Body Corporate 442930L att: Peter Michell, Madeleine Louise HO, Geoffrey Phillip Luff, John Edward Wilkinson, Denise Nancy Branson, Michelle Nookdin Hoodbhoy, Margaret Mary Hill
FOURTEENTH RESPONDENT	Robert Cilia
FIFTEENTH RESPONDENT	Omiros Emmanoulides
SIXTEENTH RESPONDENT	Theo Theodorou
SEVENTEENTH RESPONDENT	Metro Roofing Supplies Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	5 September 2006
DATE OF ORDER	8 September 2006
CITATION	Browne v Victorian Managed Insurance Authority (Domestic Building) [2006] VCAT 1855

ORDER

1. The Applicants are given leave to withdraw their claim against the Fourteenth Respondent and it is now withdrawn. The Fourteenth Respondent is otherwise to remain as a party to this proceeding.
2. Under section 60 of the Act upon the application of the Applicants I join as a party to these proceedings Pacific Estates Pty Ltd of Level 1, 12 Cramer Street, Preston, Victoria (the Eighteenth Respondent).
3. By 14 September 2006 the Applicants must serve a copy of these directions on the Eighteenth Respondent and must thereafter file a proof of service together with details of the Eighteenth Respondent's ACN.
4. Upon the application of the Applicants, I substitute Omiros Pty Ltd for Omiros Emmanoulides as the Fifteenth Respondent, and direct the principal registrar to amend the register accordingly. By 12 September 2006 the Applicants must advise the principal registrar of the ACN of the Fifteenth Respondent.
5. By 14 September 2006 the Applicants shall file and serve Further Amended Points of Claim substantially in the form exhibited to the Affidavit of Martin Brown dated 8 May 2006 amended as necessary following the withdrawal of the Applicants' claim against the Fourteenth Respondent, and with leave to amend and further particularise the claim against the Fifteenth Respondent, and the allegations against the Second to Thirteenth Respondents.
6. By 22 September 2006 the Sixteenth Respondent shall file and serve Points of Claim as against the Fourteenth Respondent.
7. By 8 October 2006 the Respondents may file and serve on the Applicants a Request for Particulars (to be specified in detail). A notice requesting "the usual particulars" or "the usual details" of some matter or thing shall not be served.
8. By 22 October 2006 the Applicants must provide answers to the Request for the Particulars.
9. Upon application, if proper, the Tribunal may order that a party, wholly or partly, need not comply with a Request for Particulars and may order costs.
10. By 10 November 2006 the Respondents must file and serve Points of Defence/Amended Points of Defence, as the case may be, specifying the material facts relied upon. Any set-off claimed must be fully set out.

11. By 16 October 2006 the parties (if they have not already done so) must each:
 - (a) file at the Registry and forward to each other a list of all documents in their possession or control, or in the possession or control of an agent, relevant to the proceedings; and
 - (b) make such documents available for inspection and photocopying upon 24 hours written notice.
12. Where experts are retained they must prepare their reports in accordance with Practice Note VCAT 2: Expert Evidence. Any party intending to rely on an expert report for the purpose of the compulsory conference must file and serve such report by 30 November 2006. Any party not intending to rely on an expert report should advise the principal registrar in writing by 30 November 2006.
13. **This proceeding is referred to compulsory conference to be conducted by Senior Member Lothian on 15 December 2006 commencing at 10.00 a.m. at 55 King Street Melbourne. Costs may be ordered if the compulsory conference is adjourned or delayed because of a failure to comply with directions including those relating to the compulsory conference.**
14. The parties may each be represented by professional advocates at the conference.
15. Unless the Tribunal directs otherwise, each of the parties must attend the conference personally or, in the case of a company, by a representative who has unlimited authority to settle. Costs may be ordered if a party's representative does not have unlimited authority to settle, or where a party refuses to negotiate in good faith at the compulsory conference.
16. The parties must each prepare a document not exceeding 4 A4 pages setting out a summary of their positions and must provide the Tribunal and each other party with a copy of that document at the commencement of the conference.
17. If the compulsory conference takes place but the parties do not settle, directions will be given and the matter fixed for hearing.
18. If the parties settle before the conference, they must notify the Registry immediately in writing.
19. The Fifteenth Respondent must pay the Applicants' costs of and incidental to the stay application heard on 18 July 2006 on an indemnity basis.

20. The Applicants must pay the Respondents' costs thrown away (if any) occasioned by the filing and service of the Further Amended Points of Claim referred to in paragraph 5 hereof. In default of agreement such costs to be assessed by the principal registrar on Supreme Court Scale on a party/party basis.
21. Liberty to the parties to apply for further directions until 4.00 p.m. on 8 December 2006.
22. Liberty to the Second to Thirteenth Respondents to apply to have their application for costs of the Compliance Hearing on 7 April 2006 heard before Senior Member Cremean.
23. The costs of this directions hearing are reserved.

Note: The Tribunal notes the Applicants are not otherwise proceeding with their application for joinder dated 8 May 2006.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the First Applicant	Mr J.M. Forrest of Counsel
For the Second Applicant	Mr J.M. Forrest of Counsel
For the First Respondent	Mr M. Czapnik, Articled Clerk
For the Second to Thirteenth Respondents:	Mr J. Nixon of Counsel
For the Fourteenth Respondent:	Ms. N. Balas, Solicitor
For the Fifteenth Respondent:	Mr A. McAdam, Solicitor
For the Sixteenth Respondent:	Mr P. Marzella of Counsel
For the Seventeenth Respondent:	No appearance

REASONS

1 On 11 August 2006 I dismissed the Fifteenth Respondent's application for a stay of the proceedings as against the Fourteenth to Seventeenth Respondents. The Applicants seek an order that the Fifteenth Respondent pay their costs of and incidental to the partial stay application on an indemnity basis. The Sixteenth Respondent seeks an order that the Fifteenth Respondent pay his costs of and incidental to the stay application.

2 Mr Forrest of Counsel appeared on behalf of the Applicants who rely on a letter from their solicitors to the solicitors for the Fifteenth Respondent dated 17 July 2006 which omitting the formal parts provides:

We refer to the above matter and your client's Application for a partial stay of the proceeding listed for the 18th of July 2006.

We regard your client's Application to be unfounded and with no prospect of success and invite your client to withdraw it on the basis that each party pay their own costs of and incidental to the preparation for the hearing of your client's Application.

Should your client decide to proceed with the Application we will produce this letter to the Tribunal seeking costs on the indemnity basis.

3 Mr Forrest submitted this was an appropriate case for the exercise of the Tribunal's discretion under s109(2) of the *Victorian Civil and Administrative Tribunal Act* 1998 submitting that the application for a partial stay was essentially a re-agitation of the application under s75 which was dismissed on 7 April 2006, albeit under a different guise. Section 109 provides that each party should bear its own costs of a proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) viz:

- (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.

4 It was conceded by Mr McAdam, solicitor, on behalf of the Fifteenth Respondent that if I was minded to exercise the Tribunal's discretion under s109(2) any costs order should be on an indemnity basis. However, his primary submission was that the Applicants' costs of the stay application should be reserved as it would be premature to make an order for costs until the final hearing and determination of this proceeding. If the Fifteenth Respondent was ultimately successful in persuading the Tribunal that the claim against it was lacking in merit then it would have been premature to have made an order for costs against it in relation to the application for a partial stay.

5 I reject this submission. The factors considered in determining the stay application were not concerned with the merits of the Applicants' claim against the Fourteenth to Seventeenth Respondents but rather whether it should be stayed pending determination of the application for review of the decision of the First Respondent. As recently noted by Judge Bowman in *State of Victoria v Bradto Pty Ltd (Palace Entertainment Complex) and Tymbook Pty Ltd (Palais Theatre)* [2006] VCAT 1813, in determining a question of costs, the Tribunal should have regard to the conduct of the parties in relation to the particular application, and that the impact and effect of the determination is immaterial. The Tribunal is empowered to exercise its discretion under s109(2) if it is satisfied *it is fair to do so* having regard to the matters set out in s109(3) (emphasis added). In this instance, I am of the view it would be unfair to the Applicants if I declined to make an order for costs in their favour.

6 The Fifteenth Respondent has conducted this proceeding in a manner which has unnecessarily disadvantaged the Applicants (and the owners – the Second to Thirteenth Respondents, although they make no application for costs of the stay application). Having been unsuccessful in his application under s75 the Fifteenth Respondent joined in the application by the Second to Thirteenth Respondents for a partial stay of the proceeding, which was subsequently withdrawn by them. At paragraph 17 of my Reasons dated 11 August 2006 I made the following observation:

Much of the material set out in the architect's submissions is a replication of the submissions in support of his application under s75 which was dismissed. Although the application before me is for a stay of the proceeding, any consideration of the submissions in relation to the applicability of the *Wrongs Act* submissions would by their very

nature require me to reconsider issues which have already been determined by the Tribunal in dismissing the s75 application. The architect has not sought leave to appeal that decision.

- 7 Having regard to the matters set out in s109(3), particularly s109(3)(b)(c) and (d), I am satisfied this is an appropriate case for the exercise of the Tribunal's discretion under s109(2) in favour of the Applicants and, having regard to the letter of 17 July 2006, and Mr McAdam's concession, that such costs should be on an indemnity basis.
- 8 The Sixteenth Respondent has also made application for his costs of the partial stay application. Mr Marzella submitted that as the Sixteenth Respondent was not excused from attending the hearing on 18 July 2006, that it had incurred costs in relation to what was ultimately an unsuccessful application and that the Fifteenth Respondent should be ordered to pay his costs on a party/party basis on Supreme Court Scale. As noted in paragraph 19 of my Reasons dated 11 August 2006, Mr Marzella indicated that if the application was successful the Sixteenth Respondent would nevertheless seek leave to appear at the hearing of the review application to protect his interests. I note that the First Respondent, and the Second to Thirteenth Respondents (who also attended the hearing) are not seeking any order for their costs of the partial stay application. I am not persuaded any order for costs should be made in favour of the Sixteenth Respondent.

The application by the Respondents for their costs thrown away occasioned by the various amendments to the Points of Claim

- 9 Mr McAdam indicated that the application by the Applicants to substitute Omiros Pty Ltd as the Fifteenth Respondent was not opposed subject to the question of any costs thrown away occasioned by the amendment.
- 10 Mr Nixon of Counsel appeared on behalf of the Second to Thirteenth Respondents and confirmed that they were seeking their costs thrown away occasioned by, what he said were numerous amendments to the Points of Claim. This was strenuously resisted by Mr Forrest on behalf of the Applicants. I have now had an opportunity of reviewing the file. The initial Points of Claim are dated 11 January 2006. Following the joinder of additional Respondents at a directions hearing on 17 January 2006 Amended Points of Claim dated 13 February 2006 were filed in response to which the Second to Thirteenth Respondents filed Points of Defence dated 14 March 2006. Although draft Further Amended Points of Claim have been filed in support of the Applicants' application for joinder dated 8 May 2006 leave to file and serve Further Amended Points of Claim has not been granted until now. The Second to Thirteenth Respondents have not filed any Amended Points of Defence.
- 11 I am satisfied it is appropriate that the Applicants should pay any costs thrown away which may have been incurred by the Second to Thirteenth Respondents by reason of the leave granted this day to file and serve Further Amended Points of Claim but not in relation to any of the drafts

which may have been served. I am also of the view that the Applicants should pay any costs thrown away by any other Respondent occasioned by the Amended Points of Claim to be filed and served in accordance with the directions made on this day.

Further and Better Particulars

- 12 Mr Nixon and Mr McAdam both expressed concern about the lack of particularity in the draft Amended Points of Claim insofar as they relate to any allegations/claims against the Second to Thirteenth Respondents and the Fifteenth Respondent respectively. Mr Forrest indicated that he would consider their concerns when finalising the Amended Points of Claim. I will grant the Respondents leave to seek further and better particulars but would encourage them to attend the compulsory conference as scheduled. As noted at the directions hearing on 5 September 2006, a compulsory conference has a number of functions as set out in s83 of the *Victorian Civil and Administrative Tribunal Act 1998*, not least of which is to identify the issues and clarify any points of law. It seems to me that given the increasing complexity of this proceeding as it unfolds, it is desirable that the parties attend a compulsory conference as soon as practicable.
- 13 I will otherwise reserve the costs of the directions hearing on 5 September 2006.

DEPUTY PRESIDENT C. AIRD