VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D591/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – stay application – s149 – costs.

APPLICANTS	Maria Dickinson, Peter Dickinson
RESPONDENT	MacDiggers Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	13 December 2007
DATE OF ORDER	18 December 2007
CITATION	Dickinson v MacDiggers Pty Ltd (Domestic Building) [2007] VCAT 2438

ORDER

1 Application under ss149 and 118 (and 130) dismissed.

2 Orders made on 13 November 2007 are confirmed.

3 Order Respondent to pay Applicants' costs of $600.00.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr S. Waldren of Counsel
For the Respondent	Mr J. Pizer of Counsel

REASONS

1 In this matter I made orders on 13 November 2007 as follows:

1. I order the Respondent to pay the Applicants the sum of $392,023.62 on the claim with interest of $18,172.71.
2. Further I order the Respondent to pay the Applicants the sum of $4,058.00 by way of costs.
3. Stay of one month.

2 Accompanying those orders were these reasons:

1. I am satisfied the Respondent has been duly served and given proper notice of the proceedings this day.
2. I am satisfied also that the Respondent (via Mr MacFarlane) does not want the proceedings to be adjourned; I have referred Mr MacFarlane to legal aid. He is not prepared to pay costs (of about $1,600.00) if the matter is adjourned. The matter, therefore, is to proceed.
3. I allow Mr MacFarlane to address me on the affidavits in support of the claim despite paragraph 3 of the orders made on 27 September 2007 not having been complied with. He has not, however, given me evidence on oath or affirmation and has not subjected himself to cross-examination. I pointed out to him evidence on oath or affirmation carries more weight than statements from the Bar table.
4. In accordance with the orders made on 27 September 2007 I rely upon the affidavits of Paul Rodriguez sworn 21 September 2007, Naomi Burton sworn 24 September 2007 and of Maria Dickinson sworn 3 October 2007.
5. On the basis of the same I am satisfied it is fair and proper to order the Respondent to pay the Applicants the sum of $392,023.62.
6. I am satisfied it is proper also to order interest in the sum of $18,172.71.
7. Further I consider it fair to order costs under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which I fix in the sum of $4,058.00 based on County Court Scale "D".

3 It is clear, I hope, from these Reasons that I endeavoured to act fairly towards the Respondent.

4 Application is now made by the Respondent for me to grant a stay under s149 of the *Victorian Civil and Administrative Tribunal* Act 1998 which reads as follows:

> (1) The Tribunal, on the application of a party or on its own initiative, may stay the operation of any order it makes pending

the determination of any appeal that may be instituted under this Part.

(2) The Tribunal may attach any conditions it considers appropriate to a stay of an order under subsection (1).

5 Alternatively application is made under s118 of such Act to extend the stay orders I have already made. Section 118 reads as follows:

(1) An order of the Tribunal comes into effect immediately after it is made, or at such later time as is specified in it.

(2) Subsection (1) is subject to an order of the Tribunal under section 149 or an order of the Supreme Court.

6 In the operation of s118 I am asked also to consider the application of s130 which reads as follows:

(1) A power of the Tribunal to make an order or other decision includes a power to make the order or decision subject to any conditions or further orders that the Tribunal thinks fit.

(2) Conditions or further orders may include—

(a) an adjournment of the proceeding;

(b) an order for costs;

(c) a condition or order that a party give notice of the proceeding, order or decision to any person specified by the Tribunal;

(d) a condition or order that a person give an undertaking to the Tribunal;

(e) a condition or order necessary or desirable to give effect to an order or other decision.

7 The Respondent's application is opposed by the Applicants.

8 The Applicants submit that this application should be made on notice. I agree that it should be made on notice. The Applicants are entitled to be given notice that a judgment it has in its favour is sought to be stayed.

9 However, I consider the application has been made on notice. The Applicants are here and represented by Counsel. But I consider the period of notice it has been given (at 11.20 a.m. today) is ridiculously short. I am told this is due to "oversight". That oversight is all the more remarkable when apparently the Originating Motion was filed on Monday – 4 days ago.

10 The Respondent contends I have power to order a stay under s149. The Applicants oppose this.

11 The Respondent argues that institution of an application for leave to appeal is sufficient to attract s149(1). I cannot agree. In my view, s149(1) contemplates an appeal that has been or may be "instituted". Merely seeking leave to appeal is not instituting an appeal.

12 I note through comments of Judge Bowman in *State of Victoria v Bradto Pty Ltd* [2006] VCAT 100 and his view that s149 is "capable of bearing a number of interpretations".

13 If I assume it is sufficient for leave to have been instituted in order for s149(1) to be attracted then I must decide whether to exercise the discretion referred to therein or not.

14 As regards the alternative submission concerning s118 I am not persuaded I may now act under that provision to specify a later time for my orders made on 13 November 2007 to come into effect. In my view I am now *functus officio*. By granting the stay I did utilize the power in s118(1) and cannot re-utilize it.

15 Concerning s130 it seems to me that for similar reasons I have utilized the power therein (as to "further orders") by granting the stay.

16 Turning then to the discretion given by s149(1) – if it arises – I am not of the view I should exercise it in the Respondent's favour.

17 The allegation is that I denied the Respondent procedural fairness in denying it an adjournment.

18 It is said I should have granted the adjournment with 3 alternatives open to me – order no costs; reserve costs; or order the Respondent to pay costs of $1,600.00.

19 The Respondent would not agree to the adjournment if costs of $1,600.00 were to be paid. It is argued I should have imposed the adjournment and, as one of my options, ordered such costs to be paid.

20 Granting the adjournment and choosing one of the other options (no costs or reserving costs) would have disadvantaged the Applicants, I consider, especially if I was to order no costs. But why should I reserve costs? No ground of substance is given to me why I should have done.

21 In disadvantaging the Applicants in this way I would be failing to act fairly in the proceeding in my view under s97 of the Act. The Applicants were ready to proceed and had attended the Tribunal in answer to its directions. They had done nothing wrong.

22 If however I had chosen the other alternative – of imposing an adjournment and ordering the Respondent to pay costs – upon what basis would I be acting?

23 The contended basis is that in that way I would have enabled the Respondent to consider its position; pay $1,600.00 and possibly end up paying less on the quantum should it lose the case.

24 However, I cannot be certain that by granting the adjournment it would end up paying less, if anything at all. I had not then heard the matter. There was no guarantee the Applicant would succeed.

25 But if it would possibly end up paying less by securing the advantage of an adjournment then that is not a judgement call for me.

26 I reject a notion that I can benevolently insist on a party having an adjournment so that it can be possibly better off. Especially if it does not want to adjourn because it does not want to pay costs. This seems to me to be a corruption of the power to grant an adjournment. It is not for me to decide how a party should carry on its business or the choices it should make. I am not here to make judgment calls for the Respondent – a company and not an unrepresented natural person I should add.

27 I also reject a notion that I can impose costs on a party as the price for an adjournment so that it can be placed possibly better off. This it seems to me is a corruption of the power to order costs. Costs are ordered to compensate never to punish. They are not ordered to allow a party a chance to be better off in terms of the amount for which judgment may be ordered against it. The Tribunal is not maternalistic: ordering people to do things for their own good. Nor is it, in these matters, an agency which can take sides in a dispute – indicating how one party can better itself. To order costs in those circumstances could bear a complexion that I was punishing the Respondent for not having, to this point, properly defended its position. I also reject the analysis that this falls under s109(e). I consider such a consideration (forcing an order for costs so a party can consider its position) not to be 'relevant' but 'irrelevant' as not bearing upon conduct. It bears upon a party's assessment of their risks in litigation.

28 Finally, I note, I have assumed that the case sought to be advanced in the Supreme Court is one based on alleged denial of procedural fairness. This is alleged to lie in the Respondent's inability to obtain a lawyer in time for the hearing. But I do not have any sworn materials from the Respondent on this and the solicitor's affidavit is silent on the point. How, is it suggested I should form a view about this without materials in point? On what basis could I legitimately act?

29 I think in the time allowed it could very well have been possible for the Respondent to have consulted a lawyer at short notice.

30 But even if this was not so, the Respondent indicated via Mr Macfarlane it wanted the matter to proceed. He was, I think, very clear on that - as he was entitled to be. Why should I go against his wishes as Counsel contended for. Frankly, I consider that contention (as I indicated at the time) "odd" and absurd. Repetition of it did not help.

31 I expect it may have been open to the Respondent, in any event, to approach a lawyer up to a week before 12 November 2007 to ascertain whether the rumour he had heard about being sued in court were true or had any basis. This is what he should have done, I think.

32 In all the circumstances I dismiss the application.

33 I confirm the orders made on 13 November 2007 and do not alter the same or extend the same and do not stay the same.

34 I am not satisfied on the materials (such as they are) that it would be a just outcome to deprive the Applicants of their fruits of victory.

35 I so order.

36 As to costs I am satisfied under s109(2) of the Act that it is fair to depart from s109(1) having regard to s109(3). I am satisfied on the submissions that the Applicants have been unnecessarily disadvantaged in having to attend the Tribunal this day by Counsel, on instructions. The application has failed and was bound to fail for a number of reasons including paucity of materials. I rely, however, upon s109(3(c): in my view the application was untenable based on that paucity of materials but based on other considerations as well.

37 As to the amount I propose to follow largely the County Court Scale "D". I consider I am able to say an amount of $400.00 is appropriate for Counsel and I allow $200.00 for what I think is appropriate in preparation.

38 I order the Respondent to pay costs of the Applicant therefore of $600.00.

SENIOR MEMBER D. CREMEAN