

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D626/2005

**DOMESTIC BUILDING LIST**

**CATCHWORDS**

Domestic building – reinstatement – costs.

<b>APPLICANT</b>	Joseph Giardina
<b>FIRST RESPONDENT</b>	Wilcon Constructions Pty Ltd (ACN 086 301 966)
<b>SECOND RESPONDENT</b>	Wilcon Constructions (Vic) Pty Ltd (ACN 104 660 451)
<b>THIRD RESPONDENT</b>	Brett Anthony Mazouris
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member D. Cremean
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8 June 2007
<b>DATE OF ORDER</b>	19 June 2007
<b>CITATION</b>	Giardina v Wilcon Constructions (Domestic Building) [2007] VCAT 1073

**ORDER**

- 1 Order the Third Respondent to pay costs of the Applicant of \$2,385.00.
- 2 Otherwise, no orders as to costs.

**SENIOR MEMBER D. CREMEAN**

**APPEARANCES:**

For the Applicant	Mr S. Matters
For the First Respondents	Mr J. Gray of Counsel
For the Second Respondent	Mr J. Gray of Counsel
For the Third Respondent	Mr J. Gray of Counsel



## REASONS

- 1 The Third Respondent in this matter was successful in setting aside orders made following his non-attendance at a Compulsory Conference. See my decision, and the Reasons I gave, on 2 May 2007.
- 2 The Third Respondent now applies for costs and claims them on County Court Scale “D”.
- 3 The Third Respondent’s application for costs was opposed by the Applicant who seeks costs himself against the Third Respondent. He agrees though that if costs are ordered in favour of the Third Respondent they should be on County Court Scale “D”. That, indeed, is the scale on which he seeks his costs. His fallback positions, if I may describe them that way, are that the Third Respondent should pay his costs thrown away (a sum of \$2,385.80) or that costs should be reserved.
- 4 The ordering of costs by the Tribunal is governed by s109 of the *Victorian Civil and Administrative Tribunal Act 1998* which reads as follows:
  - (1) Subject to this Division, each party is to bear their own costs in the proceeding.
  - (2) 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.
  - (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
    - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
      - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
      - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
      - (iii) asking for an adjournment as a result of (i) or (ii);
      - (iv) causing an adjournment;
      - (v) attempting to deceive another party or the Tribunal;
      - (vi) vexatiously conducting the proceeding;
    - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
    - (c) 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;
    - (d) the nature and complexity of the proceeding;
    - (e) any other matter the Tribunal considers relevant.

- (4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.
  - (5) Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.
  - (6) If the Tribunal makes an order for costs before the end of a proceeding, the Tribunal may require that the order be complied with before it continues with the proceeding.
- 5 It is submitted both by the Third Respondent and by the Applicant that I should order costs having regard to s109(3) on the ground that I should consider it fair to do so. The difficulty is, though, that the Third Respondent says this in respect of himself while the Applicant says it in respect of himself.
- 6 The approach I should adopt to the operation of s109 is that set out by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 at [20]:
  - “the Tribunal should approach the question [of costs] on a step by step basis, as follows –
    - (i) The prima facie rule is that each party should bear their own costs of the proceeding.
    - (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
    - (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other [matter] it considers relevant to the question”.
- 7 I apply that approach in this case.
- 8 Each party addressed me orally on their positions and provided written submissions as well, which I have duly considered.
- 9 Several points are argued by the Third Respondent which I consider simply re-visit the matters I dealt with on the prior occasion. Three important matters raised, however, are these: what is said to be the weakness of the owner’s case in resisting the re-hearing; the length of the hearing; and the lack of fault on the Third Respondent’s part.
- 10 Having reviewed my previous Reasons for Decision I cannot agree that the Applicant’s case was as weak as is alleged. It was respectably able to be advanced. In the end, though, for a variety of reasons, it was not successful and the Third Respondent won on the re-hearing point. The Third Respondent was assisted, I must point out, by the concession, rightfully,

made by the Applicant. But there was more to the case than was simply covered by that concession.

- 11 It is true that concession came late in the piece. And before that, I think the hearing went for too long. Often, pointless objections were taken. But both sides, I consider, were equally at fault in that. Each, I consider, has itself, approximately equally, to blame for the length of the hearing. This reflects itself in legal expenses paid by the parties.
- 12 I agree there was lack of fault on the Third Respondent's part at least as regards the nature of the orders made against him, and how they came to be made. This was put to me as the "external circumstances" giving rise to those orders – how they came to be made following a Compulsory Conference he did not attend and what they came to order against him. I have made comments about these matters in my previous Reasons.
- 13 Having considered these matters, and the additional ones raised, I am not satisfied I should order costs in favour of the Third Respondent. Having regard to s109(3) I do not consider it fair under s109(2) to depart from s109(1). Indeed, the contrary: it seems to me that the Third Respondent, for one reason or another, was careless about his rights at the relevant time. It is true I have set aside the orders made against him but I am not precluded from saying that the matter was quite closely balanced in some respects and, based on earlier evidence, I think he was less mindful of his responsibilities as a party to litigation – in particular, of the need to keep in contact with his legal practitioner on record.
- 14 I, therefore, decline to order costs in favour of the Third Respondent. As well, he, in effect, was granted an "indulgence" by the Tribunal, as it is put, on a re-hearing application. It used to be the practice in the courts, and may still be so, that if an indulgence of this nature is granted the beneficiary of the indulgence would be required to pay any costs thrown away.
- 15 The Applicant is not responsible for the irregularities in the orders made against the Third Respondent. He was granted orders in his favour which he subsequently, and quite properly at the time, pursued.
- 16 The Third Respondent's heedlessness in attending to his own rights and duties as a litigant was not enough for me to say that he should not succeed in having the orders against him set aside. But, causally, his dilatoriness lead to the Applicant obtaining those orders and seeking to enforce them. That is to say, there would have been nothing to enforce if the orders had not been made; and the orders would not have been made if the Third Respondent had been more attentive; yet, by seeking to enforce the orders the Applicant has been put to considerable expense.
- 17 I consider it is fair to order the Third Respondent to pay that expense. The expense is in the sum of \$2,385.00 which includes sheriff's expenses. This is, in effect, costs thrown away. It equates to those. The sum, ultimately,

was not challenged in amount. Under s109(2) I may order a party to pay “all or a specified part” of another party’s costs.

- 18 I am satisfied, for the reasons I have given, that the Third Respondent’s conduct constitutes conduct which has unnecessarily disadvantaged the Applicant. I am satisfied this falls within s109(3). I consider it fair – considering the conduct of the Applicant – to order the Third Respondent to pay for the costs thrown away by the Applicant. I depart from the position established by s109(1) to this extent.
- 19 I order the Third Respondent to pay the Applicant the sum of \$2,385.00.
- 20 Otherwise, though, given the factual circumstances of the case, I am not satisfied I should make any orders as to costs against either party or in favour of either. In that regard I rely upon s109(1), save as I have indicated.
- 21 Except as specified, there is, therefore, no order made to as costs.
- 22 Order accordingly.

**SENIOR MEMBER D. CREMEAN**