

# **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

## **CIVIL DIVISION**

### **DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D259/2002

#### **CATCHWORDS**

Domestic building – Application lacking tenable basis – costs.

[2006] VCAT 297

<b>APPLICANT</b>	J Vincent Nominees Pty Ltd (ACN 005 36 950)
<b>FIRST RESPONDENT</b>	SMA Projects Pty Ltd (ACN 077 824 018)
<b>SECOND RESPONDENT</b>	Housing Guarantee Fund Ltd
<b>THIRD RESPONDENT</b>	Centrum Architects Pty Ltd (ACN 065 422 835)
<b>JOINED PARTY</b>	Boswell Shaw Giazi Marshall Pty Ltd (ACN 069 822 082)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member D. Cremeam
<b>HEARING TYPE</b>	Directions Hearing
<b>DATE OF HEARING</b>	24 February 2006
<b>DATE OF ORDER</b>	24 February 2006

#### **ORDER**

1. The Victorian Managed Insurance Authority is substituted for the Housing Guarantee Fund Ltd as the name of the Second Respondent.
2. The Applicant file and serve amended Points of Claim (including therein full particulars of loss and damage) against the First and Third Respondents and Joined Party by 30 March 2006.
3. The First and Third Respondents and Joined Party shall file and serve Points of Defence to the amended Points of Claim by 28 April 2006.
4. By 19 May 2006 the parties must file and serve any supplementary Lists of Documents.
5. By 16 June 2006 the parties must exchange copies of any further experts reports.

- 6. I refer this proceeding to a Compulsory Conference to be conducted at 55 King Street, Melbourne commencing at 10.00 a.m. on a date after 30 June 2006. Parties must attend and may be represented. Parties must prepare short position papers. The Member conducting such conference may, in her or his discretion, adjourn the same to on-site if desirable.**
7. As between Applicant and Third and Fourth Respondents the costs are reserved in respect of this day.
8. The Second Respondent is released from the proceeding with effect from 10 March 2006 unless a party files an application by 4.00 p.m. on such date seeking to show cause why such party should not be released. In that event, the release shall not be effective until the question whether the Second Respondent should be released from the proceedings shall have been heard and determined at a hearing of the Tribunal convened for the purpose.
9. Order the Applicant to pay the costs of the First Respondent of and incidental to the application of 16 December 2004 (heard and determined on 6 December 2005) including any reserved costs. Such costs to be assessed to County Court Sale "D". In default of agreement by 17 March 2006, I refer the assessment of such costs to the principal registrar under s111 of the Act. In that event the First Respondent must file and serve a Bill of Costs in taxable form by 21 April 2006 and the Applicant if objecting must do so in writing by 19 May 2006.
10. Order the Second Respondent to pay any reserved costs in the case of the Applicant until 16 December 2004.
11. Order the Applicant to pay the costs of the Second Respondent of and incidental to the application of 16 December 2004 (heard and determined on 6 December 2005) including any reserved costs save as specified in paragraph 12 hereof. Such costs to be assessed to County Court Sale "D". In default of agreement by 17 March 2006, I refer the assessment of such costs to the principal registrar under s111 of the Act. In that event the First Respondent must file and serve a Bill of Costs in taxable form by 21 April 2006 and the Applicant if objecting must do so in writing by 19 May 2006.
12. Order the Applicant to pay any reserved costs in the case of the Second Respondent from 16 December 2004.
13. No order as to Second Respondent's costs in respect of this day.
14. The First Respondent's costs this day are reserved.

## **SENIOR MEMBER D. CREMEAN**

### **APPEARANCES:**

For the Applicant	Mr M Hoyne of Counsel
For the First Respondent	Mr C Hanson of Counsel
For the Second Respondent	Mr L M Schwarz, Solicitor
For the Third Respondent	Mr R Donaldson, Solicitor
For the Joined Party	Mr A Sella, Solicitor

## **REASONS**

1. Applications are made for costs in this matter arising out of the Reasons for Decision I delivered and the orders I made on 6 December 2005.
2. The starting point for costs must be s109(1) of the *Victorian Civil and Administrative Act 1998*. Each party must bear their own costs unless I am satisfied it is fair to depart from this having regard to s109(3).
3. The First Respondent applies for its costs against the Applicant of and incidental to the application of 16 December 2004 heard and determined by me on 6 December 2005. I have not prejudged this issue in my Reasons and have heard this question afresh including the arguments in opposition by the Applicant. I am satisfied it was proper for the First Respondent to attend or be represented on 6 December 2005 and to be heard in opposition and to have done so in light of the letter of 16 December 2004 and in light of the submissions made to me (as I understand them) on 6 December 2005. I consider there was no tenable basis for the Applicant's arguments as far as concerns the First Respondent. I regarded those arguments "unfounded in law". I consider the First Respondent has been put to unnecessary disadvantage by being here on 6 December 2005. Having regard to s109(3), I am satisfied I should depart from s109(1) and being satisfied it is fair to do so, I order costs in favour of the First Respondent accordingly.

4. The Applicant applies for costs in respect of 6 December 2005 including any reserved costs. I have allowed this application to be made because I consider it was simply overlooked at the hearing. I rely upon s97 of the Act in that regard.
5. The Second Respondent also applies for its costs in respect of 6 December 2005 but concedes if I am to order reserved costs in favour of the Applicants I should do so until 16 December 2004. Thereafter it says it should have any reserved costs in its favour.
6. I am satisfied, having regard to s109(3), that I should order the costs of and incidental to the application of 16 December 2004 (heard and determined on 6 December 2005) in favour of the Second Respondent as against the Applicant. Again I consider the Applicant's position was untenable in law – particularly in light of what it must have known what was or was likely to be the concession the Second Respondent would make. See correspondence. I note further the position taken by the Second Respondent at the actual hearing.
7. I shall order accordingly. I thus reject the Applicant's application for costs in respect of 6 December 2005.

8. I consider, however, that the Applicant is entitled to reserved costs up to the critical date of 16 December 2004 – which was when the application was made. Thereafter, I consider it proper to order that any reserved costs be those of the Second Respondent on the ground that the application heard that day was lacking a tenable basis in law as I have indicated.

9. Again I shall order accordingly.

**SENIOR MEMBER D. CREMEAN**