

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**CIVIL DIVISION**

DOMESTIC BUILDING LIST	vcat reference No. D142/2003
CATCHWORDS	
Costs – s109 of the <i>Victorian Civil and Administrative Tribunal Act 1998</i> – no orders as to costs	

APPLICANT	The Gombac Group Pty Ltd
FIRST RESPONDENT	Vero Insurance Limited (formerly Royal & Sun Alliance Insurance Australia Ltd)
SECOND RESPONDENT	Tom Papaioannou
THIRD RESPONDENT	Greg Wodetzki
FOURTH RESPONDENT	Trenerry Properties Pty Ltd (Released from proceedings 11/11/2003)
FIFTH RESPONDENT	Anthony Peter Nelson (Released from proceedings 11/11/2003)
SIXTH RESPONDENT	Nicholas Scott Nelson (Released from proceedings 11/11/2003)
SEVENTH RESPONDENT	Anna Louise Kirby (Released from proceedings 11/11/2003)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	18 July 2007
DATE OF ORDER	24 August 2007
CITATION	Gombac Group Pty Ltd v Vero Insurance Limited (Domestic Building) [2007] VCAT 1826

Order

There are no orders as to costs

DEPUTY PRESIDENT C AIRD		
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APPEARANCES:	
For Applicant	Mr S Stuckey of Counsel
For the First Respondents	Mr K Oliver of Counsel
For the Second and Third Respondents	No appearance, not parties to this application

Reasons

- 1 On 24 February 2006 I ordered:
 1. There are no orders as to costs as between the Applicant, the First, Second and Third Respondents.
- 2 Following an appeal to the Supreme Court by the First Respondent those orders were set aside insofar as they applied to the First Respondent, and the First Respondent's application for costs remitted to me for further hearing and determination. Mr Oliver of Counsel again appeared for the First Respondent, as did Mr Stuckey of Counsel for the Applicant.
- 3 There was some discussion during the course of the hearing as to whether this was a hearing *de novo* or whether I was only, in effect, being asked to revisit whether it was appropriate to exercise the tribunal's discretion under s109(2) following Gillard J's determination in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 (2 May 2007) that I had:

...erred in applying a guideline that in administrative review proceedings, costs are far less likely to be awarded than where the matter is an inter-parties commercial dispute

However, although his Honour set aside the order made on 24 February 2006 at paragraph 62 of his judgement dated 2 May 2007 he held:

With respect to the original two questions of law, I am not persuaded that the Deputy President failed adequately to have regard to the matters set out in s.109(3)(c) and (d) or that she approached the matters in subsection 109(3)(d) on the basis that the existence of complex technical issues tended against an award of costs. As stated, in my opinion, s. 109(3)(d) may result in an order for costs or may not, and of course the Tribunal could not make any order for costs unless it was satisfied that it was fair to do so.

- 4 Whether this can properly be considered a hearing *de novo* is of little, if any, import. Having considered the First Respondent's submissions at this hearing, in relation to s109(3), I am satisfied I may properly reiterate the comments and findings at paragraphs 3 – 9 of my Reasons for Decision dated 24 August 2006. These were, in effect the subject of the original two questions of law to be determined on appeal, viz:
 - (i) Whether VCAT, in declining to order that the defendant pay the plaintiff's costs of the VCAT proceeding, failed adequately to have regard to sub-ss.109(3)(c) and (d) of the VCAT Act 1998.
 - (ii) Whether VCAT, in declining to order that the defendant pay the plaintiff's costs of the proceeding, misconstrued sub-s.109(3)(d) of the VCAT Act in finding that the existence of a number of complex technical issues to be considered and determined tended against an award of costs rather than in favour of an award of

costs.

5 His Honour has provided very clear guidance about the approach to be adopted by the Tribunal is considering whether to exercise its discretion under s109(2):

“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. (emphasis added)

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”.

6 Further at [39] his Honour said:

... one has to proceed with caution because in the end the determinative is whether the Tribunal is satisfied "that it is fair to do so", that is, to order costs, thereby overcoming the prima facie rule that each party should bear their own costs

7 Having heard further argument I am not persuaded that I should exercise the Tribunal’s discretion under s109(2). . The decision in *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024 was but one of the matters taken into account in declining to exercise the tribunal’s discretion. I refer the parties to my reasons dated 24 February 2006 and in particular to paragraphs 3-9.

8 Accordingly, there will be no orders as to costs as between the Applicant and the First Respondent.

DEPUTY PRESIDENT C AIRD		
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