VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D75/2007

CATCHWORDS

Costs — admissibility of 'anything said or done in the course of mediation' – ss 78, 91, 92 and 109 of *Victorian Civil and Administrative Tribunal Act* 1998

APPLICANT	D & J M Gude
FIRST RESPONDENT	Grant Stephens
SECOND RESPONDENT	Grant Stephens as Trustee for the Colorform Superannuation Fund
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	3 May 2007
DATE OF ORDER	11 May 2007
CITATION	Gude v Stephens (Domestic Building) [2007] VCAT 810

ORDER

1. The Applicant's application for its costs thrown away of the mediation held on 4 April 2007 is dismissed.

2. The parties' costs of the mediation held on 4 April 2007 are costs in the proceeding.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr J. Forrest of Counsel
For First and Second Respondents	Mr G. Hellyer of Counsel

REASONS

1 On 8 February 2007 the Applicant commenced proceedings in this Tribunal. Following notification that the proceedings were set down for mediation on 20 March 2007, the Applicant's solicitors wrote to the Respondent on 15 February 2007 seeking consent to an adjournment of the mediation until 2, 3 or 4 April 2007 due to the non-availability of counsel on the scheduled date. On 7 March 2007 the Applicant's solicitors wrote to the Tribunal seeking an adjournment of the mediation, advising that although written consent to the adjournment had not been received from the Respondent, the Respondent had consented to an adjournment of the mediation in a telephone conversation. The application for an adjournment of the mediation was granted and the mediation rescheduled for 4 April 2007, one of the dates sought by the Applicant.

2 On 27 March 2007 the Applicant's solicitors were contacted by solicitors, who have been described as 'the family solicitor for Mr Grant Stephens' ('the Respondent'), requesting an adjournment of the mediation scheduled for 4 April 2007 as the Respondent would be overseas from 3 April to 10 April 2007 inclusive. The Applicant's solicitors sent to the Tribunal, and to the Respondent, a copy of their letter to 'the family solicitor for Mr Grant Stephens' wherein they refer to that telephone conversation and confirm that the Applicant intends to proceed to mediation on 4 April 2007 and advise:

> If your client does not make any appearance personally (as he has been representing himself to date), or fails to have solicitors and/or counsel able to appear for him with unconditional authority to settle on the usual terms required by VCAT mediation procedure, then our clients will apply for appropriate Directions/Orders on that day in your client's absence.
>
> Furthermore, if that is what eventuates, we will seek Orders against your client for our clients' costs of the day and/or costs thrown away on a full indemnity basis and for an Order that any alleged Counterclaim to be made by your client be stayed until such costs awards are paid.

3 The mediation proceeded on 4 April 2007, as scheduled. The Report of Mediation filed by the mediator advised that the mediation had been unsuccessful, as required by s91 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the Act'). It also recorded that the Applicant was represented by Mr Joe Forrest of Counsel and the Respondent was represented by Mr David Phelan, solicitor.

4 Subsequently, on 30 April 2007 the Applicant filed an Application for Directions/Orders, accompanied by an Affidavit by the first named Applicant, seeking the following orders:

1. That the Respondent pay the Applicants' costs thrown away of the mediation of 4 April 2007 to be agreed and failing agreement to be assessed by the Principal Registrar on a party-party basis on the Supreme Court Scale.
2. Such further Directions as the Tribunal considers necessary.

5 At the directions hearing on 3 May 2007, the Applicants were represented by Mr Forrest of Counsel, and the Respondent by Mr Hellyer of Counsel. Mr Forrest indicated that the application for costs thrown away of the mediation was made under s78 of the Act relying on s78(1)(g) and s78(2)(c). Section 78 provides:

> 78. Conduct of proceeding causing disadvantage
>
> (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
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> (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
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> (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
>
> (c) asking for an adjournment as a result of (a) or (b); or
>
> (d) causing an adjournment; or
>
> (e) attempting to deceive another party or the Tribunal; or
>
> (f) vexatiously conducting the proceeding; or
>
> (g) failing to attend mediation or the hearing of the proceeding.
>
> (2) If this section applies, the Tribunal may—
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> (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
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> (b) if the party causing the disadvantage is not the applicant—
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> (i) determine the proceeding in favour of the applicant and make any appropriate orders; or
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> (ii) order that the party causing the disadvantage be struck out of the proceeding;
>
> (c) make an order for costs under section 109.
>
> (3) The Tribunal's powers under this section are exercisable by the presiding member.

6 The Respondent has filed an affidavit sworn by his solicitor on 2 May 2007 to which is exhibited a bundle of correspondence wherein he objects to the

admissibility of certain paragraphs of Mr Gude's affidavit relying on s92 of the Act which provides:

> Evidence of anything said or done in the course of mediation is not admissible in any hearing before the Tribunal in the proceeding, unless all parties agree to the giving of the evidence.

7 Mr Forrest sought to persuade me that the reference to 'any hearing' in s92 does not extend to a directions hearing. He submitted that the term should be read narrowly to mean the final hearing of a proceeding, and that if so read, s92 does not act as an impediment to admissibility of evidence of what occurred at the mediation in a directions hearing.

8 I cannot agree with this submission. In the absence of any definition in the Act, and noting that the word 'hearing' is preceded by the word 'any' and further noting that there are particular sections applying to both 'mediation' and 'compulsory conferences' I am of the view that this term should be given its widest possible meaning, and as such includes a directions hearing. I am fortified in my views by the comments expressed by Morris J in *Buttigieg v Melton SC No 2* [2004] VCAT 868 at paragraph 63:

> … where the tribunal hears from the parties to the proceeding, following notice being given of the time and place of that hearing in accordance with section 99 of the Act, the tribunal is engaged in hearing the proceeding. <u>This is so even if the hearing is solely for the purpose of receiving submissions from the parties and then, following receipt of those submissions, making directions</u>. Sometimes directions will be routine and will not involve the tribunal in any more than a superficial examination of the matter before it….Moreover, even if the hearing has been listed for the purpose of making directions, it would always be possible for the tribunal to exercise other powers, of a more profound character, at such a hearing. For example, if it became apparent at a directions hearing that the application was totally misconceived the tribunal might, after hearing from the parties, exercise its powers, pursuant to section 75 of the *VCAT Act*, to summarily dismiss the proceeding. (emphasis added)

9 In this proceeding, I am asked to exercise the Tribunal's discretion under s109(2) of the Act, having regard to ss 78 and 109 which by the very nature of the application requires me to hear and consider submissions by the parties.

10 In any event, in my view, it is fundamental to the success of any Alternate Dispute Resolution process including mediation, that 'evidence of anything said or done in the course of the mediation' be inadmissible in any subsequent hearing to ensure that full and frank discussions can take place. In *Al-Hakim v Monash University* (unreported, 30 July 1999) McKenzie DP in considering the provisions of s92 said at page 12

> I also reject the Doctor's submission that I should treat the provision of clause 26 of Schedule 1 and section 92, that evidence of what happened at mediation is inadmissible, as no more than a restatement

> of the common law privilege applying to without prejudice settlement negotiations; a privilege, which I agree, undoubtedly a court can treat as inapplicable in a particular case where there are counter-balancing public interests or interests of justice which outweigh the interest in confidentiality (see Rush & Tomkins Ltd v Greater London Council (1989) Vol 1 Appeal Cases at page 1280).
>
> This is not the correct interpretation of these provisions in my view. They make evidence quite simply inadmissible, evidence of what happened at mediation, without qualification and without any discretion being given to the Tribunal to be able to override that provision.

11 It was suggested by Mr Forrest that taken to its logical conclusion, if his submission as to the proper interpretation of s92 was not accepted, evidence as to who attended, or did not attend, the mediation, and its duration would similarly be inadmissible. I cannot agree. In my view these details, whilst informative, are not 'evidence of anything said or done in the course of the mediation'. It is entirely appropriate to identify who attended and the duration of the mediation for administrative purposes. It is the discussions and conduct of the parties, their representatives and anyone else who attended at a mediation that is protected by s92.

12 To hear evidence about what transpired at a mediation, and to be asked to determine the reasons that settlement was not achieved, undermines the whole objective of mediation – to provide a confidential, without prejudice environment in which parties can freely discuss the issues in dispute. Opposing parties at an unsuccessful ADR session often form views as to why settlement has not been achieved which are often no more than mere speculation impacted by their perception of the other party's attitude.

13 I was referred to a number of authorities by Mr Forrest which I do not consider to be applicable to the present situation. Two are decisions of the Planning and Environment List (*Kilpatrick v Port Phillip CC* [2006] VCAT 1514 and *Falconbridge Pty Ltd v Yarra CC* [2005] VCAT 2449) where in both cases costs were ordered because of the failure of one of the parties to attend or be represented at the mediation. In the current proceeding, the Respondent was represented at the mediation by his solicitor.

14 I was also referred to *Deco Group Holdings Pty Ltd v Seaford Developments Pty Ltd* [2005] VCAT 1643 where, having previously indicated to the parties I would not preside at the final hearing because of matters about which I had become aware during various directions hearings, I had regard to material which might otherwise have caused a party prejudice upon the final hearing and determination. Once again, this was an entirely different situation to the one currently before me, the circumstances about which it is inappropriate to discuss here.

15 It is quite clear that any application for costs, because of the conduct of a party under s78 of the Act, is to be considered in the context of s109. I am of the view that the provisions of s78(1)(g) have not been satisfied. The

Respondent was represented at the mediation which, although settlement was not achieved, proceeded with a duration of some two and half hours. Further in deciding whether it is appropriate to exercise the Tribunal's discretion under s109(2) I must have regard to the matters set out in s109(3). In particular I consider it appropriate to consider the conduct of both parties. The Applicant having been granted an indulgence in obtaining an adjournment of the mediation, as originally scheduled, because of the apparent unavailability of counsel (about which Mr Forrest expressed some surprise), and in the absence of written consent from the Respondent, was not prepared to grant a similar indulgence to the Respondent who, it seems, was seeking a short adjournment of a little more than one week.

16 It is perhaps unfortunate that the Respondent did not contact the Tribunal directly with his request for an adjournment with evidence of the date on which his flights were booked, and his itinerary, and that this evidence is still not before the Tribunal. However, noting that his 'family solicitors' made contact with the Applicant's solicitor on 27 March 2007, some eight days prior to the scheduled date for the mediation, a similar indulgence might well have been granted with little prejudice to the Applicant. Whether the Respondent's attendance at an adjourned mediation would have resulted in settlement being achieved is unknown. However, what is apparent is that the next formal opportunity for the parties to discuss their issues with the assistance of the Tribunal is on 4 July 2007, when there is to be a Compulsory Conference – some three months after the scheduled date for the mediation – a delay that might well have been avoided if the mediation had been adjourned for a little over a week to accommodate the Respondent's travel arrangements.

17 I consider the appropriate order is that the parties' costs of the mediation are costs in the proceeding.

DEPUTY PRESIDENT C. AIRD