

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1427/2018

CATCHWORDS

Costs, s109(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

APPLICANT	Trevor Donkin
RESPONDENT	Nicholas Donkin
WHERE HELD	In chambers
BEFORE	Senior Member L. Forde
DATE OF ORDER	2 August 2019
DATE OF REASONS	4 September 2019
CITATION	Donkin v Donkin (Building and Property) (Costs) [2019] VCAT 1364

ORDER

1. Nicholas Donkin must pay Trevor Donkin's costs of the proceeding including filing and hearing fees, the sum of such costs, if not agreed, to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

L. Forde
Senior Member

REASONS

Background

- 1 This is an application for costs by the applicant which I have determined in chambers in accordance with the orders made on 2 August 2019.
- 2 The substantive proceeding took place over two days in June 2019.
- 3 On 12 July 2019 the Tribunal made orders on the substantive issues in the proceedings. The applicant was successful in his claim.
- 4 On 16 August 2019 the applicant filed written submissions in support of his cost application.
- 5 On 23 August 2019 the respondent filed written submissions in opposition to the cost application

Law regarding costs

- 6 The Tribunal's power to award costs is contained in s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ("VCAT Act").
- 7 The starting position is that each party bears its own costs. 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.
- 8 An order for costs should only be made when the Tribunal considers it fair to do so having regard to the matters set out in s 109 (3) of the VCAT Act.¹

ANALYSIS s 109(3)(c) -The relative strengths of the claims

- 9 The respondent defended the claims brought against him on two bases which can be summarised as the Trust Argument and the Power of Attorney argument.
- 10 Section 109 (3) (c) of the VCAT Act allows consideration of 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.
- 11 As set out in my reasons, the Trust argument had no tenable basis in law or fact and the Power of Attorney argument had no tenable basis in fact.
- 12 The trust argument was bound to fail at the outset regardless of whether or not the letter of 7 November 2016 could have been construed so as to create a trust (which it did not) because it is not possible for one joint tenant to hold their interest in property on trust for the other as they have no separate interest.

¹ *Vero Insurance Ltd v The Gombac Group* [2007] VSC 117

- 13 The Power of Attorney argument was equally flawed. The argument was raised in an amendment to the defence on 23 May 2019, less than a month before the hearing. As set out in my reasons I found the respondent to be an unreliable witness who was at times evasive and lacking in candour.²
- 14 The allegations against the attorney were not, for the reasons set out in my reasons, a defence to the applicant's claim.³
- 15 The submissions filed by the respondent on this application are premised on the assertion that "the weight of the objective documentary evidence established that Trevor did not wish to sever the joint tenancy" and that it was reasonable for the respondent to clarify Trevor's intention.
- 16 The submissions by the respondent are misguided. There are avenues open to a party to challenge whether a person holding a power of attorney is acting in the interest of the donor. This proceeding is not one of those avenues and in any event the Tribunal found that there was no inappropriate use of the power.
- 17 I accept the submissions of the applicant that both defences raised by the respondent had no proper basis.
- 18 I also accept the submission of the applicant that the allegations made by the respondent against the applicant's attorney without any real supporting evidence should be considered in determining costs. The applicant submitted that this was a consideration under s109 (3)(c). While that is correct, it is also a matter I have taken into account under s109(3) (e) being "any other matter the Tribunal considers relevant."
- 19 For these reasons the respondent must pay the applicant's costs of the proceedings. Pursuant to rule 1.07 of the VCAT rules 2008 the County Court scale is the appropriate scale.
- 20 Further I am satisfied that the applicant has been substantially successful in his claim and pursuant to s 115B of the VCAT Act, the respondent must reimburse the applicant the fees paid.

L. Forde
Senior Member

² Reasons paragraph 37

³ Reasons paragraph 39