

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D160/2006

CATCHWORDS

Indemnity – extent of indemnity – amounts indemnified - probative value of evidence proffered in support of claims

FIRST APPLICANT	Clements Building Pty Ltd (ACN 103 958 514) (Withdrawn from Proceeding - Orders dated 7 August 2007)
SECOND APPLICANT	Ian David Clements
FIRST RESPONDENT	Martin Reginald Barlow
SECOND RESPONDENT	Mary Bernadette Barlow
JOINED PARTY	Alfred Wayne Wilbur
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	5 July 2010
DATE OF ORDER	21 July 2010
CITATION	Clements v Barlow & Anor (Domestic Building) [2010] VCAT 1211

ORDER

1. Under s119 of the *Victorian Civil and Administrative Tribunal Act 1998*, I amend order 1 of my orders dated 28 May 2010 by substituting '30 May 2007' for '31 May 2007'.
2. The second applicant must pay the joined party \$23,397.95 forthwith.
3. The second applicant must pay the joined party's legal costs of and incidental to his defence of the respondents' counterclaim filed on 10 December 2007. In default of agreement such costs are to be assessed by the Victorian Costs Court on an indemnity basis.
4. The second applicant must pay the joined party's legal costs of and incidental to the determination of the second applicant's liability to indemnify the joined party with respect to the respondents' counterclaim, the subject of the tribunal's decision dated 28 May 2010, save for the costs of and incidental to the preparation of the affidavit of Alfred Wayne Wilbur sworn 9 April 2010. In default of agreement such costs are to be assessed

by the Victorian Costs Court on an indemnity basis. I certify for counsel for \$1,375 for 31 March 2010 and \$1,980 for 13 May 2010.

5. The second applicant must pay the joined party's costs of and incidental to the determination of the extent and amounts to be indemnified, the subject of the hearing on 5 July 2010 including the costs of and incidental to the preparation of the affidavits of Wayne Alfred Wilbur sworn 9 April 2010 and 11 June 2010. In default of agreement such costs are to be assessed by the Victorian Costs Court on a party/party basis on County Court Scale 'D'.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Second Applicant	No appearance
For the Respondents	No appearance, excused from attending
For the Joined Party	Mr P Rompotis of Counsel

REASONS

- 1 On 28 May 2010 I determined that the second applicant ('Clements') was liable to indemnify the joined party ('Wilbur') in respect of the respondents' counterclaim. As discussed with counsel for both parties, the issue of liability was determined first with the extent and quantum of the amounts to be indemnified to be determined subsequently. The hearing of the extent and quantum of the amounts to be indemnified was set down for 5 July 2010 for half a day, and the parties ordered to file and serve further affidavit material.
- 2 Wilbur was represented by Mr Rompotis of counsel at the hearing on 5 July. There was no appearance by or on behalf of Clements. As a courtesy, and having regard to the history of this application, and the principal proceeding, the tribunal rang Clement's solicitor, Philip Gleeson, from the hearing room. Mr Gleeson said that he had not received instructions from Clements to appear, and he understood that Clements had not been in contact with counsel. I indicated that in the circumstances I would proceed with the hearing.

Wilbur's claim

- 3 Wilbur has filed two affidavits in support of the amounts he claims he is entitled to be indemnified for. In his first affidavit, sworn on 9 April 2010, he seeks \$220,346.26. In his second affidavit sworn on 11 June he seeks \$139,399.49. Not only has he amended the claim for reimbursement of counsel's fees by deleting those referable to the Supreme Court proceeding, and added those referable to this application, the quantum of most of the other claims have also changed.
- 4 Although Clements did not appear at this hearing, and was not represented, his solicitor, Philip Gleeson, has filed an affidavit sworn on 29 June 2010 purportedly in response to Wilbur's claim. Although described as an affidavit, this document is really in the nature of a submission and simply seeks to re-ventilate many of the issues set out in the written document entitled 'Submissions on behalf of the Second Applicant' handed up at the hearing on 13 May 2010. In those respects I am *functus officio*.
- 5 I am now required to determine the extent and amounts costs covered by the indemnity.

What is the extent of the indemnity?

- 6 Wilbur claims reimbursement of all costs and expenses he says he has incurred in defending the counterclaim and other expenses which he says he would not have incurred but for the counterclaim. He also seeks his costs of enforcing the indemnity on an indemnity basis. His claim includes reimbursement for time which he says he spent in relation to matters arising from and defending the counterclaim.
- 7 As noted above, Wilbur has filed two affidavits and the amounts claimed for each item differ. These differences are not explained in the second

affidavit but I heard sworn evidence from Wilbur at the hearing on 5 July. The amounts claimed in each of the affidavits are:

Claim	9 April 2010	11 June 2010
Own time	\$ 41,940.00	\$ 39,350.00
Motor vehicle expenses	\$ 3,312.42	\$ 5,053.30
Office expenses	\$ 429.36	\$ 519.47
Loan interest	\$ 27,353.96	\$ 30,015.34
Legal searches etc	\$ 317.87	\$ 683.33
Counsel's fees	\$ 67,675.00	\$ 30,305.00
Solicitors' costs	\$ 59,316.00	\$ 33,253.00
Second opinion	<u>not claimed</u>	<u>\$ 220.00</u>
	\$220,346.26	\$139,399.49

- 8 Before considering each of Wilbur's claims in detail there are two issues which were raised in the written submissions handed up by counsel for Clements at the hearing on 13 May 2010, and in Mr Gleeson's affidavit: the period covered by the indemnity, and whether the indemnity only extends to costs reasonably incurred by Wilbur.

The period covered by the indemnity

- 9 On 28 May 2010 I ordered, consistent with the prayer for relief set out in Wilbur's indemnity claim filed in February 2008:

The second applicant must indemnify the joined party with respect to the respondents' counterclaim pursuant to the Terms of Settlement dated 31 May 2007 in Supreme Court proceeding No. 5120 of 2007

- 10 On reviewing the documents I note the date of the Supreme Court Terms ('the SC Terms') is actually 30 May 2007 and I will amend my order under s119 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') to reflect the correct date.
- 11 Wilbur was named as a respondent to the owners' counterclaim filed on 10 December 2007. I accept that the indemnity cannot include any costs incurred by Wilbur prior to the date of the filing of the counterclaim.

Is the indemnity limited to costs reasonably incurred by Wilbur?

- 12 In the written submissions filed on 13 May 2010 on behalf of Clements reference is made to *St George Bank Ltd v Howell and Ors* [2002] NSWSC 130 which concerned the extent of an indemnity in a mortgage whereby a mortgagor in certain circumstances was to: *indemnify us against, and you must therefore pay us for liability, loss or costs including consequential or economic cost we suffer or incur, (a) if you default under this mortgage...*

in connection and (b) in connection with the secured property. Costs were defined in the mortgage agreement includes charges and expenses and costs, charges and expenses in connection with legal and other advisers on a full indemnity basis.

Cripps AJ said at [8]:

I have come to the conclusion that the meaning of the words "full indemnity basis" in the context of this document (bearing in mind that it refers to costs that are incurred in legal proceedings) carries with it the implication that there is a limitation to the indemnity basis; and that limitation is that it should not be unduly excessive, or unduly unreasonable costs incurred by a bank. I hasten to say that I am expressing no view that the bank has made such a claim in this case.

- 13 The indemnity set out in the SC Terms is not qualified. It is simply:
Clements will indemnify the Wilbur parties, the Company and the Partnership with respect to such claims.

Nevertheless, the indemnity can only extend to those costs and expenses which are substantiated and which were clearly incurred by Wilbur in defence of the counterclaim.

The amounts claimed by Wilbur

- 14 Wilbur has filed two affidavits to which he has exhibited a number of receipts, and his spreadsheets. As I said during the hearing on 5 July, and for reasons which I will discuss when considering each of his claims, much of the material exhibited in support of those claims is totally inadequate and insufficient to substantiate those claims.
- 15 I will consider each of the claims in turn with the amount claimed in the first affidavit noted in brackets.

Own time - \$39,350 (\$41,940)

- 16 Wilbur's claim for reimbursement of his time is supported by a spreadsheet exhibited to his second affidavit. There is no material in support of this claim exhibited to his first affidavit.
- 17 In his indemnity claim filed in February 2008 Wilbur seeks orders that Clements pay his legal costs and expenses of the proceeding on an indemnity basis. I am not persuaded that his own time is an expense incurred in defending the counterclaim. I reject the submission by counsel at the 5 July hearing that his time should be reimbursed as if he were a witness. Even if I were satisfied that was the correct approach, time spent in preparation and communication with his legal advisors are not witness expenses.
- 18 In any event, the spreadsheet entries are not supported by any other material. They are simply a record of time Wilbur says he has spent in relation to the counterclaim, surprisingly in multipliers of one hour at an hourly rate of \$50. As I noted during the hearing on 5 July he has not

produced or exhibited his diaries for the relevant period confirming appointments, and any other commitments he might have had on the days recorded in the spreadsheet.

- 19 In a number of instances he records 8 hours for attendance at a tribunal compliance hearing. Generally, compliance hearings are listed for half an hour, and even allowing travelling time to and fro the tribunal from Ferntree Gully to attend the compliance hearing, 3 hours would be a generous allowance. Wilbur gave sworn evidence that he was unable to work on days when he attended the tribunal, or had appointments with his legal advisors, but he has not produced any documents to support this, such as: his pay slips, invoices, diaries, and tax returns.
- 20 Further, I note that his claim for reimbursement for his own time commences in June 2007. As noted above, the owners' counterclaim was not filed until 10 December 2007.
- 21 As there is insufficient evidence to support this claim, it is disallowed.

Motor vehicle expenses \$5,053.30 (\$3,312.42)

- 22 Wilbur initially claimed \$3,312.42 for motor vehicle expenses including petrol, parking and toll charges. To his first affidavit he exhibited a number of receipts many of which, as counsel for Clements noted at the 13 May hearing, included items which did not appear referable to the counterclaim. Further, as I noted in my earlier reasons, many of the receipts were difficult to read and at least one of the petrol receipts included additional items, although the total amount of the receipt was claimed.
- 23 Although he has not provided any explanation in his second affidavit for changing the methodology for calculating his claim for travelling expenses, Wilbur has abandoned the claim for reimbursement of petrol expenses, tolls and parking and now claims 74 cents per kilometre. Although he gave sworn evidence that this revised methodology was on his accountant's advice, no evidence as to the applicable rate as approved by the tax office when claiming mileage as a tax deduction was produced.
- 24 A log book was not produced evidencing the mileage claimed. Further, in the absence of his diaries I cannot be satisfied that the sole purpose of each trip was related to this counterclaim.
- 25 Further, a brief comparison of the spreadsheets exhibited in support of the claims for reimbursement for his own time, and for mileage expenses reveals a number of inconsistencies. By way of example, although he claims mileage for the following dates (which is not exhaustive) he makes no claim for his own time on those dates: 28 June 2009, 10 March 2008, 4 April 2008, and 7 November 2008 (when his only claim for his own time is 1 hour reviewing and sending letters to his solicitors).
- 26 As I cannot be satisfied of the probative value of the material relied on in support of this claim for this reasons set out above, it is disallowed.

Office expenses - \$519.47 (429.46)

- 27 Wilbur exhibits a spreadsheet and a number of receipts to his first affidavit in support of this claim. A spreadsheet only is exhibited to the second affidavit and there is no explanation for the increase in the amount claimed. The spreadsheets are difficult to follow and once again I note that claims are made for expenses incurred on particular dates when no claim is made for reimbursement of his time. Further, it is not clear how each and every expense claimed relates to Wilbur's defence of the counterclaim. Any office expenses incurred prior to 10 December 2007 are clearly not incurred in defence of the counterclaim.
- 28 Many of the office expenses claimed are for photocopying and general office supplies. Although in his claim for his own time Wilbur has seemingly been meticulous in recording time he says was time spent, or work lost because of the counterclaim, in cross-referencing the claim for office expenses it has been difficult to find claims for his own time on corresponding dates. Further, there is no record of the photocopied documents or the purpose for which they were photocopied.
- 29 As I cannot be satisfied on the evidence before me that each of the office expenses relates to Wilbur's defence of the counterclaim this claim is disallowed.

Loan interest - \$30,015.34 (\$27,353.96)

- 30 Wilbur claims interest of \$30,015.34 which he says he has incurred in interest payments on a loan taken out to pay his legal costs. Not only are the loan amount and the applicable interest rates not disclosed, no details about the loan facility have been included in either affidavit. There are no mortgage documents, or bank statements evidencing the interest payments.
- 31 Wilbur gave sworn evidence that the loan was originally taken out for the purposes of the Supreme Court proceedings, and it is continuing. He said that in excess of \$100,000 remains outstanding, and then said that the loan amount now exceeds \$140,000 and that it is a drawback facility with his home as security.
- 32 In the absence of any evidence at all, including full disclosure of Wilbur's financial affairs, this claim is not made out and it is disallowed.

Legal Searches \$683.33 (\$317.87)

- 33 Although he is legally represented, Wilbur gave sworn evidence that he was asked by his lawyers to obtain various searches in relation to Clements' assets and other matters. Copies of the searches have not been exhibited to either affidavit although there is a bank statement identifying various payments made to Landata. He also claims \$252.05 as his share of the transcript of the initial tribunal hearing (before Terms of Settlement were entered into with the owners). I am satisfied the cost of the transcript was a cost incurred in defending the counterclaim and will order Clements to pay

Wilbur \$252.05. I make no allowance for the searches as I cannot be satisfied they are referable to Wilbur's defence of the counterclaim.

- 34 The amount claimed includes \$120.40 hearing fee for the hearing on 31 March 2010 which is included in the costs of enforcing the indemnity, and is not allowed under this item.

Counsel's fees \$30,305 (\$67,675)

- 35 Wilbur initially claimed reimbursement of all counsels' fees incurred in both this proceeding and the Supreme Court proceeding. Counsel conceded at the 13 May hearing that counsel's fees for the Supreme Court proceeding were not covered by the indemnity.
- 36 I am satisfied that counsel's fees which are identified as being referable to the tribunal proceedings, are covered by the indemnity after the date the counterclaim was filed. Accordingly I allow this claim except for \$3,300 relating to appearances at the tribunal on 31 August 2007 and 25 October 2007, and counsel's advice in October 2007.
- 37 The claim also includes counsel's fees for appearances at the tribunal on 31 March 2010 for \$1,375 and 13 May 2010 for \$1,980 in relation to the indemnity claim which I will consider later in these reasons and which has not been taken into account under this item. The amount I allow for this item is therefore \$23,650.

Solicitors' fees \$33,253 (\$59,316)

- 38 Wilbur's claim for solicitors' fees initially included those incurred in relation to the Supreme Court proceeding. At the 13 May hearing counsel for Wilbur conceded these were not covered by the indemnity. The amount now claimed is supported by an account from Wilbur's solicitors dated 8 April 2010 for the period 2 July 2007 to 19 February 2010, which refers to both the Supreme Court and VCAT proceedings.
- 39 This account is nearly six pages, more than two pages of which are concerned with attendances prior to 10 December 2007 when the owners' counterclaim was filed. It also includes attendances on counsel in February 2010 who has not appeared in this proceeding, and the assessments of their file by Robert Wilson, cost consultant. The total professional costs are \$31,796.15 with disbursements of \$1,456.90 including counsel's fees of \$1,375 which have already been included in the claim for counsel's fees, a title search, company searches and miscellaneous.
- 40 It was suggested by counsel at the 5 July hearing that I fix a lesser amount. Having regard to ss97 and 98 of the VCAT Act I do not consider this is appropriate or fair and will order that the assessment of the solicitors' fees incurred by Wilbur in defending the counterclaim, to be paid by Clements, be assessed by the Victorian Costs Court on an indemnity basis.

Second opinion - \$220

41 Wilbur claims \$220 for what he says was a second opinion he obtained in relation to the indemnity. Although an account dated 24 June 2009 has been exhibited to Wilbur's second affidavit I cannot be satisfied this cost is referable to Wilbur's defence of the counterclaim. It is therefore disallowed.

Costs of enforcing the indemnity

42 Wilbur also seeks his costs of enforcing the indemnity. Counsel submitted at the 5 July hearing that these costs were inextricably linked with Wilbur's defence of the counterclaim, and were effectively one and the same. I reject this. The indemnity, although unqualified, clearly relates to building works claims. It does not extend to any costs incurred by the parties in enforcing the SC Terms. Although I ruled the tribunal had jurisdiction to hear and determine the indemnity claim because it is closely related to and arising from a domestic building contract, and therefore a domestic building dispute, any costs incurred by Wilbur in relation to enforcement of the indemnity are separate and distinct from those incurred in defending the counterclaim. These costs are, as yet, not quantified as Wilbur's solicitors have not rendered an account for some time, and there are counsel's fees for the preparation and appearance at the 5 July hearing.

43 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. The approach to be taken by the tribunal in considering whether to exercise its discretion under s109(2) was considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where he said at [20]:

the Tribunal should approach the question [of costs] 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.

44 I am satisfied this is a clear case where it is appropriate to exercise the tribunal's discretion under s109(2) of the VCAT Act and, and that it is fair to order Clements to pay Wilbur's costs of enforcing the indemnity claim.

45 Having regard to the matters set out in s109(3) of the VCAT Act I consider it appropriate to order Clements to pay Wilbur's costs of and incidental to the determination of Clements' liability to indemnify Wilbur for the costs and expenses he incurred in defence of the counterclaim (the subject of the tribunal's decision dated 28 May 2010). These are costs which Wilbur

would not have incurred but for Clements' denial of his obligation to indemnify Wilbur for the costs and expenses he incurred in defending the counterclaim – a denial which I have found to be completely lacking in substance and without merit.

- 46 Section 109(3)(e) allows the tribunal to take into account '*any other matter the tribunal considers relevant*'. It seems to me that where a party agrees to indemnify another, and then refuses to do so, unless there are exceptional circumstances, the costs of enforcing the indemnity should be awarded on an indemnity basis. I will so order in respect of the costs of and incidental to the tribunal's decision of 28 May 2010 save and except for the costs of and incidental to the preparation of Wilbur's first affidavit, much of which related to the extent and amounts to be indemnified.
- 47 However, in the circumstances of this proceeding, I consider there are exceptional circumstances insofar as the costs of and incidental to the determination of the extent and amounts to be indemnified (the subject of the 5 July hearing). As discussed above, I have serious reservations about the lack of substantiation for many of the expenses Wilbur claims to have incurred in defending the counterclaim, many of the claims for which have been disallowed. I also note the significant differences between the claims as set out in his two affidavits which are not explained in the second affidavit.
- 48 Accordingly, I consider it fair to order Clements to pay Wilbur's costs of and incidental to the determination of the extent and amounts to be indemnified and paid to Wilbur by Clements, the subject of these reasons, including the costs of and incidental to the preparation of Wilbur's two affidavits sworn 9 April 2010 and 11 June 2010 respectively, on a party/party basis. I consider that if these costs cannot be agreed County Court Scale 'D' is the appropriate scale for their assessment.

DEPUTY PRESIDENT C. AIRD