VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO D890/2011

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Costs – s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*; costs of unsuccessful reinstatement hearing; whether Tribunal has jurisdiction to order costs after proceeding has been struck out; whether enhanced costs order should be made where no legal grounds demonstrated.

APPLICANT	Andrew John
FIRST RESPONDENT	Dr Robert Hyndman
SECOND RESPONDENT	Janice Hyndman
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Reinstatement Hearing
DATE OF HEARING	19 September 2014
DATE OF ORDER	13 October 2014
CITATION	John v Hyndman (Costs) (Building and Property) [2014] VCAT 1327

ORDER

1. For the reasons given orally at the conclusion of the reinstatement hearing, the Respondents' application to reinstate the proceeding is dismissed.
2. The Respondents must pay the Applicant's costs of and associated with the reinstatement hearing, fixed in the amount of $1,394.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr A Beck-Godoy of counsel
For the First Respondent	Dr R Hyndman in person
For the Second Respondent	Mrs J Hyndman in person

REASONS (ON THE QUESTION OF COSTS)

The application

1. This proceeding concerns an application by the Applicant for an order that the Respondents pay his costs of and associated with their application to reinstate the proceeding, following my refusal to do so.

Background

2. On 26 April 2012, the parties participated in a mediation convened by the Tribunal, with the result that the claim and counterclaim, the subject of the proceeding was settled. Terms of settlement were entered into between the parties which provided, in part, that the Applicant would pay the Respondents $10,000 inclusive of costs (with no admission of liability) and also provide the Respondents with a number of compliance certificates relevant to the building work undertaken by him (**'the Settlement Agreement'**).

3. The Settlement Agreement further provided that:

   > 5. In consideration of the parties entering into these terms of settlement and subject to their performance, the parties mutually release and discharge each other from all further claims, demands, suits and costs of whatsoever nature, howsoever arising out of or connected with the subject matter of the dispute and the proceedings. Where the Owner is a party, this release does not apply to a breach other than a breach that was known, or ought reasonably to have been known, to the Owner to exist at the time these Terms of Settlement were executed.

4. In accordance with Clause 4 of the Settlement Agreement, orders were made that the proceeding was struck out with a right to apply for reinstatement and with no order as to costs being made.

5. It is common ground that following the signing of the Settlement Agreement, the Applicant wholly performed his obligations thereunder.

6. By letter dated 13 August 2014, the Respondents wrote to the Tribunal requesting that the proceeding be reinstated. In that correspondence, the Respondents raised the following issues:

   (a) The Applicant failed to comply with various provisions of the *Building Act 1993* and *Domestic Building Contracts Act 1995*, in respect of the building work, the subject of the claim and counterclaim comprising the proceeding.

   (b) The Applicant's claim made in the proceeding was disingenuous because what was claimed was inconsistent with evidence given by him during the course of a subsequent inquiry conducted by the Building Practitioners Board on 30 April 2014 into his professional conduct.

(c) The dwelling, the subject of the building work undertaken by the Applicant, still does not have adequate builders warranty insurance and the defects in its construction are still occurring.

(d) The Applicant deceived the *VCAT Commissioner* by failing to tell the truth.

7. It is not clear who the Respondents were referring to by the use of the term *VCAT Commissioner*, as the claim and counterclaim were not the subject of any hearing. From oral submissions made during the course of the reinstatement hearing on 19 September 2014, I understand that the reference to *VCAT Commissioner* means the presiding member who conducted the compulsory conference on 26 April 2012.

8. During the course of the reinstatement hearing, I asked the Respondents whether there was any allegation of the Settlement Agreement having been breached or not being fully complied with by the Applicant. Neither of the Respondents could point to any instance of breach. Therefore, it would appear that the issues raised in the Respondents' correspondence dated 13 August 2014 relate to matters that pre-date the Settlement Agreement.

9. Given that the Respondents were unable to identify any breach of the Settlement Agreement, I enquired as to what other grounds were relied upon by them in support of their application to reinstate the proceeding. In essence, the Respondents indicated that they felt aggrieved in having settled the proceeding in circumstances where, with the benefit of hindsight, they felt somewhat 'cheated' by the outcome. They further indicated that they had been placed under enormous pressure to settle the proceeding and felt that this may have unduly influenced their decision-making process at the time.

10. Mr Beck-Godoy of counsel, who appeared on behalf of the Applicant, submitted that there was no evidence indicating that the Respondents were placed under any undue influence by the Applicant or the Applicant's legal representatives during the course of the compulsory conference. Moreover, he submitted that no complaint was made as to the compulsory conference process after it was concluded or at any time prior to the Respondents accepting payment from the Applicant. He argued that given that nearly 16 months has elapsed since the Settlement Agreement was entered into, it ill-behoved the Respondents to now raise any complaint regarding the compulsory conference process.

11. At the conclusion of the reinstatement hearing, I found that there was no basis to reinstate the proceeding. In particular, I found that there was no instance of the Settlement Agreement having been breached; nor was there any substance to the suggestion that the Respondents had been placed under undue influence by the Applicant or his legal representatives. Accordingly, I refused to reinstate the proceeding.

12. In forming that view, I indicated that if there was evidence or allegations which concerned defective workmanship on the part of the Applicant and which was not previously the subject of the proceeding (or manifest at that time), then the appropriate course was to issue a fresh application rather than seek to reinstate the settled proceeding. As at the date of these reasons, no such application has been lodged by the Respondents.

13. Following my ruling refusing to reinstate the proceeding, Mr Beck-Godoy sought an order that the Respondents pay the Applicant's costs of and associated with the failed reinstatement proceeding. In support of the application, he relied upon an affidavit of Dale Patrick Brown sworn on 19 September 2014, which stated that, as at the time of making the affidavit, the Applicant's solicitor and client costs amounted to $5,134.80. The affidavit further stated that the fees to be charged by counsel were $4,100. Consequently, the Applicant sought payment of his costs amounting to $9,234.80.

14. Given that the proceeding was not reinstated, the question arose whether the Tribunal was *functus officio* and therefore incapable of making any order, including an order for costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). That question was reserved for further consideration by me. What follows are my findings and determination on the question of costs.

Was the Tribunal *functus officio*?

15. The word *proceeding* is defined in s 3 of the Act to mean:

> ***proceeding*** means a proceeding in the Tribunal, including—
>
> (a) an inquiry conducted by the Tribunal, including an inquiry under section 141 of the **Equal Opportunity Act 2010**; or
>
> (b) a compulsory conference under section 83; or
>
> (c) a mediation under section 88; or
>
> (d) a rehearing or reassessment under Part 6 of the **Guardianship and Administration Act 1986**;

16. In *Velickovski v Housing Guarantee Fund Ltd*,[1] the Tribunal found that it maintained its jurisdiction to order costs under s 109 of the Act, even in circumstances where the subject matter of the proceeding has been curially determined and the Tribunal would otherwise be *functus officio.* The Tribunal stated:

> 29. I raised before Counsel the question of whether there is an entitlement to costs if the Tribunal is *functus officio*. Section 109 (2) of the VCAT Act provides that "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". I am satisfied that "proceeding" includes the Second Respondent's application to reinstate.

[1] [2003] VCAT 956.

17. Similarly, in *State of Victoria v Bradto Pty Ltd and Tymbrook Pty Ltd*,[2] Vice President Judge Bowman accepted the reasoning in *Velickovski* and stated:

> 22. … An unsuccessful application to have a proceeding reinstated has been held to itself be a proceeding for the purposes of costs pursuant to s.109(2) of the *VCAT Act* – see *Velickovski v Housing Guaranteee Fund* [2003] VCAT 956, and this ruling, with which I agree, was given by Senior Member Lothian in circumstances where the Tribunal was otherwise *functus officio*.

18. I accept and endorse the findings of the Tribunal in the two decisions referred to above. In my view, the word *proceeding* refers to any justiciable application before the Tribunal, which can include an application to reinstate a proceeding that had previously been struck out. Section 3 of the Act does not restrict the meaning of proceeding to only those matters where the substantive issues are yet to be determined. In my opinion, an application to reinstate is and remains a form of legal action or process and therefore constitutes a *proceeding* in the Tribunal.

Should costs be ordered?

19. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). The relevant provisions are to be found in s 109 which provides as follows:

> **109. Power to award costs**
>
> (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;

[2] [2006] VCAT 1813.

(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.

20. In *Vero Insurance Ltd v The Gombac Group Ltd*,[3] Gillard J stated:

> [20] In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question 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, <u>only if it is satisfied that it is fair to do so.</u> 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 s.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 that it considers relevant to the question.

21. Mr Beck-Godoy submitted that it was fair to order that the Respondents pay the costs incurred by the Applicant because:

(a) There was no legal basis to reinstate the proceeding, nor was any articulated through the oral submissions made by the Respondents;

(b) By letter dated 17 September 2014, the Respondents were advised that:

(i) the Applicant considered the reinstatement application to *lack foundation and it is clearly implausible, manifestly weak and bound to fail*; and

(ii) if the application for reinstatement was not withdrawn, the letter would be relied upon in support of the Applicant's application for costs on a solicitor and own client basis.

22. Dr Hyndman submitted that the terms of settlement expressly stated that the parties agreed and consented to orders being made that the proceeding was to be struck out *with a right to apply for reinstatement*. He said that he was unaware that the right to apply for reinstatement was conditional upon there being a breach of the terms of settlement. In essence, he was of the view that a right to apply to reinstatement simply meant that he was permitted to

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[3] [2007] VSC 117.

request that the Tribunal reopen the subject matter of the litigation if it considered that it was appropriate to do so.

23. Dr Hyndman further stated that he did not receive the Applicant's solicitors' letter dated 17 September 2014 until after 6pm on the day prior to the day of the reinstatement hearing. Therefore, he had insufficient time to digest and respond to the matters raised in that correspondence.

24. Despite the Respondents' erroneous understanding of their rights under the Settlement Agreement, I am of the view that the application for reinstatement was misplaced.

25. In forming that view, I do not accept that it was reasonable for the Respondents to have understood that the right to apply for reinstatement was a right given to them at large to request that the original proceeding be reinstated, absent any consideration of what was agreed under the Settlement Agreement. If that was the view formed by the Respondents, then they have ignored the release given in clause 5 of the Settlement Agreement cited above.

26. In my view, a misunderstanding by the Respondents of their rights under the Settlement Agreement does not exonerate them from liability on the question of costs. Section 109 focuses on what the Tribunal considers fair in the circumstances having regard to a number of factors listed under s 109(3). Section 109(3)(a) enlivens the Tribunal's discretion in circumstances where a party to the proceeding has conducted the proceeding in a way that has unnecessarily disadvantaged the other party. The subsection does not require that conduct to be deliberate or malicious.[4]

27. In the present case, I find that the Applicant was unnecessarily disadvantaged in having to answer an application for reinstatement which had no legal basis. In that respect, the affidavit of Dale Patrick Brown identifies that the Applicant had incurred significant costs as a result of that unmeritorious application. In my view, initiating a groundless application enlivens the Tribunal's discretion to award costs under s 109(3)(a), (c) or (e) of the Act. Accordingly, I find that in the present circumstances, it is fair that the Respondents pay some of the Applicant's costs of and associated with the reinstatement application.

Measure of costs

28. As indicated above, the Applicant seeks that his costs be paid on a solicitor and own client basis. In my view, the facts in the present case do not justify an enhanced costs order. In that respect, I accept that the Respondents' conduct was not deliberately aimed at unnecessarily disadvantaging the Applicant but rather, the result of an erroneous understanding of their rights under the Settlement Agreement.

[4] *Nakkasoglu v Bayside CC* [2000] VCAT 682 at [43].

29. The reinstatement hearing occupied less than one hour of hearing time. One affidavit was filed on behalf of the Applicant. The affidavit only went to the question of costs. No written submissions were filed or complex issues of law canvassed during the course of the reinstatement hearing. Moreover, no evidence was adduced. In my view, the hearing was not complex and therefore resulted in an *ex tempore* determination. That being the case, I fail to understand how almost $10,000 has been spent on what I consider to be a relatively simple reinstatement application.

30. Having regard to the nature of the present application, the hearing time and the issues traversed, I am of the view that the fair measure of costs to be awarded in favour of the Applicant is $1,394. I have determined this amount by reference to the County Court *Scale of Costs* as follows:

Item No	Description	Amount
22	Brief to appear	$154
42	Counsel appearance and attendances (½ day)	$856
43	Short affidavit	$267
26	Letter (3 folios)	$117
Total		**$1,394**

31. I will fix costs in that amount.

SENIOR MEMBER E RIEGLER