VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D148/2004**

CATCHWORDS

[2005] VCAT 1644

APPLICANT	Katerina Filis
RESPONDENT	David William McNeil
SECOND RESPONDENT	HSBC Bank Australia Ltd (ACN 006 434 162)
WHERE HELD	Melbourne
BEFORE	Senior Member M Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	26 July 2005
DATE OF ORDER	10 August 2005

ORDER

1. Having regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 and being satisfied it is fair to do so I order Applicant to pay the costs of 2nd Respondent. In default of agreement such costs to be assessed by the principal registrar in accordance with the Magistrates' Court Scale.

SENIOR MEMBER M LOTHIAN

APPEARANCES:

For Applicant	Mr D Oldham, Solicitor
For First Respondent	No appearance
For Second Respondent	Mr L Macgowan, Solicitor

REASONS

1. This is a dispute about whether the Second Respondent is entitled to costs, and on which scale, consequent upon the withdrawal of proceedings by the Applicant.

2. On 9 March 2004 the Applicant commenced proceedings against the First and Second Respondents. The relief sought was:

   "(a) the contract has been validly avoided by the First Applicant;
   (b) the Notice is an unlawful demand;
   (c) the First Respondent be restrained from calling up the Bank Guarantee;
   (d) the Notice is invalid and of no effect;
   (e) the Applicant is entitled to the return of the Deposit plus interest thereon;
   (f) alternatively, the Contract is unconscionable and is void;
   (g) the First Respondent pay the costs of and incidental to this Application; and
   (h) such other order as the Tribunal deems appropriate".

3. "The Contract" referred to in (a) and (f) was a contract of sale to the Applicant from the First Respondent. The subject of the contract was part of the land upon which a multi-storey building was to be erected, plus improvements to be constructed.

4. "The Notice" referred to in (b) and (d) was a recision notice served by the First Respondent on the Applicant, requiring the Applicant to purge an alleged default within 14 days, failing which the First Respondent would enforce his remedies.

5. The "Bank Guarantee" referred to in (c) was not defined in the Points of Claim and was only referred to in paragraph 10:

   > "The First Respondent wrongfully threatens and intends unless restrained by the Tribunal to call up the Bank Guarantee provided by the Applicant".

6. Although not pleaded, it is common ground between the Applicant and the Second Respondent that the Bank Guarantee referred to was security provided by the Second Respondent to the First Respondent on behalf of the Applicant.

7. The Second Respondent is named in the title to the Points of Claim and identified in the Application, but there is no other reference to it and no relief has been sought against it. The drafting of the Points of Claim appears to be hasty and it appears that the Applicant's lawyers first intended to proceed against the First Respondent only, then added the Second Respondent as an afterthought. This is obvious as paragraphs 4, 6, 7 and 8 refer to "the Parties" or "the Respondent" which cannot, by nature of those pleadings mean the Second Respondent and paragraphs 2, 9, 10, 11 and the prayer for relief make mention specifically of the "First" Respondent. As Mr Magowan for the Second Respondent said, the application and Points of Claim reveal no cause of action against the Second Respondent.

8. On 26 July 2005 I made an Order by Consent that the proceeding against the First Respondent be struck out with no order as to costs. An order was also made, by consent, that the proceeding against the Second Respondent be withdrawn. As mentioned above, the one remaining issue concerns the Second Respondent's claim for costs.

9. Mr Oldham for the Applicant said the Second Respondent should not receive costs – they have played an insubstantial role and did not appear at hearing of 4 July 2005 and could have chosen to strike the matter out early under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998.

10. Nevertheless, the Application was accompanied by an affidavit and exhibits which ran to over 100 pages. Although it might be obvious to a careful reader that the Application and Points of Claim reveal no cause of action against the

Second Respondent, any party serving a document of that size, or any size for that matter, must assume that the prudent recipient will read it. The Second Respondent's failure to make application under s75 has, in all probability, saved costs rather than the opposite.

11. It is reasonable that costs be ordered. The issue is, if the parties fail to agree, which scale should apply?

12. The size of the dispute is, at most, the value of the Bank Guarantee being $74,500. This is within the jurisdiction of the Magistrates' Court. Had the pleadings been drafted to reveal even a glimmer of a cause of action against the Respondent, the complexity of the proceedings might have justified costs on County Court Scale D. They did not. All that was justified was an initial perusal, any appearances and a watching brief. In these circumstances, the Magistrates' Court scale is appropriate.

SENIOR MEMBER M LOTHIAN