VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D502/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – application for costs – liability of lawyer.

APPLICANT	Classic Period Homes Pty Ltd (ACN: 096 046 105)
RESPONDENT	David Appleby
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Proceeding
DATE OF HEARING	25, 26 and 27 June 2007
DATE OF ORDER	27 June 2007
CITATION	Classic Period Homes v Appleby (Domestic Building) [2007] VCAT 1235

ORDER

1 I order Mr Glen Thexton to pay $3,135.00 to the Respondent.

2 I direct the Principal Registrar to relist the principal proceeding for further hearing (closing submissions) before me on 13 July 2007 at 10.00 a.m. at 55 King Street Melbourne. Allow 1 day.

3 Costs (not including 27 June 2007) reserved.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr G. Thexton, Solicitor
For the Respondent	Mr A. Beck-Godoy of Counsel

REASONS

1 I provide these Reasons for the order I have made against Mr Glen Thexton, solicitor.

2 He represents the Applicant in the proceedings. The Respondent is represented by Mr Beck-Godoy, of Counsel, instructed by Mr John Hoey.

3 I have ordered Mr Thexton, himself, to pay costs of $3,135.00. In that regard I have acted under s109(4) of the *Victorian Civil and Administrative Tribunal Act* 1998. Before make such order, I provided him with a reasonable opportunity to be heard required by s109(5). I satisfied myself there was nothing further he wanted to submit on the point.

4 I set out s109, in its entirety, as follows:

> (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.
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> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
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> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
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> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
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> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
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> (iii) asking for an adjournment as a result of (i) or (ii);
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> (iv) causing an adjournment;
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> (v) attempting to deceive another party or the Tribunal;
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> (vi) vexatiously conducting the proceeding;
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> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
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> (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;
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> (d) the nature and complexity of the proceeding;
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> (e) any other matter the Tribunal considers relevant.
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> (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

(5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.

(6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.

5 Under s109(4) Mr Thexton is the "representative" of a party – namely, the Applicant.

6 I am satisfied that I am able to make the orders I have made, despite the proceedings still continuing, under the combined effect of s109(2) and (4). I am clear also that, under s109(2), I may order a specified part of the costs of the Respondent to be paid – namely, those incurred in respect of 27 June 2007. Those costs I have taken to be one whole day including costs of the previous day between 3.00 p.m. and 4.00 p.m. which I specifically reserved.

7 Having regard to the terms of s109(4) I am satisfied that Mr Thexton, rather than his client, is responsible for conduct described in s109(3)(a) and (b). Having regard to his conduct, and to his responsibility, I am satisfied, further, that the Respondent has incurred costs unnecessarily by reason of such conduct.

8 Finally, having regard to the terms of s109(3), and to the duty of the Tribunal under s97 of the Act to proceed fairly, I am not in any doubt it is fair I should make the order for costs against him personally and that he should compensate the Respondent for its costs incurred unnecessarily as I say. I have indicated that those costs equate to one whole day of the proceedings. I have ordered such costs to be paid on an indemnity basis because that is justified and I am satisfied any other basis will not "compensate" the Respondent as mentioned in s109(4).

9 I am very clear, I should add, that, in the absence of s109(4), I would be ordering the Applicant to pay those costs under s109(2) having regard to s109(3) because I would be satisfied it is fair to do so – that is, to depart from the initial position established by s109(1). But it is Mr Thexton on behalf of the Applicant, and not the Applicant itself, who bears responsibility. Therefore, under s109(4) it is he, and not his client, who should be ordered to compensate the Respondent in costs.

10 Hence, my orders do not in any way reflect upon the Applicant as regards the merits of the case. I continue to have an open mind about the merits of the case – I have not even concluded hearing final submissions yet. But I shall be continuing to hear the case to its conclusion as I have determined I should. My orders relate solely to Mr Thexton and his behaviour. Despite the proceedings still continuing, I have indicated my view that I am able to make the orders against him. I refer to the words "At any time" appearing in s109(2) in that regard.

11 I am quite clear that Mr Thexton, on behalf of the Applicant, has engaged in conduct "causing an adjournment" within s109(3)(a)(iv). I am also quite clear that he, on behalf of the Applicant, is "responsible for prolonging

unreasonably the time taken to complete the proceeding" within s109(3)(b). The latter, as well, leads to a finding of the former: in finding he is responsible for prolonging unreasonably the time taken to complete the proceeding, within s109(3)(b), I find he has caused an adjournment of the proceeding, within s109(3)(a)(iv). His behaviour brings him within both provisions read separately and read together as one leading to the other.

12 The proceeding was allocated a 3 day hearing limit – commencing on 25 June and concluding on 27 June 2007. The hearing, however, was not concluded on its third day. It has been adjourned off, of necessity, to a fourth day to enable final submissions to be concluded. Had an entire day not been lost, the hearing would have concluded on 27 June 2007. But an entire day was lost by Mr Thexton's behaviour. The completion of the hearing was thereby prolonged. In my view it was prolonged "unreasonably". Because the hearing has been prolonged, it has not been concluded as scheduled and thereby its adjournment has been caused.

13 I consider the hearing has been prolonged "unreasonably" by conduct on Mr Thexton's part. He has continued to insist I am biased – despite my rulings I am not – and, when asked by me to withdraw the accusation, has declined to do so (referring only to my rulings that I am not biased). Dealing with this insinuation has taken up considerable Tribunal time. That time has been lost and, as I have said, it equates to one entire day.

14 Having stood the matter down at 3.00 p.m. on 26 June I resumed shortly thereafter to deliver reasons for deciding I was not biased and should not disqualify myself. I concluded that day after delivering that ruling at about 4.00 p.m. I detected, however, that Mr Thexton was dissatisfied with my ruling and I raised the matter with him again the following day when resuming at about 11.15 a.m. He indicated he still considered me biased, but did not ask me to disqualify myself. Despite this, I considered it proper to stand the matter down to reconsider. Satisfied I was not biased, I resumed at 12.15 p.m. Mr Thexton then asked for time to get advice, so I stood the matter down until 2.15 p.m. At that time, upon resuming, I asked him (more than once) if he was withdrawing the allegation of bias. When pressed, he indicated he was not prepared to withdraw it. I stood the matter down again until about 3.15 p.m. I then ruled that I considered I was not biased and that I intended to continue hearing the case. The Respondent's Counsel sought costs and I ordered costs accordingly as I have mentioned. And as I have mentioned, I ordered those costs against Mr Thexton personally as the Applicant's representative.

15 After my ruling on 26 June that I was not biased, and would not be disqualifying myself, Mr Thexton, on behalf of the Applicant, had certain courses open to him. But he did nothing about the matter except to defiantly repeat the bias allegation by declining and refusing to withdraw it when asked about it. I stood the matter down on three occasions on 27 June – on two occasions to consider my position in view of an unwithdrawn allegation of bias and on one occasion to enable Mr Thexton to obtain

advice. I considered it proper to examine my position each time because an allegation of bias – one which is repeated despite a ruling – is a serious matter, which I do not treat lightly, going to the heart of decision-making. I should not wish to continue hearing a matter in such circumstances – despite not being asked to disqualify myself – unless I am clear that I am not biased. Therefore, it took time, on each occasion, for me to thoroughly consider my position. Having done so, I concluded the proceedings on 27 June with a ruling, yet again, that I was not biased.

16 An unwithdrawn accusation of bias – unaccompanied by any further application to disqualify – is not something which a party's legal representative should level at a judge or tribunal member conscientiously discharging the duties of office. It reflects upon the integrity of the judge or member and of the very court or tribunal itself– that they would continue to hear a matter despite being biased is the substance of the accusation. Levelling such an accusation without asking the judge or member to disqualify themselves – without taking any steps to set aside their prior ruling that they do not disqualify themselves – is, to my mind, quite improper conduct by an officer of the court. It is no answer to say that I have ruled I should not disqualify myself, and that the case should continue to proceed. Mr Thexton's response, to this effect, does not satisfactorily deal with the matter. There is still a floating accusation of bias. It is unresolved and it taints the whole hearing process. In my view, either the accusation should be withdrawn or the ruling refusing disqualification should be reviewed or appealed. But neither to withdraw the accusation nor to review or appeal the ruling, is, in my view, unacceptable conduct.

17 I am satisfied Mr Thexton was alert to the effect of his accusation. He knew, as I have pointed out to him, that this was an unacceptable state of affairs. Yet, as I say, when pressed by me, he declined and refused to withdraw his allegation. This, I consider, was unworthy. Fortunately, on 27 June, it was conduct which took place while Mr Clune – his client's representative – was absent from the Tribunal. It seemed to me, therefore, that this was conduct expressly referable solely to Mr Thexton. No one was present from the Applicant giving him instructions. He denied himself being an officer of his client. In this way, though, I was able to keep separate his conduct and that of his client. Although he was acting for the Applicant, he was, it seemed to me, responsible for his own conduct and was not being prompted by anyone. It was as if he was on a frolic of his own.

18 Mr Thexton's accusation of bias on my part is, in any event, entirely without foundation. It is also mischievous. At times, it seemed, his accusation even seemed to go close to one of actual bias. But I have taken it that he was still meaning to refer to apprehended bias. It is clear law, however, than an apprehension of bias must be reasonably and not fancifully entertained: *Trustees of Christian Brothers v Cardone* (1995) 130 ALR 345. As the Singapore High Court has said: "The fact that an

allegation of bias has been made against a judge is not enough, otherwise a party could secure a judge of his choice by merely alleging bias or apparent bias on the part of another or other judges". See *Chee Siok Chin v A G* [2006] SGHC 153 at [51]. It is what the "fair-minded lay observer might reasonably apprehend" which is critical: *Johnson v Johnson* (2000) 174 ALR 655 at 658. Bias is not shown, however, in itself by demonstrating that a tribunal member has made comments adverse to the interests of one party during the course of a hearing: *David's Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108.

19 Mr Thexton had no grounds at all for entertaining an apprehension of bias on my part. It seems the particular focus of his concerns was the order made by the Tribunal on 8 March 2007 (paragraph 3) that the Applicant produce the original contract at the hearing. I did not constitute the Tribunal on that occasion. It seems to me that Mr Thexton was complaining about my questioning whether that order had been complied with at the hearing, or, if not complied with, whether there was a reasonable excuse for such non-compliance. He may also have been complaining about my commenting on the shortness of his cross-examination of the Respondent.

20 Specifically, Mr Thexton seemed to be concerned that I was asking him whether he might be able to account for the whereabouts of the document in question considering that it had not been produced by his client as ordered. He said that I was pressuring him in saying that he might have to give evidence about whether he had the document in his possession. I said this on the basis of an assumption on my part that clients usually give their documents to their lawyers, and, in this case, the Applicant, via Mr Clune, was denying on oath that the document was in its possession. In the circumstances, my assumption did not seem an unreasonable one. It turns out, in fact, as I mention below, that my assumption was entirely well-founded. See paragraph 27.

21 I indicated to Mr Thexton, at one point, that if the document was not produced the case would be proceeding with an unproduced document ordered to be produced. This could lead to adverse inferences unless explained. I thought this fair to point out to him. In that regard I said he himself might have to give evidence about the matter if it was to be explained: because, by that point, I had already heard from his client on the matter. Later I indicated – I thought helpfully – that he might, instead, wish to provide me with an affidavit in the matter. The Respondent's solicitor had already provided me with an affidavit on the point and I did not want Mr Thexton to feel that I was not extending to him, and his client via him, the same opportunity or courtesy. I made it clear that I could not simply receive evidence from the Bar table. My view, based on long experience, was that there was likely to be objection to that.

22 I could not see how in any of this a fair-minded lay observer might reasonably apprehend I was biased. There was an extant order of the

Tribunal so far not complied with, and no excuse proferred of a substantial kind or of any kind at all for its non-compliance. I consider I was entitled to enquire after an order of the Tribunal made in the very case I was hearing intended to take effect at the hearing I was conducting. I consider I was entitled to be concerned about whether there had been compliance with that order or not. I should not wish to see the orders of the Tribunal subverted or set at naught. I have an interest in seeing that procedural orders made for my hearing of a case be observed.

23 Mr Thexton, however, as was strictly his entitlement, declined to give any sworn or affirmed evidence, by affidavit or otherwise, about the document and its whereabouts. He only gave me the explanation from the Bar table that he did not have the document and his client, he repeated, had given evidence on oath, via Mr Clune, that it did not have the document either. He referred me to the photocopy Terms and Conditions given in evidence and said that was all that was being or could be produced. Those Terms and Conditions, however, were only a photocopy and were curious in any event in their definition of "Director".

24 My insistence that an extant order of the Tribunal be complied with and the original document produced – or reasonable excuse given on oath or affirmation for non-compliance with it – became the occasion for Mr Thexton's allegation of bias. Yet he had appeared for the Applicant at the directions hearing where the order for production was made. And no appeal had been taken from that order either – despite it being made some 3 or so months before.

25 Insisting that an order of the Tribunal be complied with – or reasonable excuse be given for non-compliance with it – can hardly constitute a ground for alleging bias in my view. There is nothing in that which would indicate I am still not being open-minded. There is nothing in that which could reasonably indicate I have pre-judged the case.

26 Especially is this so if the order is one made by another member – and made by another member in Mr Thexton's presence quite some time before the hearing. He knew the order had been made and he knew its terms and effect. When it was made by another member, my enquiring after it could not reasonably, in my view, constitute bias of any sort.

27 Mr Thexton's accusation of bias on my part is baseless as I have ruled. All the more apparent does this become when it seems that the original document he is complaining about in relation to myself is one which he in fact had had possession of himself. See letter from Mr Thexton's office referred to in the Affidavit of John Hoey sworn on 27 June 2007. My assumption, referred to earlier, that clients usually give their documents to their lawyers was, in this instance, entirely correct. Mr Thexton's response to the terms of his own letter was that the letter was "not relevant", as I recall. On the contrary, I consider that letter highly relevant. If nothing else, it sharply brings into question his propriety. He did not tell me the

document we had been discussing had ever been in his possession. I could tell, I think, that he was embarrassed when his letter was produced – as well he might be.

28 In the circumstances I have set out, it seems to me that Mr Thexton's accusation of bias on my part was unprincipled and wrong. It was founded on a document which he himself had had in his possession – at one point or another – without disclosing that fact. It was unprincipled also in that it was calculated to call into question the integrity of the Tribunal's decision – making process – by making an unfounded allegation of bias and refusing to withdraw it. I am satisfied no officer of the court, acting reasonably, would have behaved this way. In my view, given all the facts, the accusation of bias on my part was extraordinary and lacking all merit.

29 Despite my ruling on two separate occasions that I did not consider I was biased, Mr Thexton still persisted with his accusation. At the conclusion of the third day, in adjourning the case over, I ruled even a third time that I was not biased. In the end, however, it was apparent to me that no number of rulings I gave him in that regard could either deter him or satisfy him.

30 His antics, if I may call them that, wasted a whole day. In those circumstances, because the case was adjourned off, the Respondent applied for costs. As I said, I granted that application and made orders against Mr Thexton personally under s109(4) being satisfied he, rather than his client, was responsible for unreasonably prolonging the completion of the hearing, by his wrongful allegation of bias, thereby causing the matter to be adjourned.

31 I was asked to order costs on an indemnity basis which I granted. Indemnity costs may only be ordered in "exceptional" circumstances. See *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 at [91] – [92] per Nettle J A. I consider that Mr Thexton's accusation of bias was so entirely lacking foundation, and so calculated to wound the hearing process, that the case was indeed exceptional – given also that the document he was complaining about, which had been ordered to be produced, had once been (and for all I know, may still be) in his own possession.

32 There is this further point. Anything less than indemnity costs might not "compensate" within the meaning of s109(4).

33 Having made the orders against Mr Thexton I resolved, as I said, to continue hearing the case. I am reminded of what Underwood C J said recently in *Irwin v Meander Valley Council (No 2)* [2007] TASSC 19 at [10]: "it is important to understand that judges should not step aside simply because a claim is made that bias on the part of the judge might be apprehended". I would add, respectfully, that this applies even if the claim is made more than once or even on several or many occasions. I note also the decision in *Brown v DML Resources* [2001] NSWSC 250 to the effect that, although there is a natural tendency in a member to disqualify himself

or herself when bias is alleged so as to remove any doubt about a tribunal's processes, it is inappropriate for the member to yield so readily.

34 I have therefore directed the Principal Registrar to list the matter before me on another date so that I may complete the hearing of it. It must be for the Applicant to decide, in view of what has gone on in the matter, whether it still wishes to be legally represented by Mr Thexton. I note that s62 of the Act does not give an automatic right of audience to the lawyer of a party. But I would be reluctant to prevent his appearance if the Applicant is determined to have him appear because it could harm the Applicant at this late stage.

35 Having made the orders I have made, I revoke the direction I made to the Principal Registrar to refer this matter on to appropriate authorities to review Mr Thexton's conduct.

36 A stay of 30 days on payment of the costs was sought by Mr Thexton. The Respondent opposed any stay at all. Mr Thexton said he did not have any money so I granted him a stay of 14 days.

SENIOR MEMBER D. CREMEAN