VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D197/2005**

CATCHWORDS

Section 81 of the *Victorian Civil and Administrative Tribunal Act* 1998 – costs of complying with order under s81 – costs of Applicants – solicitor/client costs

APPLICANTS:	Campaul Investments Pty Ltd (ATF Tulloch Family Trust)
RESPONDENT:	Contractors Bonding Limited
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Hearing
DATE OF HEARING:	25 January 2006
DATE OF ORDER:	14 February 2006

[2006] VCAT 177

ORDERS

1. The Respondent shall pay the costs of Stirling Horne and Bruno Secatore, the liquidators of Stonnington Building and Development Group Pty Ltd (in liquidation) of and incidental to complying with the order made on 24 August 2005 pursuant to s81 of the *Victorian Civil and Administrative Tribunal Act* 1998 as follows:

   (i) the costs of retrieval and production of the documents fixed in the sum of $858.00 or such lesser sum as may be certified by the liquidators as being in accordance with the scale of Insolvency Practitioners Association of Australia. Should such lesser sum be so certified the liquidators may apply to the principal registrar for an order to be made by Deputy President Aird in Chambers for payment by the Respondent of such sum; and

   (ii) the liquidators' application for costs including the hearings of 6 October 2005 and 25 January 2006. Such costs are to be paid on a solicitor/client basis. In default of agreement I refer the assessment or settlement of such costs to the Principal Registrar under s111 of the Act.

2. The Respondent shall pay the Applicant's costs of and incidental to the liquidator's application for costs including the hearing on 25 January 2006. Such costs to be paid on a solicitor/client basis. In default of agreement to be assessed by the Principal Registrar under s111 of the Act.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants:	Mr B. Potenza, Solicitor
For the Respondent:	Mr P. Quinn, Solicitor
For the Liquidators of Stonnington Building and Development Group (in liquidation)	Mr S. Stuckey of Counsel

REASONS

1. These reasons for decision relate to four proceedings (D197/2005, D199/2005, D182/2005 and D485/2005) all of which are appeals by homeowners against decisions of the Respondent, the warranty insurer, to deny liability in respect of their claims. Each of the claims is for incomplete and defective works following the liquidation of the builder, Stonnington Building & Development Group Pty Ltd. On 24 and 25 August 2005 I made orders under s82 of the *Victorian Civil and Administrative Tribunal Act* 1998 requiring the liquidators of the builder to produce certain documents to the Principal Registrar. Application has been made by the liquidators for their costs arising from those orders.

Background

2. On 10 May 2005 I made directions in proceedings D197/2005 and D199/2005 which included directions for the filing and service of Lists of Documents by 26 July 2005. The Respondent failed to comply with those orders and a compliance hearing was held on 24 August 2005.

3. On 27 July 2005 the Applicants' solicitors (in proceedings D197/2005 and D199/2005) wrote to the Respondent's solicitors as follows:

> *We refer to the above matter and note that pursuant to the Orders made on 10 May 2005 by Deputy President C Aird, the Respondent was required to file and serve List of Documents by 26 July 2005.*
>
> *We have not been served with a List of Documents and the Respondent is in breach of the Orders.*
>
> *Kindly indicate by return what you intend to do about your client's non-compliance.*

4. The Respondent's solicitor responded by letter dated 19 August 2005 more than 3 weeks later advising (in relation to D199/2005):

The Liquidator has indicated that he will not agree to us copying the documents held in relation to this matter.

Therefore it is necessary to make an application to the Court under the Corporations Law for an Order we can copy so that an adequate list of documents can be prepared on behalf of our clients.

Such an application will be made to the Supreme Court in due course for an appropriate Order.

VCAT, as you know, have not had jurisdiction to make an Order under the Corporations Law. (sic)

5. The Applicants' solicitors responded by letter dated 23 August 2005:

We refer to your facsimile letter dated 19 August 2005 but which was only received by our office today, 23 August 2005. The matters raised in your letter at this point of the litigation is entirely unsatisfactory.

We note that no issue regarding the documents has arisen prior to your letter.

Your letter fails to provide any explanation of previous attempts you have made to gain access to and to have copies the builder's documents.

This is an unacceptable state of affairs.

Section 81 of the VCAT Act empowers the VCAT to make relevant orders regarding the production of documents and copying can be undertaken by the VCAT under Section 128 or pursuant to orders under Section 80 generally.

We ask you to confirm that you will be making application for the production and copying of documents by return.

6. Mr Quinn, solicitor, appeared on behalf of the Respondent at the compliance hearing and said that although he had been able to carry out an informal inspection of the building files in early August, he had been advised by the liquidators that copies could not be made until a court order was obtained. There is no written communication to this effect from the liquidators, and no affidavit material in relation to these discussions has been filed by Mr Quinn. Mr Quinn also indicated the Respondent was unable to prepare particularised Points of Defence (in compliance with the directions of 10 May 2005) until it had access to, and copies of, the relevant building files. During the compliance hearing it became apparent that there had been little or no attempt to contact the liquidators

to arrange an inspection of the documents until early August 2005 (and then only in relation to the matter the subject of proceeding D425/2005 although Mr Quinn indicated there were 7 or 8 other claims in relation to the same builder) seemingly after receipt of the letter of 27 July 2005 from the Applicants' solicitor.

7. Mr Quinn said he had obtained instructions from the Respondent to make application to the Supreme Court of Victoria *'in due course'* for an appropriate order under s460 of the *Corporations Law.* Subsequently, during the costs hearing Mr Quinn indicated any such application would be under s486 (I make no findings as to the appropriate section for any such application, it not being relevant to the liquidators' application for costs). I raised the possibility of making an order under s81 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the Act'). Mr Quinn expressed some reservations as to the jurisdiction of the tribunal to make such orders. Mr Potenza, solicitor, who appeared on behalf of the Applicants, shared my view that the powers under s81 are very broad and enable the making of an order that the liquidators produce the relevant documents. Section 81 provides:

> (1) On the application of a party to a proceeding, the Tribunal may order that a person—
>
> (a) who is not a party to the proceeding; and
>
> (b) who has, or is likely to have, in the person's possession a document that is relevant to the proceeding—
>
> produce the document to the Tribunal or the party within the time specified in the order.
>
> (2) The Tribunal's power to make an order under sub-section (1) is exercisable by any member.

8. Although Mr Quinn asserts he maintained his position that the tribunal did not have jurisdiction to make orders under s81 ('the s81 orders') my recollection, confirmed after listening to the recording of the hearing, is that Mr Quinn indicated he had the Respondent's instructions to apply for whatever orders were necessary to obtain copies of the documents from the builder, said "*to save any*

argument before the Supreme Court the easiest way (is) to get VCAT to make an order and see what the liquidator does".

9. Mr Rakowski, solicitor, appeared on behalf of the Respondent at the Directions Hearing on 25 August 2005 in respect of proceedings D182/2005 and D425/2005. Mr Quinn states in paragraph 4 of his affidavits sworn 24 January 2006 in relation to each of these proceedings:

> *'That after time the Order pursuant to Section 81 of the Victorian Civil and Administrative Tribunal Act 1998 was made in this matter was made (sic). Mr Rakowski, an employee solicitor from my office appeared on behalf of the Respondent. I instructed Mr Rakowski to indicate to the Tribunal that if (sic) may be appropriate for it to make an order on the same basis as in Campual Pty Ltd, although this had neither been consented to nor opposed and was made of its own motion I verily believe that Mr Rakowski acceded to an order on that basis at the time he appeared'.*

10. Once again I have had the opportunity of listening to the recording. At the commencement of the Directions Hearing for proceeding D182/2005 I enquired of Mr Rakowski whether I should make a similar order under s81 to those made on the previous day and he responded: *"If you could – I was going to request that …"*

11. Not only did he consent to the making of the order in D182/2005 he confirmed an intention to seek such an order. And, in D425/2005 in response to a similar enquiry about the making of an order under s81, responded: *"Yes, thank you"*. In my view it is disingenuous to suggest that it might be appropriate for similar orders to be made, but then to argue that this is not the same as requesting that such orders be made.

Jurisdiction

12. As indicated to Mr Quinn during the costs hearing, having satisfied myself I had jurisdiction to make the orders on 24 and 25 August 2005, I am not prepared nor, in my view, am I able, to revisit the question of jurisdiction and effectively sit as

an appellate body in relation to those orders. It seems to me that Mr Quinn's primary objective for now questioning the tribunal's jurisdiction to make the s81 orders is to support his submission that his client should not be required to pay the liquidators' costs. I note that towards the end of the approximately three hour costs hearing, Mr Quinn made the observation that even had application been made to the Supreme Court in all probability orders similar to the s81 orders would have been made. He also acknowledged that the making of the orders had been a practical way of achieving production of those documents.

The Liquidator's application for costs

13. The liquidators are seeking the sum of $2,574.04 being the retrieval and production costs in relation to the s81 orders made in proceedings D197/2005 (on 24 August 2005), D182/2005 and D425/2005 (on 25 August 2005) and a further $1,424.98 in relation to the orders made in proceeding D199/2005. They are also seeking their associated legal costs of complying with the s81 orders, and their legal costs of and incidental to their application for costs necessitated by the Respondent's refusal to accept responsibility for them. They are seeking their legal costs on a solicitor/client basis.

14. Regrettably, although the orders in proceeding D199/2005 were made at the same time as those in D197/2005, the Respondent failed to serve a copy of those orders on the liquidators as ordered. I accept this necessitated some duplication of the work carried out by the liquidators in retrieving the documents. Although Mr Quinn said he had been told by Mr Rakowski that he had served the orders in D199/2005 on the liquidators, a Proof of Service has not been filed as required by the directions, nor otherwise produced by the Respondent. In light of Mr Quinn's assertion that the liquidators required a court order before allowing copies of the documents to be made, one could not have expected (as suggested by Mr Quinn during the costs hearing), the liquidators to deliver up the files in relation to D199/2005 simply because it was one of the files Mr Quinn had discussed with them.

15. The initial request from the liquidators was that the Respondent agree to pay their costs of retrieval of the documents capped at $3,000 with a further $500 legal costs. Subsequently the liquidators advised the Respondent the actual cost of retrieval was $2,574.00 plus the additional sum of $1,424.98 because of the failure of the Respondent to serve the s81 orders in proceeding number D199/2005. These costs appear reasonable – certainly much less than the costs incurred by the parties in attending this costs hearing.

16. Although Mr Stuckey of Counsel indicated on behalf of the liquidators that it was difficult to apportion the costs of retrieval in the sum of $2,574.00 between the three files to which they relate, for the purposes of making appropriate orders I am of the view that it is convenient to apportion those costs equally between the three proceedings - $858.00 for each proceeding, with the additional sum of $1,424.98 for proceeding D199/2005.

17. Having regard to the decisions of this tribunal in *Bufalo Corporation Pty Ltd v Bulla Road Pty Ltd* (unreported, 26 May 2000) and *Cabouret v Reward Insurance Pty Ltd* [2002] VCAT 1493 I am satisfied that the liquidators are entitled to their costs of complying with the s81 orders and I accept it is appropriate that the retrieval costs be in accordance with the Scale of Insolvency Practitioners Association of Australia. I will fix the costs of retrieval at the maximum sums sought by the liquidator or such lesser sums as may be certified by the liquidator as being in accordance with the said Scale. They are also entitled to their legal costs which I am satisfied should be on a solicitor/client basis.

Who should pay the liquidators' costs?

18. Mr Quinn submitted that the s81 order was for the benefit of all parties, and that the Applicants' discovery is incomplete and defective in each proceeding because it does not include the 'liquidators' documents'. He suggests that as the Applicants are unsecured creditors of the builder, these documents are in the care

custody or control of the Applicants and that it was their responsibility to obtain the appropriate orders for their discovery. The relationship between the Applicants and the liquidators is not relevant to the question of the liquidators' costs. I reject absolutely any suggestion that the owners had a responsibility to obtain production of the relevant documents by the liquidator to enable them to further their respective claims under the relevant policies of warranty insurance. It is clearly not in the spirit of warranty insurance nor am I persuaded, in the absence of any submissions drawing my attention to particular sections, required by the policy, that a homeowner, who has a claim under a policy of warranty insurance following a builder's insolvency, then has a responsibility to take extreme, or any, steps to obtain copies of the builder's files, to enable them to make a claim.

19. Although Mr Quinn's submissions focussed on the tribunal's jurisdiction under s81, and which party had the responsibility or standing to make any application to the Supreme Court, I make no findings in relation to either. In my view, they are not relevant to the question before me – who should pay the liquidators' costs. It was also suggested by Mr Quinn that if I were minded to make an order for costs that such costs should be apportioned equally between the five parties. Even if I were minded to apportion the costs it would be in the proportions raised by me during the costs hearing – Mr Quinn's client is the Respondent in the four proceedings and therefore, at the very least, would be responsible for fifty per cent of the liquidators' costs with the other fifty per cent apportioned equally between the four Applicants. However I am not persuaded that apportionment is appropriate.

20. The s81 orders were made in the context of the Respondent's clearly expressed intention to apply for whatever order was necessary to obtain access to, and copies of, the relevant documents to enable it to comply with the directions made on 10 May 2005, both in relation to discovery and the filing and service of particularised Points of Defence. Further, had application been made to the

Supreme Court I expect that the party making the application, who I anticipate would have been the Respondent, as it had apparently given instructions to Mr Quinn to make such application, would have been ordered to pay the liquidators' costs.

21. It is further submitted by Mr Quinn that having inspected the documents produced by the liquidators he formed the view, as set out in paragraph 9 of the Affidavits filed in each of the proceedings, sworn on 24 January 2006:

> *9. That I verily believe from my inspection that:*
>
> *(a) The Tribunal would not properly be able to hear this matter and the related matters of …the documents produced being put into evidence.*
>
> *(b) None of the parties legal representatives could properly prepare their cases for conduct of these proceedings and the related proceedings of … without inclusion of these documents.*

22. I accept the respective submissions made on behalf of each of the Applicants that it is for them to decide how to conduct their cases. Whether or not these documents are required for the conduct of their case is immaterial to the question of the liquidators' costs. Once the Respondent has filed and served its Lists of Documents I expect the Applicants will make whatever arrangements for inspection and copying of documents they consider appropriate, in the normal course of the litigation.

23. Further I note that where Lists of Documents have been filed they include an item in the following terms,

> '*Copy documents yet to be accessed and copied as relevant from the files and documents of Stonnington Building and Development Pty Ltd held by the Liquidator Bentley MRI Accountants. Access to these documents provided for pursuant to an order of the Victorian Civil and Administrative Tribunal dated 24/25 August, 2005 has so far been denied*'.

23. There was no satisfactory explanation from the Respondent as to why documents

over which it contends it has no control have been included in its List of Documents. In all the circumstances I am satisfied the Respondent is responsible for payment of the liquidators' costs.

The Applicants' application for costs

24. The Applicants in each proceeding also seek their costs of and incidental to the liquidators' application for costs on a solicitor/client basis. Having regard to the provisions of s109 of the Act and in particular s109 (3) (a) and (b) I am satisfied the Applicants have been unnecessarily disadvantaged by the conduct of the Respondent. The Applicants have incurred the costs of what was, essentially, an unnecessary hearing. Whilst a party is generally entitled to have the tribunal determine its liability in respect of costs, in circumstances where the s81 orders were clearly made for the benefit of and with the support of the Respondent, where the non-availability of the documents held by the liquidators was proffered as an excuse for its non-compliance with directions in two of the proceedings, it should come as no surprise to the Respondent that it has been held liable for payment of those costs.

25. The Respondent has put each of the Applicants to the cost and expense of preparing affidavit material and attending the costs hearing because of its reluctance to accept responsibility for and agree to payment of what can only be described as the very reasonable costs of the liquidators. I am not prepared to consider any application for costs of the Directions hearing held on 6 October 2005 where directions amending the previously set timetable were made. Although I accept caution should be exercised before awarding solicitor/client costs, I am satisfied it is appropriate to do so in this instance. This costs hearing was entirely unnecessary.

26. In default of agreement between the Respondent and the liquidators, and/or the Respondent and the Applicants of them I will order that such costs be settled or assessed by the principal registrar under s111 of the Act on a solicitor/client

basis.

Comment

27. Notwithstanding Mr Quinn's assertion that the Respondent has taken all reasonable steps to progress the litigation the facts and circumstances of this application and the Respondent's conduct generally indicate otherwise. The law is quite clear – a third party should not be out of pocket in complying with an order of a court or tribunal for third party discovery and it should come as no surprise to the Respondent that it has been held liable for payments of those costs. Further I note the Respondent has consistently failed to comply with Directions in all proceedings. At the costs hearing I extended time for the filing of Lists of Documents by the Respondent to 3 February 2006 although Mr Quinn indicated he would be in a position to file and serve them by 27 January 2006. The Respondent has once again failed to comply.

DEPUTY PRESIDENT C. AIRD