VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP560/2017

BUILDING AND PROPERTY LIST

CATCHWORDS

Building dispute; successful party's application for costs; costs awarded.

FIRST APPLICANT	Mr Eswaran Chidambaram
SECOND APPLICANT	Sharmilla Perera
RESPONDENT	Pace Development Group Pty Ltd (ACN 108 488 817)
WHERE HELD	Melbourne
BEFORE	Hugh T. Davies, Member
HEARING TYPE	Costs Hearing
DATE OF HEARING	In Chambers
DATE OF ORDER	3 July 2018
CITATION	Chidambaram v Pace Development Group Pty Ltd (Building and Property) [2018] VCAT 994

ORDER

The applicant must pay to the respondent the respondent's costs of the application to be assessed on a party and party basis on the County Scale by the Costs Court in the absence of agreement

APPEARANCES:

For the Applicant

For the First Respondent

For the Second Respondent

REASONS

1 On 22 March 2018, following a hearing on 8 March 2018, I made orders dismissing the application and reserving the question of costs. The applicants, who were not legally represented at any stage of the proceeding, had sought damages of $14561.39.

2 The parties were given leave to file submissions as to costs which the respondent did by a document dated 13 April; the applicants have not filed submissions despite my ordering, on 15 May 2018, that they have an extension of time until 1 June to do so.

3 In its submissions the respondent sought the following order:-

> *"The Applicants pay the costs of the Respondent, of and incidental to these proceedings, including reserved costs, to be assessed in accordance with the County Court Scale on the normal basis by the Victorian Costs Court."*

4 The Tribunal's power to award costs is contained in Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act") which provides:-

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (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.

5 Sections 109 (3) (a) (i) & (vi), (c) & (d) require consideration in this costs application.

6 In my view this is an appropriate matter in which to award costs.

7 In Vero Insurance Ltd v The Gombac Group Ltd [2007] VSC 117 Gillard J stated:

> *"In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis as follows:*
>
> *(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 it is fair to do so. That is a finding essential to making an order.*
>
> *(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question."*

8 In a letter to the applicants dated 16 September 2016, before the application was lodged in the Tribunal, the respondent's legal representative stated: -

> *"We would, in the normal course, request details of how it is that you allege that our client is responsible for the damage sustained to the Property before recommending that our client provide any response.*
>
> *However, our client is reluctant to incur costs associated with that process in circumstances where it can demonstrate there is no liability on its part anyway.*
>
> *We are instructed that this is not the first time that you have alleged that there is a water leak on your balcony.*
>
> *We are instructed that in or around October 2013, you engaged a building consultant, Kieran Warrin of Gemcan Constructions Pty Ltd, to inspect the Property and prepare a report to comment on the cause of the alleged water leak.*
>
> *In Mr Warrin's report dated 2 October 2013, he relevantly concluded as follows:*
>
> *"One area in particular that had major signs of corrosion was in the centre of the decking. This was clearly the cause of the water leak that penetrated the unit below.*
>
> *We believe the cause of the corrosion was dog urine."*

While our client was under no obligation to carry out any work at that time, our client, in good faith and without any admission as to liability, addressed your concerns by removing and replacing the damaged roof sheeting and reinstalling the decking, at our client's cost.

At that time, we are instructed that our client again reminded you that acid from pets' urine/excrement could cause premature deterioration of the zinc aluminium tray deck underneath the decking, and warned you that appropriate measures should be put in place to avoid pets continuing to urinate on the balcony.

You now complain that your balcony is again leaking water. Our client's investigations show that contrary to our client's advice, you have continued to allow your tenants' pets to urinate on the balcony.

In the circumstances, we are unclear of the basis on which you can substantiate any claim against our client and our client denies any liability for the damage sustained to the Property.

It seems to us that your tenants are responsible for the damage sustained to the Property and we suggest that you direct your attention towards them.

Alternatively, if you wish to pursue a claim against our client despite what we have said above, such claim will be vigorously defended. If the need arises, this letter will be referred to on the question of costs which will be sought on an indemnity basis."

9 On 4 May 2017, Member Rowland ordered that

1. *The applicant must give the respondent at least 7 days' notice of commencing the building works and give the respondent reasonable access to inspect the balcony and take photographs.*
2. *The applicant must at least 7 days prior to the works commencing provide the contact details for the contractor engaged to carry out the works to the respondent.*
3. *The applicant must provide to the respondent a copy of the documents under order 1 of the directions dated 4 May 2017 in OC229/2017 as soon as possible.*
4. *The application is adjourned to a date no later than 1 August 2017. Any party may renew the application by requesting a hearing date in writing from the Principal Registrar by 1 August 2017. If no written request is received by this date the application will be marked dismissed.*

10 The Applicants failed to comply with those Orders which put the Respondent at the disadvantage in not being able to engage an expert to carry out a detailed inspection and provide a full report. The Respondent could only obtain a report from its expert replying to the comments made in the applicants' experts reports.

11 In my view, these matters of themselves justified the respondent being legally represented as it might not otherwise have been.

12 Deputy President Bowman in *State of Victoria v Bradto Pty. Ltd. and Timbrook Pty. Ltd [2006] VCAT 1813 (*as cited with approval by the Court of Appeal of the Supreme Court of Victoria in *24 Hour Fitness Pty. Ltd v W & B Investment Group Pty. Ltd S APCI 2015 0039)* stated, when considering Section 92 (2) of the RTA, that a proceeding is conducted in a vexatious manner *"if it is conducted in a way productive of serious and unjustified trouble or harassment or if there is a conduct which is seriously and unfairly burdensome, prejudicial or damaging*".

13 The views expressed by Rigby Cooke in its letter of September 2016, in the end run, were the same as those upon which the Tribunal based its decision to dismiss the application.

14 In *Dennis Family Corporation Pty. Ltd. v Casey CC [2008] VCAT 691* the Tribunal observed that it is "probably seldom" that an order for costs would be made having regard to Section 109(3) (c) alone where there was a real issue to be tried and real justification for the claims being made on either side and that it is only where there is a "very weak case for one side or none at all", that this consideration is likely to lead to an order for costs. *(See Pizer's Annotated Act 4th Edition at 109.200).*

15 As stated *in Gresham v Bass SC, [2004] VCAT 1537*, costs are not to be awarded automatically just because the case may be weak or untenable.

16 Whilst the fact that an applicant fails in its claim does not necessarily mean that the claim had no tenable basis in fact or law so as to attract the provisions of Section 109 (3) (c), in this matter the respondent had a resounding win. The bases of the written reasons for my decision gave total endorsement to the submissions made by counsel for the respondent at the hearing, and to the contentions made by the respondent's legal representative in a letter to the applicant referred to below. There was not a single finding or conclusion in the applicants' favour.

17 What constitutes a complex matter for the purposes of Section (109) (3) (d) will vary from case to case. Whilst this application involved a reasonably straight forward claim by the applicants that the respondent had failed to carry out works at their property in a proper and workmanlike manner it became more complex because of the way the applicants commenced and prosecuted the claim; in other circumstances, neither the claim nor the hearing would have involved what, in this context of this List and the facts of the particular case, constituted complex issues.

18 This was not a "large matter of a commercial type", an issue the Tribunal dealt with in *Sixty-Fifth Eternity Pty. Ltd v Boroondara CC [2009] VCAT 284*.

19 In numerous decisions of the Tribunal, including *Solid Investments Pty. Ltd v Greater Geelong CC [2005] VCAT,* it has been stated that "complexity"

by itself would rarely be enough to justify a costs order and that it is just one of the issues to be considered.

20 However, in my view the cumulative effect of all relevant issues to which Section 109(3) of the Act refers, in this case, arising almost entirely from the applicants' conduct, should result in a costs order.

Hugh T Davies
Member