VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D696/2006

CATCHWORDS

Costs – s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 – whether appropriate case for exercise of the Tribunal's discretion – conduct of the parties

APPLICANT	Dura (Australia) Constructions Pty Ltd (ACN 004 284 191)
RESPONDENT	SC Land Richmond Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 February 2007
DATE OF ORDER	5 March 2007
CITATION	Dura (Australia) Constructions Pty Ltd v SC Land Richmond Pty Ltd (Domestic Building) [2007] VCAT 330

ORDER

1. There are no orders for costs of the respective applications of the Applicant and the Respondent heard and determined on 15 December 2006 or for that part of the directions hearing on 6 February 2007 when the Respondent's application for costs was heard.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr A. Herskope of Counsel

For Respondent Mr A.J. Laird of Counsel

REASONS

1 On Friday, 15 December 2006 the Applicant made an urgent ex parte application for an interim injunction restraining the Respondent from dealing or disposing with the proceeds of two Bank Guarantees, which had been presented for payment by the Respondent the previous day. Despite some concerns about the lack of supporting material, which I expressed at the time, I made the interim injunction and adjourned the application to further hearing on the following Tuesday, 19 December 2006. As noted on my order, after I had made my decision and confirmed the orders, a facsimile from the Respondent's solicitors requesting an opportunity to be heard in relation to any such application, was drawn to my attention.

2 Later the same morning, the Respondent made application for the interim injunction to be discharged, which was listed for hearing the same afternoon. The Respondent filed affidavits of two of its directors in support of the application, both of which had been sworn on 14 December 2006.

3 At the hearing of the Respondent's application it quickly became apparent that there was little or no utility in maintaining the injunction. The funds had already been disbursed, Mr Laird said to pay moneys owing to the Applicant's contractors' so that they would return to work. After a short adjournment the Applicant conceded that the injunction should be discharged, but then made a further application for injunctive relief which I declined to grant in the absence of appropriate supporting material.

4 The Respondent now seeks its costs of and incidental to the Applicant's application for injunctive relief and its subsequent application that the injunction be discharged. Mr Laird of Counsel, who appeared on behalf of the Respondent, submitted that this was an appropriate instance for an order for costs on an indemnity basis. The application was opposed by the Applicant. Mr Herskope of Counsel who appeared on behalf of the Applicant submitted that there should be no orders as to costs.

The Respondent's position

5 The Respondent relies on s109(3)(c), (d) and (e) of the *Victorian Civil and Administrative Tribunal Act* 1998. Mr Laird submitted that had proper disclosure been made by the Applicant it would have been obvious that the ex parte application was weak. It would have been apparent that there was no serious issue to be tried, and that the balance of convenience favoured the Respondent having access to the bank guarantees to pay the Applicant's debts. Further, that the Applicant had failed to establish that damages were not an appropriate remedy.

6 Mr Laird relied on the affidavits filed by the Respondent - in particular, the allegations that the Applicant owed its contractors in excess of $500,000.00

when it 'departed' from the project – debts which had to be paid by the Respondent so that the contractors would continue working on the project.

7 Further, he submitted that it had been totally inappropriate for the Applicant to make an ex parte application in circumstances where the Respondent's solicitors had expressly requested the Applicant's solicitors notify them of any application. In this regard he referred me to the correspondence passing between the parties' solicitors. It is perhaps helpful to set out relevant extracts from that correspondence.

8 On 23 October 2006 the Applicant's solicitors wrote to the Respondent's solicitors advising:

> …please confirm your client's undertaking not to call upon the existing bank guarantee as foreshadowed in your letter, failing which our client reserves its rights to take such action as it sees fit including seeking injunctive relief, in which case this letter would be produced in support of such relief as well as on an application for costs, whether on an indemnity basis or otherwise.

On 26 October 2006 the Applicant's solicitors wrote again:

> We refer to our letter dated 23 October 2006, a copy of which we enclose.
>
> In that letter we explained to you the situation with the bank guarantees and that neither is due to expire in December as asserted by you. We enclose copies of the bank guarantees. We sought provision of any bank guarantee you say is due to expire in December. You have not done so.
>
> Moreover, we sought an undertaking from your client not to call upon the bank guarantees as foreshadowed in your letter. To date, your client has failed to give that undertaking.
>
> Do you intend to respond to our letter? If so, please ensure we receive it by midday tomorrow, 27 October 2006, failing which you are aware of our client's position.

9 The Respondent's solicitors wrote to the Applicant's solicitor on 27 October 2006 advising :

> We acknowledge receipt of your letter dated 26 October 2006 concerning bank guarantees provided by your client.
>
> We have asked our client for a copy of the bank guarantee which it understood would expire in December but it appears that our client was in error and the bank guarantee does not expire until February.
>
> …
>
> Your request for an undertaking is noted. The request is unreasonable and seeks to cut across our client's contractual rights and no such undertaking will be provided.
>
> Any application for injunctive relief would appear misconceived. If you are instructed to proceed with such an application, please ensure

that we are provided with proper notice. Please also note that our client would seek an order for costs on an indemnity basis and that this letter will be relied upon in that regard.

10 On 2 November 2006 the Applicant's solicitors again wrote to the Respondent's solicitors:

> We refer to our letters to you dated 23 and 26 October 2006, to both of which we have not received any reply.
>
> In your letter dated 19 October 2006, you sought information about the expiry date of one of the 2 bank guarantees submitted by our client to your client. In the final paragraph of your letter you wrote:
>
> > *'Failing no satisfactory response, our client expressly reserves all of its rights including its right to call upon the existing bank guarantee security'* (sic)
>
> We responded to you by letter dated 23 October 2006 and gave what is plainly a satisfactory response to your letter and we sought your client's undertaking that it would not call upon the existing bank guarantees. You did not reply to our letter and your client did not give the undertaking sought.
>
> By further letter dated 26 October 2006, we enclosed copies of the 2 bank guarantees provided by your client and inquired whether we could expect to receive a response to our earlier letter. Again, we have received no response and your client has still not given the undertaking sought in our letter dated 23 October 2006.
>
> Our client has a reasonable apprehension, based upon the above referred to passage in your letter dated 19 October 2006 and the continuing refusal by your client to give the undertaking sought in our 2 letters, that your client will call upon the bank guarantee in circumstances where there is no basis for, or entitlement for your client, to do so.
>
> In these circumstances, we give your client one further opportunity to provide its undertaking by 12.00 noon tomorrow, 3 November 2006, that it will not seek to call upon either of the bank guarantees until resolution of the VCAT proceedings commenced by our respective clients, failing which your client will leave our client with no alternative but to take such steps as are necessary to protect its rights without further notice to you.

11 In essence, the Respondent seeks costs because of the alleged failure of the Applicant to disclose all relevant material to the Tribunal including the correspondence referred to above, its indebtedness to its contractors, the nature and extent of the bank guarantees which the Respondent alleges are unconditional, and the applicable authorities.

The Applicant's position

12 Mr Herskope submitted, on behalf of the Applicant, that its conduct in seeking ex parte injunctive relief was entirely appropriate in the

circumstances. He noted that such relief was granted on the basis of counsel giving the usual undertakings as to damages, and that orders were made requiring the Applicant to file and serve affidavit material confirming the matters that had been put from the bar table in support of the application.

13 He described the correspondence as being reflective of the parties' respective solicitors effectively 'drawing their guns'. Each party was seeking an undertaking from the other. He also noted that the affidavits filed by the Respondent in support of its application that the interim injunction be discharged, had been sworn the previous day, and did not refer to any particular proceeding number. He suggested this was a clear indication that the Respondent anticipated that the Applicant would make urgent application for injunctive relief immediately the Respondent called upon the bank guarantees.

Discussion

14 The parties are involved in extensive litigation both before this Tribunal and elsewhere. The Respondent relies on its solicitors' letter of 27 October 2006 where they specifically request they be given notice of any application for injunctive relief, and says that the Applicant should have produced a copy of that letter at the hearing of its ex parte application. However, I note that this letter was apparently sent by facsimile. The copy of the facsimile transmission report handed to me at the costs hearing indicated that there was 'no response'. There is no evidence that a hard copy was sent. I cannot be satisfied it was actually sent to the Applicant's solicitors, or that they had a copy of it when I heard the ex parte application.

15 It seems the affidavits of the Respondent's directors sworn on 14 December 2006 were prepared in anticipation of application being made by the Applicant for injunctive relief. Neither affidavit records the proceeding number to which it refers (and surprisingly this was not completed by hand before the affidavits were filed). I make no findings about the matters deposed to in these affidavits, and in particular the circumstances surrounding the payments made to the Applicant's contractors, particularly whether or not the accounts should have been paid.

16 Whilst it is true that the application was heard ex parte, the Respondent might well be said to have taken a somewhat high-handed attitude in cashing the bank guarantees without notice to the Applicant. The correspondence passing between the parties makes it quite clear that each was seeking assurances and undertakings from the other that pre-emptive steps would not be taken.

17 Although I expressed some concern at the hearing of the ex-parte application that this might be a case of 'shutting the gate after the horse has bolted' I was nevertheless persuaded that I should grant the interim injunction, albeit for a limited period of time, as for it to have any utility it

was necessary for it to be granted as a matter of urgency. Had the Respondent not made application for an urgent hearing for a discharge of the injunction, it would have returned to the tribunal for further hearing the following Tuesday – two business days later. However, this is not to criticise the Respondent for making the application. It was entirely appropriate that it do so in circumstances where the funds had been deposited in its trading account, were no longer separately identifiable and where payments had been made against those funds. It is not for me to speculate as to what application may have been made, or the outcome of such application, had the Applicant been put on notice of the Respondent's intention to call-in the bank guarantees. I am only concerned with the matters as they were before me on December 15th.

18 In the circumstances, having regard to the conduct of both parties, I am not persuaded that this is an appropriate case for the exercise of the Tribunal's discretion under s109(2). There will therefore be no order as to costs of either application.

19 Similarly, there will be no order for costs as to that part of the directions hearing on 6 February 2007 applicable to the hearing of the Respondent's application for costs of the two applications heard and determined on 15 December 2006.

DEPUTY PRESIDENT C. AIRD