VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP280/2014

CATCHWORDS

Section 75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* – application for compensation – unfettered discretion

FIRST APPLICANT	Ian McPhee Graham
SECOND APPLICANT	Beth Maureen Graham
FIRST RESPONDENT	Ian Bruce McNab
SECOND RESPONDENT	Alastair Finlay McNab
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	4 June 2015
DATE OF ORDER	30 June 2015
CITATION	Graham v McNab (Building and Property) [2015] VCAT 980

ORDER

1. The applicants must pay the respondents compensation under s75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* being their costs of this proceeding. In default of agreement such costs are to be assessed by the Victorian Costs Court on a solicitor-client basis on the County Court scale .
2. I certify counsel's fees at $3,300 per day, and $330 per hour.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants	Ms T Acreman of Counsel
For Respondents	Mr R Moore of Counsel

REASONS

1 On 26 March 2015 I made orders, with Reasons, striking out the proceeding for lack of jurisdiction.[1] The applicants' claims were brought under Part IV of the *Property Law Act 1958* ('the PLA') and I found that their claims did not arise from a co-ownership dispute. Costs were reserved with liberty to apply. The respondents seek an order under s75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that the applicants pay them an amount to compensate them for their costs and expenses of the proceeding, with the costs to be ordered on an indemnity basis.

2 The application is opposed by the applicants. Further, they contend that if I am minded to make an order in favour of the applicants, any costs should be assessed on the County Court scale on a standard basis.

3 The applicants were represented at this hearing by Ms Acreman of Counsel, and the respondents were once again represented by Mr Moore of Counsel.

SECTION 75

4 Section 75 relevantly provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
>
> (a) is frivolous, vexatious, misconceived or lacking in substance; or
>
> (b) is otherwise an abuse of process.
>
> (2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
>
> …

5 The orders striking out the proceeding for lack of jurisdiction were made under s75(1). The respondent's application for compensation is made under s75(2).

6 The applicants concede that the respondents' application should be considered under s75(2) of the VCAT Act. Ms Acreman submitted that whilst the Tribunal has a wide discretion under s75(2), in deciding whether to exercise the Tribunal's discretion I should have regard to the matters set out in s109(3). However, this is by no means the established approach as demonstrated by the previous decisions of the Tribunal to which I was referred by Ms Acreman.

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[1] [2015] VCAT 353

7 In *Ingram v McLennan & Associates Pty Ltd*[2] where Deputy President Dwyer said at [4]

> Section 75(2) operates independently of s 109, and is broader than the power to award costs under s 109. It does not operate from a starting presumption that each party ordinarily bear their own costs but, equally, it does not create a presumption that costs should automatically follow the event. There is a general discretion, which should be exercised having regard to the particular circumstances of the proceeding.

8 In *Walsh v Cannon & Ors*[3] Judge Harbison VP said at [4]:

> The respondents say that s75 gives to the Tribunal a broad and unfettered power to compensate a party who suffered the institution and prosecution of a proceeding which is misconceived or lacking in substance. The respondents argue that where proceedings are struck out under s75(1) an order for costs should be made [under] s75(2) and that in deciding whether to make such an order, I should not take into account the principle in s109 which provides that each party in VCAT proceedings will usually bear their own costs.

Her Honour continued at [6]

> Although s75(2) provides no direct guidance on the circumstances under which costs should be awarded after a successful application under s75(1), the Act provides that I must act fairly and accordingly to the substantial merits of the case in all proceedings (s97). Many of the matters set out in s109 are in my view therefore properly to be considered in this application for costs, even thought it is brought under s75(2) and even though the matters identified in s109 are not referred to in s75(2).

9 In *IIQ Pty Ltd (ACN 134 743 614) and Anor v Delaney Associates Pty Ltd (ACN 063 887 836)*[4] Vassie SM said at [13]:

> The last word has not yet been spoken on the relationship between section 75 (2) and section 109. This is not the occasion to add many more words. All I say is that I agree with the following propositions contained in the written submissions as to costs to which Mr Slattery, Counsel for the first respondent, spoke at the hearing. (They are my paraphrasing, not his words).
>
> a. It is open to a respondent who has succeeded on a summary dismissal or strike out application made under section 75 to seek costs either under that section or under section 109.
>
> b. Section 75 (2) is unaffected by the general rule in section 109 (1) that parties bear their own costs. When an application for costs is made under section 75 (2) the Tribunal has a complete discretion to award, or not award, costs.

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[2] [2014] VCAT 412
[3] [2008] VCAT 2409
[4] [2011] VCAT 2056

c. The power to award costs under section 109 (2) is also discretionary.

d. Vexatious conduct of a proceeding, unreasonable prolongation of a proceeding and the making of untenable claims are all grounds for the exercise of the discretion under s 75 (2) to award costs, just as they are for the exercise of a discretion under section 109 (2) to award costs.

e. So by and large it makes little difference whether an application for costs, following a summary striking-out of a proceeding, is made under section 75 (2) or under section 109 (2).

10 Mr Moore referred me to the comments by Justice Ross VP in *Oakley Thompson & Co Pty Ltd*[5] where he said at [29]

> In my view ss 75(2) and s 109 can be read together and when so read they disclose a coherent and sensible scheme. Subsection 75(2) makes specific provision for an award of compensation in circumstances where a dismissal or strike out application is successful because absent such a provision the power to award costs would be in doubt. The scope of an award of compensation is broader than the costs which may be ordered under s109 in order to discourage unmeritorious claims. [underlining added]

11 I agree with, and adopt, his Honour's observations. Further, in my view, the Tribunal's discretion under s75(2) is unfettered. Whilst, in deciding whether to exercise its discretion, the Tribunal might be assisted by matters similar to those set out in s109(3) it is not required to consider those specific matters.

THE RESPONDENT'S APPLICATION

12 Counsel for the respondents provided detailed written submissions in support of the application, in which he set out the history of the proceeding confirming that the question of jurisdiction was always in issue. It is helpful to summarise the chronology:

26 August 2015	Application filed.
6 September 2014	Application received by the respondents.
9 October 2014	Directions hearing at VCAT at which time an application under s75 of the VCAT Act was foreshadowed by the respondents on the basis there was no co-ownership dispute.
1 December 2014	The respondents filed and served Points of Defence including a defence that the applicants' claim was not co-ownership dispute.
8 December 2014	Compulsory conference was held where settlement was not achieved, and at which time the respondents

[5] [2008] VCAT 2074

	say the question of jurisdiction was raised again. Orders were made immediately following the compulsory conference, including orders for the applicants to amend their Points of Claim and for the respondents to make a s75 application with supporting material.
22 December 2014	The applicants filed and served Amended Points of Claim. The first order sought in the Prayer for Relief was amended from *A declaration that the applicants have a full equitable interest in number 73* to *A declaration that the applicants have an equitable interest in the property.*
16 February 2015	Applicants filed and served further and better particulars in which they claim an equitable interest in the whole of the property.

13 During the s75 hearing counsel for the applicants confirmed that they were claiming the property was theirs and theirs alone.

14 The respondents contend that it was always clear that the tribunal did not have jurisdiction under the PLA to consider the applicants' claims, and that the amendment to the Points of Claim was an attempt to:

> …mask their difficult by giving the semblance that this was a dispute between co-owners when it never was, to avoid the jurisdictional hearing and to get the application to a substantive hearing in the hope that a tribunal could be persuaded to award the whole of the property to the applicants. In fact, and remarkably, Mr McKenzie said as much in his oral submissions to the Tribunal.[6]

15 Further, that the applicants persisted with their application despite having been put on notice that their claim was not a co-ownership dispute and therefore had no tenable basis in law under the PLA.

16 Ms Acreman submitted that the fact the applicants had not succeeded in resisting the respondents' application should not be sufficient to persuade me to exercise the Tribunal's discretion in favour of the respondents. I disagree.

17 As I said at [28] of my earlier Reasons:

> In considering whether the Tribunal has jurisdiction to consider the applicants' claims, I am not concerned with the merits of their claims. For present purposes, I find on the material which has been filed that it is arguable they have an equitable interest in the property. However, that is not enough to enliven the Tribunal's jurisdiction. The applicants have made their application under Part IV of the PLA yet they claim they are the owners of the *whole* of the equitable estate in

[6] Respondents submissions on costs at [8]

> the property. On their own case, they demonstrate that they are not co-owners of an equitable interest in the property. [underlining added]

18 Further, as discussed in my earlier Reasons, I found each of the alternative bases upon which the applicants made their claims lacked substance or were untenable in law in the absence of a co-ownership dispute.

19 Ms Acreman only referred me to one instance where the tribunal declined to exercise its discretion under s75(2) in favour of a respondent and, I note that, in that instance the applicant was self represented.[7] In this proceeding, the applicants are legally represented including by counsel experienced in this jurisdiction.

20 I am satisfied this is an appropriate case for the exercise of the tribunal's discretion under s75(2). Not only had the tribunal previously confirmed that its jurisdiction under Part IV of the PLA could only be enlivened where an applicant is a co-owner of the same interest as the other parties to the proceeding.[8], the respondents fairly and squarely raised the question of jurisdiction with the applicants at a very early stage of the proceeding.

SHOULD AN ORDER FOR INDEMNITY COSTS BE MADE?

21 Mr Moore submitted on behalf of the respondents that in ordering they be paid compensation under s75(2) I should order that their costs be assessed on an indemnity basis. Whilst ordinarily costs ordered in this tribunal will be assessed on a standard or party/party basis, I am persuaded that the circumstances of this proceeding warrant the making of an enhanced costs order. I consider the appropriate order is that the applicants pay the respondents' costs to be assessed on a solicitor-client basis on the County Court scale.

22 Although I have previously found them not to be relevant in considering whether to exercise the tribunal's discretion under s109(2) of the VCAT Act[9], Justice Woodward's comments in *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*[10] are, in my view, relevant to a consideration of the compensation to be awarded under s75(2):

> I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law"

23 As noted above, the applicants claim under the PLA was manifestly hopeless and untenable whilst they continued to assert they held the whole of the equitable interest in the property. They are not, and never were, co-

[7] *1IQ* supra
[8] *Garnett v Jessop* [2012] VCAT 156
[9] *MK Builders Pty Ltd v 36 Warrigal Road Pty Ltd & Ors* [2012] VCAT 1799
[10] [1988] FCA 202 at [401]

owners of the property as defined in s222 of the PLA. They were represented by counsel experienced in this jurisdiction. Properly advised they should never have commenced these proceedings, and certainly once alerted to the jurisdictional issues almost immediately after the commencement of the proceeding, they should have sought leave under s74 of the VCAT Act to withdraw. Instead, they amended their Points of Claim, whilst persisting with their claim that they held the whole of the equitable interest in the property.

24 Accordingly, I will order that the applicants pay the respondents compensation under s75(2) of the VCAT Act being their solicitor-client costs of this proceeding to be assessed on the County Court scale.

DEPUTY PRESIDENT C AIRD