VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP249/2014

CATCHWORDS

DOMESTIC BUILDING – power to order costs in favour of intervenor – VCAT Act – s73, s109.

APPLICANTS	Simon John Laughlin and Maureen Laughlin
FIRST RESPONDENT	Certainteed Windows Pty Ltd (ACN 006 383 955) (stayed in liquidation)
INTERVENORS	Ian Rudd and Ross Wilson
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 October 2016
DATE OF ORDER	28 October 2016
CITATION	Laughlin v Certainteed Windows Pty Ltd (Building and Property) [2016] VCAT 1793

ORDER

The applicants must pay the intervenors' costs of and incidental to the joinder applications from 2 March 2016 including this costs hearing. In default of agreement such costs are to be assessed by the Victorian Costs Court on a standard basis on the County Court Scale.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Applicants	Mr A Felkel of Counsel
For the Intervenors	Mr B Powell, solicitor

REASONS

1 On 14 September 2016 I dismissed the applicants' second application to join the former directors of the respondent ('the intervenors') as parties to the proceeding. I reserved costs with liberty to apply.

2 The intervenors apply for their costs from 2 March 2016, the date on which the first application for joinder was made, together with their costs of this costs hearing.

3 Mr Felkel of counsel appeared on behalf of the applicants at the costs hearing, although he did not represent them at the hearing of either of the applications for joinder. Mr Powell, solicitor, appeared on behalf of the intervenors. Both handed up written submissions to which they spoke.

CAN AN ORDER FOR COSTS BE MADE IN FAVOUR OF AN INTERVENOR?

4 The Tribunal's power to order costs is found in s109 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') which provides that the Tribunal can order a party to pay all or part of the costs of another party in a proceeding.

5 It is submitted on behalf of the applicants that the Tribunal does not have power to order costs in favour of the intervenors as they are not parties to the proceeding. The question is whether the intervenors, having been given leave to intervene so they could be heard in relation to the joinder applications, are parties for the purposes of s109.

6 Section 73 of the VCAT Act provides:

> (1) The Attorney-General may intervene on behalf of the State in a proceeding at any time.
>
> (2) The Director may intervene at any time in a proceeding under an enabling enactment that is administered by the Minister administering the *Australian Consumer Law and Fair Trading Act 2012*.
>
> (2A) The Small Business Commissioner appointed under the *Small Business Commissioner Act 2003* may intervene at any stage in proceedings brought before the Tribunal—
>
> (a) concerning a retail tenancy dispute within the meaning of Part 10 of the *Retail Leases Act 2003*; or
>
> (b) under section 22 of the Australian Consumer Law (Victoria); or
>
> (c) under the *Owner Drivers and Forestry Contractors Act 2005*.

(2B) If the Small Business Commissioner intervenes in proceedings referred to in subsection (2A), he or she becomes a party to the proceedings and has all the rights (including rights of appeal) of such a party.

(2C)

[Repealed]

(3) The Tribunal may give leave at any time for a person to intervene in a proceeding subject to any conditions the Tribunal thinks fit.

(4) A person (other than the Small Business Commissioner) who is entitled under this Act or an enabling enactment to intervene in a proceeding and who does intervene is entitled to be joined as a party to the proceeding.

7 In *Kyrou v Contractors Bonding Limited* [2006] VCAT 597[1] Senior Member Walker, in considering whether an intervenor is a party to a proceeding, said:

16. As to the consequence of granting leave to intervene, Williams Civil Procedure (paragraph 1.9.06.17) states (at p.2663):

"An intervenor becomes a party to the proceeding with all the benefits, including the right to adduce evidence, to join in argument, and to appeal and to the burdens of a party."

In support of that statement the learned author cites the case of *Corporate Affairs Commission V Bradley* [1974] 1 NSW Law Reports 391, where Hutley JA said (p396)

"A person accepted as an intervenor becomes a party to the proceedings with all the privileges of the parties. Thus he can appeal, tender evidence and participate fully in all aspects of the arguments. His position is quite different from that of an Amicus Curiae. Intervenors have been allowed to appeal."

17 At first sight, this sits somewhat uneasily with s 59 of the VCAT Act which states as follows:

"59. *Who are the parties to a proceeding?*

(1) The parties to a proceeding are—

(a) in a proceeding in the Tribunal's original jurisdiction—

(i) the person who applies to the Tribunal, or who requests or requires a matter to be referred to the Tribunal; and

(ii) in the case of an inquiry by the Tribunal, the person who is the subject of the inquiry; and

[1] [2006] VCAT 597

(iii) any person joined as a party to the proceeding by the Tribunal; and

(iv) any other person specified by or under this Act or the enabling enactment as a party;"

18 Since we are dealing here with the Tribunal's original jurisdiction the rest of the section is not relevant. Mr Lentini has not been joined as a party to the proceeding under s 60 but if, as appears to be the case, the consequence of granting him leave to intervene is to make him a party, the grant of the leave amounts to a joinder, albeit temporary and only for a limited purpose. I therefore thinks he comes within s 59(l)(iii). There is no basis for giving him leave to intervene to any other extent than to resist the joinder application but to this extent I think he is a party.

8 The applicants rely on the commentary of the learned authors in *Pizers Annotated VCAT Act* (5th edition) who suggest that following the enactment of s73(4), which commenced on 10 September 2014, a person does not become a party to a proceeding simply by being given leave to intervene. Rather, that they do not become a party until a separate subsequent step is taken to join them. Section 73(4) provides that a 'person entitled to intervene' is entitled to be joined as a party to the proceeding. The learned authors make the following observation at [VCAT 73.100]:

> Although the matter is still not entirely free from doubt, it is submitted that now, by reason of ss 60(3) and 73(4) which both commenced operation on 10 September 2014), a person does not become a party to a proceeding only by reason of having been given leave to intervene in that proceeding. The Victorian Parliament has made it clear that, with the exception of the Small Business Commissioner, a person who is entitled to intervene does not become a party to the proceeding when they intervene. Rather, such a person will only become a party if a separate (subsequent) step is made to join them. Why should a person who is required to seek the VCAT's leave to intervene be placed in a stronger position than a person who is entitled to intervene? It is difficult to see any reason in principle or policy to justify that outcome. As such, it is submitted that a person who is given leave to intervene is not a party to the proceeding until a separate (subsequent) step is made to join them.

9 Considering the comments of the then Attorney General, Mr Clark, in the Second Reading Speech for the *Courts Miscellaneous Amendments Bill 2014*, it is clear that s73(4) was introduced to clarify the status of persons entitled to intervene. Whether an additional step is required to join them as parties as suggested by the learned authors is, in my view, problematic. In my view s73(4) does no more than confirm that the common law position applies to those entitled to intervene. He said:

> The bill provides that a person who is entitled to intervene in a proceeding (for example, the valuer-general or the public advocate) and who does intervene, is also entitled to be joined as a party. Given that the Tribunal almost invariably allows statutory interveners to be joined as a party, this change is intended to reduce delays by avoiding unproductive argument about whether to join such a person as a party.

10 The learned authors also refer to s115A of the VCAT Act which commenced on 2 June 2014 and which relevantly provides that in Div 8A of Pt 4, the word 'party' does not include 'a person who is a party only because the person … has intervened or is entitled to intervene in a proceeding'.

11 Although the learned authors opine that s115A, which commenced before s73(4), was included because there was some doubt about whether a person became a party by reason of having been given leave to intervene, I consider this provision supports the view that a person given leave by the Tribunal to intervene, is a party for the purpose for which leave was granted – in this case, so they could be heard in relation to a joinder application. This is a quite different situation to the statutory entitlement of certain persons to intervene in a proceeding. It is their right to be joined as a party that is specifically addressed in s73(4).

12 In a joinder application the proposed party is given leave to intervene solely so that they may be heard in relation to the joinder application, to which they are in effect a party. Where a joinder application is made in a proceeding in the Tribunal's original jurisdiction, they arise from *inter partes* disputes: whether from direct claims made against the proposed party, or by reason of a respondent seeking to take advantage of the proportionate liability defence available under Part IVAA of the *Wrongs Act 1958.*

13 Further, in *Foundry Supermarket Pty ltd v Da Vinci Foundry Pty Ltd and Ors* [2011] VCAT 1648[2] Riegler SM said:

> 27. Second, the applicant submits s.73(3) does not expressly state that an intervenor automatically becomes a party to the proceeding. In my view, the absence of express words stating that an intervenor becomes a party to the proceeding is not determinative. Indeed, the words of the subsection are expressed widely, subject only to giving the Tribunal power to impose conditions on the right to intervene. In my view, the words of subsection (3) do not obviate the position at common law. In that respect, I consider that in the absence of clear words abrogating what would otherwise be the position at common law, the provision is not to be interpreted in a manner suggested by the applicant. Indeed, that approach would be inconsistent with the legal assumption that there is a presumption against alteration of common law doctrines. In *Potter v Minahan*,

[2] [2011] VCAT 1648

O'Connor J quoted with approval from the Fourth Edition of *Maxwell on Statutes*:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such affect the general words, simply because they had that meaning in their widest, or unusual, or natural sense, would be to give them a meaning in which they were not really used.

…

34. A similar approach was adopted by the Full Court of the Federal Court of Australia in *Cheesman v Waters*:

> In *United States Tobacco Co v Minister to Consumer Affairs* (1988) 20 FCR 520 at 534; 83 ALR 79 at 94, Davies, Wilcox and Gummow JJ said that:
>
> An intervenor, whether pursuant to s12 of the ADJR Act, O 6, r 8 (1) of the Federal Court Rules, s 78A of the Judiciary Act 1903 (Cth) or otherwise, becomes a party to the proceedings with the benefits and burdens of that status.
>
> Their Honours then quoted with approval the following passage from the judgement of Hutley JA in *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 396:
>
> A person accepted as an intervenor becomes a party to the proceedings with all the privileges of a party. Thus he can appeal, tender evidence and participate fully in all aspects of the argument…

...

35. In my view, once leave to intervene was given, the Intervenors were for all intents and purposes parties, within the meaning of that term as described in s.59 of the VCAT Act, albeit for a limited purpose; namely to resist the Application for Production of Documents only.

14 I respectfully concur and adopt Senior Member Riegler's reasoning. Whist the learned authors of Pizer might express concern that, following the commencement of s73(4), this interpretation means a person given leave to intervene seemingly has greater rights than a person entitled to intervene, that is a matter for the legislature, not for the Tribunal. I am satisfied that there is nothing in s73 that displaces the common law position, that a person granted leave to intervene becomes a party for the purpose for which such leave was granted; in the present case for the purposes only of resisting the joinder application.

15 In any event, having regard to the definitions of 'application' and 'proceeding' in s3 of the VCAT Act, I am satisfied that the definition of 'application' includes an 'application for joinder', and that the hearing of the application may be considered as a proceeding in itself. The definition

of ‘proceeding’ includes a compulsory conference held under s83 of the VCAT Act and a mediation under s88 of the VCAT Act, so is not confined simply to what might be described as the entire case. In the Building and Property List and the Domestic Building List before it, applications for joinder are generally ordered to be served on the proposed party who is then given leave to be heard in relation to the application for joinder, as they are, in effect, the respondent to the application. Their rights and interests are affected by the application. This process was introduced many years ago, in recognition of it being a serious matter to join a party to a building dispute and to avoid unnecessary applications under s75 of the VCAT Act .

16 In circumstances where orders for compensation, in the nature of costs, can be ordered under s75 to compensate a person who is successful in an application under s75, it would be surprising if orders for costs could not be made in favour of persons who, having been granted leave to intervene, successfully resist an application for joinder.

THE APPLICATION FOR COSTS

17 Despite having handed up some written submissions in relation to the intervenors’ application for costs, Mr Felkel confirmed that the only oral submissions on costs being made on behalf of the applicant were concerned with the Tribunal’s jurisdiction to order costs in favour of an intervenor. He did not otherwise speak to the written submissions. However, as they were handed up at the commencement of the costs hearing, I have had regard to them. Surprisingly, the authorities referred to in the respondent’s written submissions are primarily concerned with applications for costs in the Planning and Environment List and not with similar applications in the Building and Property List or the Domestic Building List.

18 Section 109 provides:

> 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—
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> (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

19 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs under s109:

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, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

20 Insofar as the intervenors rely on the respondent's conduct of the substantive proceeding before the respondent went into liquidation, I consider such matters to be irrelevant to a consideration of the intervenors' application for costs, and accordingly have not considered them. In the same way, I consider the submission by the applicants that it would not be fair for the Tribunal to order them to pay the intervenors costs because the only way they *could possibly seek justice and have their claim properly heard was to join the non-parties. That the application for joinder was commenced as a last resort, and occasioned by the non-parties' conduct as officers of the Respondent is relevant to the exercise of the discretion under section 109(2)* to be irrelevant, particularly in circumstances where two joinder applications failed.

Section 109(3))c) – the relative strengths of the claims

21 I am satisfied that the relative strengths of the joinder application is a relevant consideration. I agree with Mr Powell's submission that the task for an applicant for joinder is not particularly onerous – they simply have to demonstrate they have an 'open and arguable' case against the proposed party/ies which the applicants failed to do, twice. It therefore follows that the applicants' claims as enunciated in support of the two joinder applications were weak.

Section 109(3)(d) - complexity

22 Although the task for an applicant for joinder is not particularly onerous, there are a number of legal principles to be considered in determining whether joinder should be ordered. As noted above, hearing from proposed parties before joinder has been the practice of this list, and the Domestic

Building List before it for many years. When considering an application for joinder similar issues to those applicable to applications under s75 of the VCAT Act must be taken into account. These can be legally complex, and it is appropriate that a proposed party be granted leave, if necessary, to be represented in any hearing of a joinder application.

CONCLUSION

23 I am satisfied in all the circumstances that it is fair to exercise the Tribunal's discretion under s109(2) and order that the applicants pay the intervenors' costs of and incidental to the joinder applications from 2 March 2016, the date of the first joinder application, including their costs of this costs hearing. In default of agreement such costs are to be assessed by the Victorian Costs Court on a standard basis on the County Court Scale.

DEPUTY PRESIDENT C AIRD