VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVILDIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D521/2008

CATCHWORDS

Costs – section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 – whether order for indemnity costs should be made

APPLICANT	Charant Developments Pty Ltd (ACN: 108 077 943)
FIRST RESPONDENT	Qui Nguyen
SECOND RESPONDENT	Thao Huynh
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	4 September 2009
DATE OF ORDER	10 November 2009
CITATION	Charant Developments Pty Ltd v Nguyen & Anor (Domestic Building) [2009] VCAT 2339

ORDER

1. The respondents shall pay the applicant's costs of this proceeding including reserved costs except for the costs of and incidental to the obtaining of the expert report of Andrew McLeish, Senior Manager, PPB Forensics, and his attendance at the hearing to give evidence. In default of agreement such costs are to be assessed by the principal registrar on a party/party basis on County Court Scale 'D'.
2. Certify for counsel for $3,300 for each day of the hearing – five days.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr A. Sandbach of Counsel
For Respondents	Ms E. Ruddle of Counsel

REASONS

1 On 1 May 2007 the parties entered into a building contract for the construction of a new home by the applicant builder for the respondent owners with a contract price of $430,000. During the course of construction, when it came time for the door handles to be ordered, disputes arose between the parties about which document comprised the contract specifications. The builder contended it was a four page document headed 'Architectural List of Inclusions' ('the builder's list of inclusions') and the owners contended it was a five page document headed "-final- Architectural complete inclusions" ('the owners' list of inclusions'). The builder commenced proceedings on 5 August 2008 applying for the tribunal to determine the issue.

2 The owners denied that the initials on page 4 of the contract were theirs or that those of Mr Nguyen on the builder's list of inclusions were his. In other words, they alleged that their initials had been forged. After a five day hearing I determined the builder's list of inclusions comprised the contract specifications, and reserved the question of costs with liberty to apply ('my earlier reasons')[1]. I understand that following the publication of my decision on 6 August 2009 the builder issued the owners with a 'notice to pay' and all monies then outstanding under the contract were paid together with interest.

3 The builder has applied for its costs on an indemnity basis. The application for costs is opposed, in the alternative the owner says that any order for costs should be on a party/party basis on County Court Scale 'B'.

4 Mr Sandbach of Counsel appeared on behalf of the builder, and Ms Ruddle of Counsel appeared on behalf of the owners.

5 In considering any application for costs I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides that each party must bear its own costs of a proceeding unless the tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109 provides:

> 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;

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[1] *Charant Developments Pty Ltd v Nguyen & Anor* [2009] VCAT 1553

(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

6 Counsel for the builder appeared to proceed on the presumption that a costs order would be made in its favour and that it was simply a matter of whether such an order should be on a party/party or indemnity basis. However, in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:

> i. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that <u>it is fair to do so</u> having regard to the matters stated in s109(3). <u>That is a finding essential to making an order</u>. (emphasis added)

7 Counsel for the owners has prepared detailed written submissions in relation to each of the matters set out in s109(3), which must be considered by the tribunal when deciding whether to exercise the discretion under s109(2). It is submitted on behalf of the owners that I should not exercise the tribunal's discretion under s109(2) because it would not be fair to do so having regard to the manner in which the builder has conducted this proceeding. Further, if I was persuaded an order for costs should be made, an order for indemnity costs should not be made, and that such costs should be on a party/party basis on County Court Scale 'B'. The owners have not applied for costs.

<u>Section 109(3)(a)(i) failing to comply with orders of the tribunal</u>

8 The owners allege that the late service of witness statements in reply which were due on Friday, 23 January 2009 limited the available time for proper preparation of their case. Mr Merola's witness statement in reply was apparently served on Wednesday, 28 January, three business days late. The witness statements in reply of the builder's other witnesses were not served until Friday, 30 January and the hearing commenced on 3 February.

9 An adjournment of the hearing was not sought, nor was any request for preparation time made. It was apparent during the hearing that counsel for the owners had carefully and thoroughly prepared the owners' case, and I am not persuaded there was any disadvantage suffered by the owners as a result of the late service of witness statements in reply such that they should not be ordered to pay the builder's costs.

10 Again, the late filing of the builder's written submissions which were due on 23 February, but were not filed until 11 March, did not cause any unnecessary delay in the finalisation of the proceeding. Any delay in delivery of the decision was due to my commitments, and was not caused by the late filing of these submissions.

11 Further, I am not satisfied that the owners were disadvantaged by the late filing of Mr Holland's first report on 6 January 2009, although it was due on 12 December 2008, such that they should not be ordered to pay the builder's costs.

Section 109(3)(a)(iv) – causing an adjournment

12 The hearing was initially listed for 2 December 2008 but was adjourned to 3 February 2009, at the builder's request, following the later than initially expected receipt of Mr Storey's report. It is submitted on behalf of the owners that the builder decided to obtain its own report because Mr Storey's report was unfavourable to it, and that they were disadvantaged because they *'...the Respondents, who, having borne half the cost of the Tribunal's expert, were faced with the position of not having an expert engaged by them to assist them...'*[2]

13 First, although the parties consented to the appointment of Mr Storey as an expert under s94 of the VCAT Act, it was , in my view, entirely appropriate and reasonable for the builder to retain its own expert because of the seriousness of the allegations. Section 94 provides for the appointment of an expert to *'advise it in respect of any matter arising in a proceeding'* with the costs of the expert to be paid by the parties *'in the proportions determined by the Tribunal'*. Further, the tribunal does not have property in an expert and is not bound to accept the opinion of a s94 expert.

14 Bearing in mind that the paramount duty of all experts is to the tribunal not to their clients[3], it was entirely a matter for the owners whether they engaged their own expert or simply relied on Mr Storey whose opinion I found could only be regarded as 'weak' support for the allegation that the disputed initials had been written by someone other than Mr Nguyen. Any disadvantage the owners perceive they have suffered, because they failed to obtain their own expert report once they became aware that the builder was obtaining its own, is a matter for them.

[2] Respondents' submissions as to costs at [11]
[3] PN VCAT2

Section 109(3)(b) – length of hearing

15 The hearing proceeded over five days with the primary witnesses being cross-examined at length. I do not accept the submission on behalf of the owners that the cross-examination of Mr Storey, the s94 expert, unreasonably prolonged the hearing. Whilst it might be unusual for a s94 expert to be cross-examined, because of the seriousness of the allegations, and, further, because it was apparent that Mr Storey may not have had access to the same material as Mr Holland [the builder's expert], as a matter of fairness it was appropriate that the builder be given an opportunity to test his evidence. At the time no objection was raised on behalf of the owners.

Section 109(3)(c) – relative strengths of the parties, including whether the claim has not tenable basis in fact or law

16 The owners' case was weak. As will be seen from my earlier reasons, I found Mr Nguyen to be a less than satisfactory witness, and repeat my comments in my earlier Reasons:

> Despite counsel's best endeavours to ask clear and direct questions in cross-examination, Mr Nguyen was evasive in his answers preferring, it seemed, to answer the questions he thought should be asked, not those that were being asked. [50]

and

> Surprisingly, he [Mr Nguyen] did not accept, when it was put to him in cross-examination, that he would obtain a financial advantage if the owners' inclusion sheets were found to be the contract inclusions. This seems to me to be disingenuous. The cost of the cobra door handles is approximately $15,000 more than the cost of those allowed for in the builder's inclusion sheets. [53]

17 In my view the inherent weakness of the owners' case is a matter which supports an order for costs in favour of the builder.

Section 109(3)(d) – complexity and nature of the proceeding

18 I do not agree with counsel for the owners that the cost of the Cobra door handles, which seems to have triggered this dispute, is in anyway reflective of the complexity of this proceeding. The allegations made by the owners, if proved, could have had very serious implications for the builder. The cost of the door handles was not the subject of the preliminary hearing. I was required to determine which list of inclusions comprised the contract specifications and, in doing so, consider the owners' allegations that the initials on page 4 of the contract and on the builder's inclusions sheets had not been written by them: that they were forged.

19 Having considered the submissions I am satisfied that in the circumstances of this proceeding it is fair to make an order for costs in favour of the builder.

The builder's application for indemnity costs

20 The builder seeks costs on an indemnity basis. The Court of Appeal has made it clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. As Nettle JA said in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165:

> … where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

21 Counsel for the builder referred me to the comments of Robson J in *Vink v Tuckwell (No 3)* [2008] VSC 316 where he said:

> 93 The authorities discussed below establish that merely alleging fraud and failing to make out the allegation is not by itself sufficient to constitute special circumstances entitling a court from departing from the general rule that costs are taxed on a party/party basis. On the other hand, if the allegation of fraud is made where it is irrelevant to the proceedings or is made knowing it to be false, then the court may well be justified in ordering costs on an indemnity basis.
>
> 94 In my opinion, making allegations of fraud without reasonable grounds is tantamount to making the allegations with little or no regard as to whether the allegations are true or false. The law typically prescribes the same culpability to reckless indifference as to actual knowledge.

22 Although the allegations of forgery were very serious. I am not persuaded costs should be ordered on an indemnity basis. Had I been satisfied, on the balance of probabilities, that the initials had been forged this could have had serious implications for Mr Merola of the builder. As I said in my earlier reasons:

> This is an unfortunate case where the integrity of the parties has been called into question. This dispute insofar as it relates to the initials on page 4 of the contract might well have been avoided if the builder had used an original bound contract, rather than a photocopy, and provided a similarly bound duplicate to the owners. The builder's record and document system appear haphazard to say the least. It is unfortunate that the builder has not retained copies of the 56 revisions of the list of inclusions, or emails passing between the parties. However, on the evidence before me I cannot be satisfied that the owners' list of inclusions comprise the contract inclusions. For the reasons I have discussed I am not persuaded that the disputed initials are not those of Mr Nguyen. Further I am not satisfied that the owners' list of inclusions was provided to the builder by email on 28 April 2009, prior to the contract signing. I accept Mr Merola's evidence as to

> what happened at the contract signing. Accordingly I find that the builder's 4 page list of inclusions comprises the contract inclusions.

23 Further, although one day was allocated for the hearing of the preliminary question [to determine which list of inclusions comprised the contract specifications], it proceeded over five days. One day had been allocated in consultation with the parties' legal representatives, at the same directions hearing when orders were made appointing Mr Storey as a s94 expert.

24 At the time, it seemed clear that this was a simple matter as to whether the owners' initials had been forged by the builder, as they alleged. One might well have expected this to have been determined after hearing from the parties as to the circumstances surrounding the signing and initialling of the contract documents, and then a consideration of the expert evidence. In the event, the builder filed a lengthy witness statement of Mr Merola, one of its directors, and also of a number of contractors who were also called to give evidence. A considerable proportion of the hearing time was concerned with the conduct of the owners, and in particular Mr Nguyen prior to the contract being entered into, and during the period of construction. This was of limited assistance to me in determining which list of inclusions comprised the contract inclusions, or whether the initials were those of the owners.

25 Further, towards the end of the hearing the builder sought leave to call a further expert witness: Andrew McLeish of PPB Forensics, whose evidence, quite frankly, did not add anything. Accordingly, all costs incurred by the applicant in obtaining this report, and Mr McLeish's attendance at the hearing must be paid by it. As I said in my earlier reasons:

> Towards the end of the hearing the builder sought to lead evidence from Andrew McLeish, Senior Manager, PPB Forensics, about the integrity of the information obtained from the owner's computer or the information on the USB key including the date stamps. The builder contends this material suggests that Mr Nguyen has tampered with the inclusion sheets. On the evidence before me I am unable to reach any conclusions about the integrity of the data, and <u>in any event do not consider that it assists me in determining which list of inclusions comprises the contract inclusions</u>. [42] [emphasis added]

26 I am not persuaded that there is anything so exceptional about this proceeding that would justify an order for indemnity costs.

Conclusion

27 I am satisfied this is an appropriate case for the exercise of the tribunal's discretion under s109(2) of the VCAT Act and that it is fair to order the owners to pay the builder's costs of this proceeding. I consider County Court Scale 'D' to be the appropriate scale for the assessment of costs if the parties are unable to reach agreement. The issues were complex, and

although the cost of the Cobra door handles may have triggered the dispute, this was not the issue before me.

28 Counsel for the builder requested I certify for counsel at $3,300 per day for the five days of the hearing, $330 per hour for preparation of submissions and reply submissions and one day for this costs hearing including preparation.

29 Inexplicably, it is submitted on behalf of the owners that the briefing of 'senior-junior' counsel with some 25 years experience was unreasonable where the amount in dispute was $15,000. As I have commented a number of times, this was not the issue before me. Given the seriousness of the allegations and the possible implications for the builder had I found for the owners, it was entirely appropriate for the builder to brief experienced counsel.

30 In the circumstances of this case, noting the seriousness of the allegations, I consider it fair and appropriate to certify for counsel at $3,300 per day for the five days of the hearing. However, I am not prepared to certify for counsel's fees for preparation of submissions and reply submissions nor for the costs hearing. In this regard I concur with and adopt the comments by Young SM in *Ryan v VMIA* [2007] VCAT 965 where he said

> I consider that the use of experienced junior counsel was required to properly and comprehensively put the Applicants' evidence and legal submissions. Therefore, I consider that the appearance fees sought are justified and I will so order. In relation to the hourly fee for paperwork and preparation I consider that these items are specifically covered or encompassed in the items set out in Scale 'D; and as that is the appropriate scale, I consider that there is insufficient justification to order higher fees for these specific items.

31 Further to my earlier comments, I am not satisfied it would be fair to order the owners to pay the costs of Mr McLeish's report/s or his attendance at the tribunal to give evidence. His was of little probative value and did not assist me in determining whether the owners' initials had been forged, as they alleged. I will therefore except payment of his costs from my orders.

DEPUTY PRESIDENT C. AIRD