VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D114/2007

CATCHWORDS

Section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, slip rule, whether the Tribunal is *functus officio*, error on the face of the record, contemporaneous slip, exercise of Tribunal's discretion, whether either party has acted on the order, delay in seeking correction.

APPLICANT	Martha Constantinidis
FIRST RESPONDENT	MMMMM Pty Ltd (ACN: 090 515 996)
SECOND RESPONDENT	Vasillios (Bill) Fatouros
THIRD RESPONDENT	Lawcorp Lawyers Pty Ltd (ACN 093 244 510)
FIRST JOINED PARTY	Adept Constructions Pty Ltd (Struck out from proceeding 25/11/08)
SECOND JOINED PARTY	Brian Arthur Johnston (t/a "Stay Dry Membranes") Struck out from proceeding 25/11/08)
THIRD JOINED PARTY	Blain-Air Heating and Airconditioning Pty Ltd (Struck out from proceeding 25/11/08)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	19 October 2010
DATE OF ORDER	9 November 2010
CITATION	Constantinidis v MMMMM Pty Ltd & Ors (Domestic Building) [2010] VCAT 1811

ORDER

Under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 I correct order 7 of 17 July 2009 by removing the word "directions".

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr B. Reid of Counsel
For First and Second Respondents	Mr J. Bower-Taylor, Solicitor
For the Third Respondent	No appearance

REASONS

1 The First and Second Respondents sought an order that I correct an order of 17 July 2009 under the slip rule - s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act"). The Second Respondent settled with the Applicant the evening before the hearing of this application, so the only parties with a real interest in the outcome of this application are the Applicant and the First Respondent. Nevertheless, Mr Bowers-Taylor, solicitor, appeared for both the First and Second Respondents. Mr B. Reid of Counsel appeared for the Applicant to oppose the application.

2 Section 119 of the VCAT Act provides:

> (1) The Tribunal may correct an order made by it if the order contains-
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> (a) a clerical mistake; or
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> (b) an error arising from an accidental slip or omission; or
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> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
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> (d) a defect of form.
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> (2) The correction may be made-
>
> (a) on the Tribunal's own initiative; or
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> (b) on the application of a party in accordance with the rules.

3 The order sought is to amend order 7 to remove the word "directions":

> 7 The applicant must pay the cost thrown away (if any) of the amendment to the Points of Claim and the cost of the directions hearing of 16 and 17 July 2009 of each of the respondents to be agreed. Failing agreement, costs are to be determined by the Principal Registrar pursuant to Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on County Court Scale D.

4 The significance of the description "directions" hearing is that it has a particular meaning under the County Court Costs Scale and the allowance at the time of the hearing was only $279 in total, or perhaps $279 per day. The hearing of 16 and 17 July 2009 was described by the Tribunal as a "directions hearing" in its notice to the parties, the law list and the heading of the orders made, but it is beyond doubt that this interlocutory hearing dealt with significantly more than directions for the further conduct of the proceeding.

5 The hearing of 16 and 17 July 2009 was to consider the Second Respondent's application of 11 June 2009 for the following orders:

> 1. An order pursuant to section 75(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"), summarily dismissing the Applicant's claims against the Second Respondent.

2. Alternatively, an order pursuant to section 75(1) of the Act, striking out (in a pleading/absence of natural justice sense) the Applicant's claims against the Second Respondent.

3. Further and alternatively, the Applicant provide further and better particulars of the Applicant's Further Amended Points of Claim dated 20 March 2009 pursuant to the Second Respondent's request dated 1 June 2009.

4. The Applicant pay the Second Respondent's costs of this Application, and the proceeding.

5. Alternatively, the Applicant pay the Second Respondent's costs of this Application.

6. Such further or other orders as this Honourable Tribunal considers appropriate.

6 On 22 June 2010 Mr Bowers-Taylor, solicitor, of JBT Lawyers for the Second Respondent, wrote to the Tribunal. The nub of his letter is as follows:

> In the course of taxing the costs order in paragraph 7, we advise that objections have been received from the Applicant which in our respectful submission place a perverse interpretation on the costs order. The Applicant places reliance on the inclusion of the word "directions" before "hearing" ... to contend that only costs of a directions hearing (within the meaning of the County Court Scale) ought to be allowed (which is vastly different to the costs of a day or days of hearing of an application). It is submitted that plainly the intention was for the respondents to have the costs of the days of hearing of the strikeout application. We therefore request the order be amended under the "slip rule" by deleting the word "directions" as in our respectful submission the lengthy contested application hearings on 16 and 17 July 2009 were not a "directions hearing" in the sense contended for by the Applicant.

7 On 1 July 2010 solicitors for the Applicant wrote to the Tribunal, referred to the JBT Lawyers' letter of 22 June and objected to the order sought. The relevant parts of the letter are:

4. We submit that the amendment proposed by Mr Bower-Taylor is a variation of the Order rather than a correction due to an error arising from an accidental slip or omission.

5. The wording of the Order is clear and there is no basis to suggest that Senior Member Lothian has made an error in expressing the Order in those terms.

6. The First and Second Respondents are seeking to use section 119 of the VCAT Act to make new submissions to the Tribunal on the question of costs to extend the scope of the Orders granted to them. Clearly this is an abuse of process.

7. Accordingly we submit that the Tribunal does not have the power pursuant to section 119 to make an amendment of the kind sought by the First and Second Respondents.

8. Further and in the alternative we draw the Tribunal's attention to pages 104 to 113 of the transcript of proceedings of 17 July 2009 ... being the pages relevant to the submissions by the Respondents for costs commencing at line 4 of page 104.

9. At line 16 of page 104 ... Mr Nixon for ... the Second Respondent submits as follow:

   "The costs I seek are those that are wasted or thrown away which are the costs – not of the application per se but that needs to be dealt with at the end of the application, for the costs of yesterday's appearance and today's appearance As well as the costs occasioned by having to - costs occasioned by reason of the filing of the second further amended points of claim and that will leave the balance of the costs of the application for determination when the application is ultimately finalised."

10. Further after hearing from Mr Reid for ... the Applicant who made submissions against a costs order being made against the Applicant, at line 10 of page 112 Mr Nixon submitted as follows:

    "We are trying to be fair, we are not saying all of the costs of the application now, that I think is properly preserved or ultimately determined on the 26th after we get the next pleading. But today and yesterday has been entirely wasted. You'll never get the costs back and there's nothing that can change that ...

11. We submit that [Mr Nixon] made it clear in his submissions that the Second Respondent did not seek the costs of the hearing of the application for the strikeout but sought instead only the costs of the appearance on 16 and 17 July 2009.

8 It is not absolutely clear what Mr Nixon meant by "the 26th" because order 5 of 17 July 2009 listed the application under s75 for further hearing before me on 26 August 2009 if the proceeding failed to settle at the compulsory conference of 21 August 2009, and order 6 set the proceeding down for hearing on 26 October 2009. It is more likely that he meant 26 August 2009 – the date for further hearing of the s75 application.

9 There followed a series of letters from the parties which resulted in the application being set down for a hearing before me. It was eventually heard on 19 October 2010.

10 Mr Reid's submissions on 19 October 2010, were three. He submitted, first, that the Tribunal is *functus officio*. Secondly, he submitted that the slip, if any, was not contemporaneous. He said it must have been at the time the order was made, not at the time of the taxation. Thirdly, he said that in any event I should exercise my discretion under s119 against the First and Second Respondents.

FUNCTUS OFFICIO

11 Mr Reid submitted that when the review of the transcript was undertaken, the order reflected the transcript. Mr Reid referred to a decision of SM Young in *Pratley v Racine*[1] of 31 January 2007 (erroneously shown in the report as 2006). The decision is of little assistance to me because the facts differed markedly from those before me. In *Pratley* the application was that SM Young revisit his earlier slip-rule decision of 22 November 2006 where he declined to amend. When SM Young asked counsel for the applicant why he was not *functus officio* with respect to the s119 application, having already heard and determined it, she "declined to pursue her application"[2].

12 There has been no earlier application under s119 in this proceeding concerning the orders the subject of this application. I find that I am not *functus officio* with respect to the First and Second Respondents' application.

ERROR ON THE FACE OF THE RECORD

13 A reason given by SM Young in *Pratley* to refuse the slip rule application on 22 November 2006 was that no error was established on the face of the record.

14 Mr Reid submitted that there is no error on the face of the record. However, if the correct interpretation of the expression "directions hearing" under the County Court costs scale gives a result that is at odds with the result I intended when the order was made, there is an error on the face of the record[3] being a defect of form. The result I intended was that the Respondents would receive an amount representing scale costs for appearing at an interlocutory hearing for the time actually occupied, not an amount that is artificially reduced by being characterised as a directions hearing.

15 In the alternative there is an error in costing an interlocutory hearing at VCAT, described for administrative purposes as a "directions hearing" as if it were narrowly defined in accordance with County Court usage. Whatever the cause, there appears to be miscommunication of my intent.

16 Mr Reid said that the difference between the amount the Applicant claims is payable, and the amount the First Respondent seeks is about $9,000. He emphasised that the First Respondent could not seek the costs of "the application". Mr Bowers-Taylor interjected that this is not what his client seeks. Mr Reid and Mr Bowers-Taylor seemed to be in furious agreement that on 17 July 2009 Mr Nixon was only seeking costs of the appearance on the two days.

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1 [2007] VCAT 159
2 Paragraph 3
3 *Cosgriff v Housing Guarantee Fund Ltd* [2006] VCAT 463

CONTEMPORANEOUS?

17 The other two reasons given by SM Young to refuse the slip rule application on 22 November 2006 in *Pratley*, were first, the Applicant's delay of 22 months in making his application and second, that it would have required SM Young to hear further evidence. As he said, an application under the slip rule was not the appropriate forum for a challenge requiring the hearing of further evidence.

18 Mr Reid referred to the decision in *Lawley & Anor v Terrace Designs Pty Ltd & Ors*[4] which in turn referred to *Hatton v Harris*[5] and *L Shaddock & Assoc Pty Ltd v Parramatta City Council (No 2)*[6] which establish the test that the slip rule applies if the judge (or tribunal member) would have corrected the order if he or she had been made aware of the alleged slip at the time the order was made. The First and Second Respondents' application passes this test. If my attention had been drawn to the interpretation that would be given to expression "directions hearing" under the County Court costs scale, I would have changed the order on the day it was made. Mr Reid and Mr Bowers-Taylor agree that this issue was not canvassed on 17 July 2009.

19 Mr Reid also referred me to my own decision in *Ryan v Edward John Lowe trading as Urbane Builders*[7] where I said at paragraph 8 that "the scope of the slip rule is not unlimited" and quoting *Re Stahle and Camberlea Properties Pty Ltd*[8]:

> The slip rule in terms permits to be corrected an error in a judgement or order arising from an accidental slip or omission. An error in a judgement or an order which is the product of a deliberate decision is not within the rule. [Emphasis added]

20 The misdescription of the interlocutory hearing as a directions hearing accords with the first sentence. It was emphatically not a deliberate decision.

DISCRETION

21 Mr Reid said that matters I should take into account in exercising my discretion are that the parties have acted on the order made – the proceeding settled after the order and payments have been made. He remarked in particular that the Third Respondent did not take issue with the interpretation of the Applicant. He submitted that the First and Second Respondents delayed in seeking the amendment and the delay is unexplained. He also submitted that no new facts have come to light since the order and that there are no new propositions of law. The last point is true, but I am not satisfied that it is relevant in this application.

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4 [2010] VCAT 512
5 [1982] A.C. 547 at 558
6 [1982] HCA 59
77 [2005] VCAT 2713
8 [2000] VCAT 1883

Parties have acted on the order

22 Mr Reid tendered a copy of the Terms of Settlement of September 2009. If anything, they militate against the view that the parties agreed or assumed that costs for the interlocutory hearing would be the relatively minor amount allowed for a directions hearing. The provisions concerning the relevant order are:

> 5. The parties agree and consent to the following orders being made by the Tribunal in the proceeding:
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> ...
>
> (b) the Respondents will pay the Applicant's costs ... save that the Applicant will bear her own costs of and incidental to:
>
> ...
>
> ii. the Second Respondent's application filed on 15 June 2009 including the hearing of that application on 16 and 17 July 2009;
>
> 5A For the avoidance of doubt, the Applicant is not released from liability (if any) for payment of the costs ordered in favour of the First and Second Respondents pursuant to ... paragraph 7 of the Orders made 17 July 2009 ...

23 If the parties all agreed that the costs under order 7 were only a few hundred dollars, it is likely that they would have agreed the amount rather than spending time and money to include such a provision in the Terms of Settlement. Even a respondent's request for such a provision in the course of negotiating settlement must have made the Applicant and her team aware that the amount in question was more than trivial. Further, the expression "hearing of that application" in clause 5(b)(ii) acknowledges that the hearing was beyond a directions hearing.

Third Respondent did not take issue

24 Mr Reid said that the Second Respondent had sought approximately $9,000 for the two days. Mr Bowers-Taylor interjected that the sum sought by the First Respondent on 19 October 2010 was $2,290, being $1,145 per day for appearance for each of two days, but that the Applicant said the amount paid should be $279.

25 Mr Reid said that the Third Respondent had accepted a total of $558. As I said on 19 October, I draw no conclusion from the Third Respondent's decision. It could have been because the Third Respondent considered the Applicant's interpretation was correct. Conversely, it could have been because the Third Respondent decided that to concede this item was a sensible commercial outcome for it.

Delay in seeking correction

26 The only matter that concerns me is the First and Second Respondents' delay of approximately 11 months in making their application under the slip rule. In the interest of finality, such applications should be made without delay. However I accept Mr Bowers-Taylor's submission that the need to seek correction under the slip rule became apparent when his firm received the notice of objection to his client's bill of costs on 22 June 2010, and that the application for an order under the slip rule was made on the same day.

27 In contrast, in *Pratley*, SM Young found that the second slip rule application had been made for the ulterior purpose of attempting "to have the assessment of costs dismissed; or, secondly, to have it postponed for as long as possible."

28 I consider that it is fair to make the order sought by the First and Second Respondent and pursued by the First Respondent. I consider that it would be unfair not to make the order sought, because the effect of the order would not accord with its intent.

CONCLUSION

29 Under s119 of the VCAT Act I correct order 7 of 17 July 2009 by removing the word "directions".

SENIOR MEMBER M. LOTHIAN