

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D856/2007

CATCHWORDS

Costs – reserved costs – can apply for them at any time – indemnity costs – when awarded – relevant considerations

APPLICANT	Kasim Khan
FIRST RESPONDENT	Chris Kimitsis t/as Quest Building - Registered Building Practitioner No. DBU 14853
SECOND RESPONDENT	Billy Seri
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing
DATE OF HEARING	7 June 2010
DATE OF ORDER	14 July 2010
CITATION	Khan v Kimitsis t-as Quest Building (Domestic Building) [2010] VCAT 1203

ORDER

- 1 Order the Second Respondent Bill Seri to pay the Applicant's costs reserved on 29 July 2008, 3 October 2008 and 3 November 2008, such costs, if not agreed, to be assessed by the Costs Court on a party/party basis in accordance with Scale "D" of the County Court Scale.
- 2 Order the First Respondent to pay the Applicant's costs of this proceeding, save in regard to the costs ordered in paragraph 1 hereof, such costs if not agreed to be assessed by the Costs Court in accordance with Scale "D" of the County Court Scale on an indemnity basis, except in regard to any costs that have been unreasonably incurred.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr Felkel of Counsel
For the First Respondent	In person
For the Second Respondent	No appearance

REASONS

The application

1. This is an application by the Applicant (“the Owner”) for costs against both Respondents following the determination of this matter on 28 April 2009.
2. The case concerned a claim by the Owner against the first Respondent Mr Kimitsis (“the Builder”), who was a registered builder, with respect to the non completion and defective construction of a dwelling house.
3. The defence taken by the Builder to the proceeding was that he was not the builder who constructed the house. He claimed that the house was constructed by the second Respondent Mr Seri. Upon that allegation being made by the Builder the Owner joined the second Respondent Mr Seri to the proceeding.
4. Thereafter a number of procedural orders were made that Mr Seri did not comply with. On one occasion, a self executing order was made against him.

The orders made

5. When the matter came before me for hearing the determining factor was whether the Builder had signed the building contract and authorised Mr Seri to use his building insurance or whether Mr Seri had done this without the Builder’s knowledge.
6. For lengthy reasons which accompanied the order I decided that I did not believe the Builder’s evidence. I was satisfied that he knew and authorised Mr Seri to carry out the construction using his name and domestic building insurance and that he signed the building contract and in so doing, undertook overall responsibility as builder.
7. As a consequence, the Builder was ordered to pay the Owners \$86,510.71 with respect to defects, incomplete work and delays. The claim against Mr Seri was dismissed.

The application for costs

8. The application for costs came before me for hearing on 5 June 2010. The Applicant was represented by Mr Felkel of Counsel, the Builder appeared in person and Mr Seri did not appear.

9. The power to award costs is found in s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* which provides, (where relevant) as follows:

“(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 subsection (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;

(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.

(4) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.”

The application against Mr Seri

10. In regard to Mr Seri, Mr Felkel pointed out his numerous failures to comply with orders and directions which resulted in four quite unnecessary hearings. Mr Felkel submitted that the costs incurred in regard to those failures ought to be paid by Mr Seri. I accept that submission. In regard to one hearing, an order for costs was made against Mr Seri. In regard to the other three hearings that is, on 29 July 2008, 3 October 2008 and 3 November 2008 the costs were reserved.

11. Where costs are reserved it is open to a party at any time to make application for an order for those costs, which is what the Owner does now.
12. Having looked at the circumstances in which costs were incurred on those dates in regard to those applications, it is apparent that, on each occasion, they were caused by the failure of Mr Seri to comply with interlocutory orders. As such, it is appropriate that Mr Seri pay the Applicant's costs of each of each such hearing. In accordance with usual practice, the costs will be on Scale "D" of the County Court Scale on a party/party basis.
13. Save as aforesaid, since the claim made in the proceeding against Mr Seri was unsuccessful it would not be appropriate to make any other order for costs against him.

Costs against the Builder

14. In regard to the Builder, Mr Felkel referred in particular to s.109(3)(a)(5) that is, attempting to deceive another party. He referred to comments that I made in the reasons for decision to the effect that I did not accept the Builder's evidence in regard to numerous key issues. These included the signing of the contract, the fact that he was aware of the activities of Mr Seri, the fact that he authorised Mr Seri to obtain the insurance and carry out the construction in his name and the explanation that he gave for signing a proposal form for insurance, which I found was not credible;
15. Mr Felkel submitted that in these circumstances an order ought to be made against the Builder in favour of the Owner for indemnity costs.
16. He referred me to the Tribunal's very recent decision in *Milankovic v Binyun Pty Ltd and Ors* [2010]VCAT 538. In that matter the Tribunal refused an application for indemnity costs but in doing so referred to the decision of Balmford J in *Sholl Nicholson Pty Ltd v Chapman (No 2)* [2001] VSC 462 as to the matters to be taken into account in determining whether to order for indemnity costs. Those matters are summarised in the Tribunal's decision as:
 - (a) Whether a party has been forced to take legal proceedings entirely through the wrong or totally inappropriate conduct of the other party;
 - (b) Whether an action has been commenced or continued in circumstances where the Applicant, property advisor, should have known he had no chance of success;
 - (c) Where a party persists in what should, on proper consideration, be seen to be a hopeless case;
 - (d) Whether a party against whom indemnity costs are sought has made a false allegation of fraud;
 - (e) A particular conduct that causes a loss of time to the Court and a party;

- (f) Commencing or continuing proceedings for an ulterior motive or in wilful disregard of known facts or clearly established law;
- (g) Making allegations which ought never to have been made will undue prolongation of a case by groundless contentions; and
- (h) any imprudent refusal of an offer of compromise.

I respectfully agree with this summation of what her Honour found as to the state of the authorities.

Application of the principles

17. The starting point for any application for costs in this Tribunal is that each party pays their own costs (s.109(1)). In s.109(2), the Act permits an order for costs to be made where it is fair to do so in the circumstances, having regard in particular to the matters referred to in s.109(3).
18. Generally, costs in this Tribunal, if awarded at all, are awarded on a party/party basis in accordance with the appropriate County Court Scale, depending upon the amount of the claim. In domestic building cases it is commonly found that the nature and complexity of the proceeding is such as to warrant an order for costs and as a result, orders for costs are commonly made, although on a party/party basis.
19. In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw 651 Pty Ltd and Anor* [2005] VSCA 165, Nettle J said (at p.91 et sequa):
 - “91. I also agree with their Honours that where an order for costs is made in favour of a successful party in domestic building list proceedings, the costs should ordinarily be assessed on a party/party basis. If and to the extent that Reid v. FAI suggests otherwise I agree with all Ormiston JA that it is wrong and should not be followed.
 - 92. Of course there may be occasions where it is appropriate to order costs in favour of the successful claimant in domestic building list proceedings on an indemnity basis. But those cases will be exceptional and, broadly speaking, circumscribed by the same criteria as governing an award of indemnity costs pursuant to rule 63.28(c) of the Supreme Court (General Civil Procedure) Rules 1996”.
20. In this matter the proceeding was defended by the Builder when it should not have been. He was clearly the builder and he was responsible for the non-completion of the house insofar as it was incomplete and for the defective construction. I found that he signed the building contract yet he falsely denied having done so. By signing the contract he made himself responsible for the completion of the building in accordance with its terms. He delegated the task of construction to Mr Seri but that did not affect his contractual liability to the Owner. As such, the proceeding ought not to have been defended.
21. The Builder brought Mr Seri into the proceeding which caused substantial delay and further costs and ultimately his allegations against Mr Seri were found to be without any foundation. Indeed, much of his evidence was false

and I do not believe that he had any belief himself in the truth of what he was saying.

22. Generally, a party bona fide conducting proceedings should not face an order for costs anything more onerous than party/party costs. Where however the unsuccessful party has put the other party to unnecessary expense by improper conduct, false allegations or denials and ultimately, false evidence, the case falls within that exceptional class of cases where an order for indemnity costs should be made.

Order to be made

23. In those circumstances I order that the First Respondent pay the Applicant's costs of this proceeding, save in regard to the costs ordered to be paid by Mr Seri, such costs if not agreed to be assessed in accordance with Scale "D" of the County Court Scale by the Costs Court on an indemnity case, except in regard to any costs that have been unreasonably incurred.

SENIOR MEMBER R. WALKER