VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D497/2001**

CATCHWORDS

Domestic building – costs – liability of legal representative

[2005] VCAT 1096

APPLICANT	LBC Constructions Pty Ltd
RESPONDENT	Capital Bridge Pty Ltd
JOINED PARTY	Suncorp Metway Insurance Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	7 April 2005
DATE OF ORDER	7 June 2005

ORDER

1. Application(s) under s109(4) of the *Victorian Civil and Administrative Tribunal Act* 1998 dismissed.

2. Reserve liberty to apply.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	Mr A Marshall of Counsel
For Respondent	No appearance
For Joined Party	Mr M Whitten, Solicitor
For Oakley Thompson & Co	Mr T Davies of Counsel

REASONS

1. I am asked to make orders in this matter against Oakley Thompson & Co, Solicitors, under s109(4) of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

> *"If the Tribunal considers the representative of a party, rather than the party, is responsible for conduct described in sub-section (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."*

2. This most unfortunate matter arises as a result of directions made by Deputy President Aird on 30 November 2004 listing it for hearing on 7 April 2005.

3. There are, in fact, two proceedings – D497/2001 and D58/2002. On 3 July 2003 his Honour Judge Bowman, Vice-President, acceded to an application to disqualify himself following publication of reasons for decision by him on 6 March 2003 in D497/2001. He ordered on 3 July, pursuant to s108 of the Act, that the Tribunal be reconstituted.

4. Prior to 3 July 2003 other orders I believe made by his Honour include these:

   (a) 4 March 2003 (in both D497/2001 and D58/2002)

   "1. On Respondent's Application , matter removed from list of cases for Hearing this day and refixed at 10.00am on 11/3/03 .(duration 15 days)

   2. Arguments concerning costs, security for costs, and any asset preservation order adjourned to 10.00am on 6/3/03.

   3. Any further material in relation to costs, security for costs and asset preservation order to be filed and served by 4.00pm on 5/3/03 including any material relevant to costs filed and served on behalf of the Respondent's former solicitor, Oakley Thompson & Co.

   4. Any answering material to be filed and served by 10.00am on 6/3/03.

   5. Costs of the Application and Joined Party thrown away by reason of this adjournment to be paid either by the Respondent or Oakley Thompson and Co, subject to argument and material presented on 6/3/03.

   6. Amount of such costs, including the question of costs payable in relation to 5/3/03, reserved.

   7. Liberty to apply generally."

(b) 6 March 2003 (in both D497/2001 and D58/2002)

"1. Order respondent to pay costs thrown away by reason of the adjournment of this matter as follows:-
Applicant's costs - $14,645
Joined Party's costs - $12,572
- total of $27,217 to be paid by 10.00am on Thursday 13th March 2003.

2. Order that Respondent provide security for costs in the sum of $50,000 in relation to the Applicant and $50,000 in relation to the Joined Party, a total of $100,000, such amount to be paid to the Principal Registrar of this Tribunal by 10.00am on Thursday 13th March 2003.

3. Matter otherwise adjourned for hearing on Thursday 13th March 2003 at 10.00am (duration 15 days)."

(c) 13 March 2003 (in both D497/2001 and D58/2002)

"1. Matter is adjourned to Monday 17 March 2003 at 10.00am.

2. Order Respondent to provide material on affidavit including material from the bank referred to by counsel for the Respondent in relation to what has been done and what is being done in relation to security for costs, such affidavit material to be filed and served on or before 10.00 am on 17 March 2003.

3. Stay in relation to payment of costs ordered on 6 March 2003 in relation to adjournment until 10.00 am on 17 March 2003.

4. Question of Asset Preservation Order adjourned to 17 March 2003 on undertaking that Respondent will not deal with any property at 1455 Main Road, Eltham between now and 17 March 2003 or deal with any other asset of the Respondent.

5. All material upon which the Applicant intends to rely in relation to its application for an Asset Preservation Order to be filed and served on the Respondent by 12 noon on 14 March 2003.

6. Any answering material on which the Respondent intends to rely to be filed and served on the Applicant by 10.00 am on 17 March 2003.

7. Order Respondent to pay Applicant's and Joined Party's costs thrown away by reason of the adjournment this day, amount of such costs reserved."

(d) 17 March 2003 (in D497/2001 only)

"1. Amount of reserved costs ordered on 13 March 2003 fixed at $8,245.

2. Cross claim of the respondent struck out with a right of reinstatement.

3. The making of any application by the Respondent for reinstatement of the cross claim is conditional upon:-

(a) payment of the costs order in paragraph 1 hereof;

(b) the provision of security for costs as ordered on 6 March 2003.

4. *In the event that the costs referred to in Order 1 hereof are not paid by 10.00 am on 24 March 2003, it is ordered that the defence to the claim be struck out.*

5. *The application is otherwise adjourned to 24 March 2003 at 10.00 am.*

6. *Order Respondent to pay the costs of this proceeding incurred by the Joined Party for items not common with D58/2002, such costs to be taxed in default of agreement and taxed as appropriate for a Supreme Court matter."*

(e) 17 March 2003 (in D58/2002 only)

"1. Amount of reserved costs ordered on 13 March 2003 fixed at $8,754.

2. *Further order Applicant to pay Respondent's costs of the proceedings to be taxed in default of agreement, such costs to be taxed as appropriate for a Supreme Court matter.*

3. *Pursuant to s.78 of the Victorian Civil and Administrative Tribunal Act, application otherwise struck out with a right of reinstatement.*

4. *The making of any application by the Applicant for such reinstatement is conditional upon:-*

(a) payment of the costs order referred to in paragraph 1 hereof;

(b) the provision of security for costs as ordered on 6 March 2003."

(f) 24 March 2003 (in D497/2001 only)

"1. In accordance with the self executing order contained in Order 4 of the orders made on 17 March 2003, the defence of the Respondent is struck out and it is ordered that the Respondent pay the Applicant the sum of $253,330.15 as set out in paragraph 15(b)-(f) of the Applicant's amended points of claim dated 29 April 2002.

2. *Claim pursuant to paragraph 15(a) of the Applicant's amended points of claim adjourned* sine die.

3. *Order Respondent to pay the Applicant interest, amount reserved.*

4. *Order Respondent to pay Applicant's costs of the proceeding to be taxed in default of agreement, such costs to be taxed as appropriate for a Supreme Court matter.*

5. *Question of whether any part of the costs referred to in Order 4 hereof should be paid by Messrs Oakleigh Thompson & Co adjourned to a date to be fixed.*

6. *Stay in relation to execution of the order contained in paragraph 1 hereof for a period of 30 days from the date hereof."*

(g) 26 June 2003 (in both D497/2001 and D58/2002)

"Removed from list of cases on 27 June 2003.

Listed for a Directions Hearing on 3 July 2003."

5. In his reasons for decision dated 6 March 2003 his Honour made the following observations in paras 1, 3, 11, 12, 13, 16, 26, 27, 28 and 29.

> *"1. In this matter, I was required to give a ruling concerning costs. The costs had been incurred as the result of an adjournment. In turn, the adjournment had been caused by the solicitors for the respondent, Messrs Oakley Thompson & Co, informing the Tribunal that they were no longer retained by the respondent. This case is commercial in nature, and allegedly involving in excess of' $1million. Speaking metaphorically, but not all that inaccurately, Oakley Thompson & Co informed the other parties and the Tribunal that they were no longer retained at the 59`h minute of the 11`h hour. This resulted in the respondent being represented by a firm of solicitors allegedly unfamiliar with the complex background of the matter, and the last-minute engaging of a barrister, Mr Hay, who was given no chance to see that justice was done on behalf of his client. Thus, if justice was to be done, some adjournment of this matter (which had been fixed for hearing for an estimated 15 days) was inevitable. I say at the outset that I have no criticism whatsoever of the performance of Mr Hay, who, whilst doing his best to represent the interests of his client in difficult circumstances, was honest and flank in his approach, and, quite properly, clearly cognisant of his duty to the Tribunal.*
>
> …
>
> *3. The behaviour of Oakley Thompson & Co leading up to the ultimate adjournment is as follows. The proceedings were commenced by LBC Constructions Pty Ltd ("LBC") when, through its solicitors, it lodged an application with this Tribunal on 9 July 2001. Oakley Thompson & Co became the solicitors "on the record" for Capital Bridge Pty Ltd ("Capital Bridge") by letter dated 24 July 2001 to this Tribunal. They subsequently lodged a counterclaim on its behalf on 15 August 2001. They remained as its solicitors, without any ostensible reservation or restriction, during all the preliminary steps leading up to the commencement of the hearing. They took several steps on its behalf, including applying for security for costs (an application which was not ultimately pursued); serving a Notice of Default and Termination; applying for a summary dismissal of LBC's application on the basis of a failure to comply with an order of the Tribunal; lodging a Third Party Notice of Joinder against Suncorp Metway Insurance Limited ("Suncorp"); lodging lengthy and complex points of defence and points of claim against Suncorp; lodging points of counterclaim and a request for further and better particulars of LBC's claim; seeking an order enforcing compliance with an earlier order of the Tribunal; again seeking an order that LBC's application and defence to counterclaim be struck out; lodging further amended points of counterclaim; lodging witness statements, further witness statements, and a further affidavit of documents. Oakley Thompson & Co also either appeared, or apparently caused counsel to appear, on behalf Capital Bridge at numerous directions hearings. Suffice to say that, even allowing for some duplication, the Tribunal file consists of the best part of*

four volumes of documents relating to this matter, and many of these either originate from Oakley Thompson & Co or are documents brought into existence in response to requests or initiatives of that firm. Until just over one working day before the hearing was due to commence, there was no suggestion that Oakley Thompson & Co were doing anything less than representing Capital Bridge in what could be described as an extremely thorough manner.

…

11. *Mr Hay had with him at the Tribunal Mr Sgro, Director of Capital Bridge. Thus, he was in a position to obtain instructions as to what may have occurred. The only information which he obtained was to the effect that Oakley Thompson & Co had filed the notice of discontinuance because they had been unable to find a suitable banister to represent Capital Bridge. I might say that I find it absolutely extraordinary that, at the eleventh hour, a firm of solicitors should go "off the record" for such a reason. That is leaving to one side any question of whether or not leave so to discontinue is required, and any question of the extreme discourtesy shown both to the Tribunal and to the other practitioners.*

12. *Understandably, the other parties were upset and indignant at the whole course of events. Mr Marshall of counsel, on behalf of LBC, made submissions which included reference to other occurrences that had taken place "behind the scenes" in the period immediately prior to the hearing date.. I accept what he had to say in this regard without reservation, but in any event an affidavit subsequently sworn and filed by his instructing solicitor confirmed these matters. They included the fact that, because of a letter from Oakley Thompson & Co dated 13 February 2003 and subsequent events, the applicant's solicitors were put to a very considerable amount of trouble in preparing a Tribunal book, as the respondent required all documents from its lists and affidavit of documents to be included in same.. Ultimately, the Tribunal books, which were extremely voluminous, were served on 26 February. Further, Ms Agrotis, Mr Marshall's instructing solicitor, telephoned Mr Vagg on 24 February at the request of Mr Marshall. Apparently Mr Marshall wished to engage in some discussions with opposing counsel for the purposes of either settlement discussions or attempts to narrow the issues. Upon enquiring of Mr Vagg as to the name of counsel retained, Ms Agrotis was informed by Mr Vagg that he had not yet engaged counsel. I gather that there were then further discussions between Mr Marshall and Ms Agrotis. Due to the nature and complexity of the matter and its history, there was a concern that an application for an adjournment may be in the offing, it appealing very peculiar that counsel had not been engaged. Accordingly, on 26 February 2003, Ms Agrotis sent a fax to Mr Vagg stating:-*

> "We are writing to advise that Mr Alan Marshall of Counsel has requested that you provide us with the name of the banister who will be appearing on behalf of Capital Bridge Pty Ltd so that he may liaise with him prior to the Hearing."

13. *On 27 February - there now being only two working days prior to the commencement of the hearing - Ms Agrotis again rang Mr Vagg to obtain his views as to which court recording service might be used, and also again*

enquired as to the name of counsel engaged. I gather some agreement was reached in relation to the use of a recording service. Mr Vagg advised Ms Agrotis that his firm had two members of counsel in line to act for the respondent. I accept that there was absolutely no indication from Mr Vagg that the matter would not proceed; that Oakley Thompson & Co, for whatever reason, were about to file a Notice of Discontinuance; or that Oakley Thompson & Co's retainer by Capital Bridge was anything less than a complete one.. The next steps in the saga were those involving the faxes of 28 February, and which have been set out above.

…

16. Thus, at that stage it seemed to me that the following was the situation:-

(a) This was a complex piece of litigation, potentially involving a very large sum of money, and also involving numerous preliminary steps and directions hearings, quite a few of which had been initiated by Oakley Thompson & Co on behalf of Capital Bridge.

(b) At no stage did Oakley Thompson & Co, as solicitors "on the record", give any indication to other practitioners involved or to the Tribunal that they had anything other than a complete retainer in the matter or that the matter would not be proceeding on 4 March 2003. Indeed, their correspondence and the steps which they were taking were ostensibly indicative of a determination to proceed on that date.

(c) At a time so close to the hearing date as to render it impossible for replacement solicitors or counsel to become adequately acquainted with the matter, they firstly applied for an adjournment on the basis of being unable to obtain counsel, and then filed a Notice of Discontinuance.

(d) They gave no indication to other practitioners that there was any prospect of them filing such a Notice of Discontinuance, and similarly gave no prior notice to, or sought leave from, the Tribunal in this regard.

(e) The only reason for so doing that could be inferred from the correspondence and sequence of events, and the only reason advanced by Capital Bridge through its new solicitors and counsel, was that they had filed a Notice of Discontinuance because they had been unable to engage suitable counsel. To describe that proposition as extraordinary would be to use the mildest of terminology.

(f) Submissions made from the Bar Table on behalf of LBC (and including references to correspondence) made it clear that the unavailability of counsel long involved in the matter on behalf of Capital Bridge should have been obvious for some weeks; there was no suggestion that he had previously been retained for the hearing; other experienced and competent counsel would have been available even if engaged as late as a few weeks before the hearing; and there was no explanation forthcoming as to why Oakley Thompson & Co had not engaged the services of counsel.

(g) Oakley Thompson & Co had given every indication that they were still retained by Capital Bridge and that the matter would proceed up until

the point where there was one working day remaining before the commencement of the hearing. Such indications included discussions concerning a recording service and indeed they had made quite demanding requests upon the solicitors for LBC in the period immediately prior to the hearing date.

…

26. *It should be said that, given the warning bells that had rung loudly concerning Capital Bridge's financial position, clearly it was in the interests of the other parties to secure a costs order against Oakley Thompson & Co if that were possible. It also seemed to me that, morally, it was Oakley Thompson & Co who should have been paying the costs. Their behaviour towards both their fellow practitioners and the Tribunal was, in my opinion, appallingly poor and unprofessional. However, two matters had to be borne in mind. The first was the peculiar wording of s.109(4) of the Victorian Civil and Administrative Tribunal Act 1998. The second was, bearing in mind that wording, the fact that Mr Sgro, rather than distancing himself and his company from Oakley Thompson & Co, specifically agreed with the matters contained in Mr Vagg's affidavit, and was otherwise silent on the question of costs.*

27. *Having considered those matters, I subsequently ruled on the question of whether the costs should be paid by the respondent or by Oakley Thompson & Co as follows:-*

> "This is my ruling in relation to the cost dispute involving Oakley Thompson & Co.
>
> My ruling is that the costs of the other parties in relation to the adjournment of this matter should be borne by the respondent and not by Oakley Thompson & Co, its former solicitors. This is my ruling for one simple reason, and it is certainly not because I consider Oakley Thompson & Co to be free from blame in causing this fiasco. Nothing could be further from the truth.
>
> However, s.109(4) of the VCAT Act states clearly that an order pursuant to it can be made "If the Tribunal considers that the representative of a party, *rather* than the party, is responsible for the conduct in question ..." (my underlining).
>
> Clearly it was intended to cover the situation where an innocent party would otherwise have to bear costs which had been incurred due to the negligence, or dishonesty, or erroneous judgment of a representative. It is clearly an "either/or" provision. Order 63A.23 of the Rules of Procedure seems to me to be considerably broader. It seems to me to be desirable in the appropriate situation to be able to order costs against both party and representative on a joint and several liability basis, or to apportion between them. I am of the opinion that, unfortunately, that power does not exist pursuant to s.109 of the VCAT Act.
>
> I have no doubt that this expensive adjournment has been caused by both the respondent and Oakley Thompson & Co. It would be difficult for a cynic not to have some suspicion that the whole thing is not what some people might describe as a "put up job", in which the other unfortunate

parties, this Tribunal, and others waiting in the list are those who suffer. However, I do not so find.

The fact is that I cannot say that it is the representative rather than the party that is responsible for the conduct - causing the adjournment. Even if the respondent and Oakley Thompson & Co were not acting in concert, the blatant lack of concern - or negligent lack of concern - on the part of each of them for others, and including this Tribunal, is what has caused the adjournment. The behaviour of each contributed. It was not one rather than the other.

The ultimate instruction to seek an adjournment came from the respondent. When that was refused, Oakley Thompson & Co withdrew their services on, in my opinion, the most spurious of grounds and at the last minute. That precipitated the adjournment.

Mr Sgro, a director of the respondent, has filed an affidavit effectively agreeing with everything set out in the affidavit of Mr Vagg of Oakley Thompson & Co, so the respondent is certainly no innocent victim.

The behaviour of both has been unsatisfactory. The behaviour of Oakley Thompson & Co as solicitors on the record and officers of the Court, owing a duty to the Court, has been particularly unsatisfactory. They have engaged in a course of conduct which has been misleading - in my opinion quite deliberately creating a false impression to the other parties involved and to this Tribunal. They apparently pursued this course of conduct over several months before effectively pulling the rug out from under a complex and expensive piece of litigation booked in for some 15 sitting days.

However, I do not believe that the circumstances permit me to order costs against Oakley Thompson & Co. My current intention is to set out these reasons at greater length, publish them, and draw them to the attention of the Law Institute of Victoria.

I order the respondent to pay the costs of the applicant and the joined party in respect of the adjournment of this matter and we shall now move on to the issues involved in this order and the other orders.

The attendance of Mr Davies on behalf of Oakley Thompson & Co is excused."

28. *It might be added, as a footnote, that the fears of the other parties concerning the financial status of Capital Bridge may well have had some justification. Whilst it apparently paid some costs, after a series of fits and starts and adjournments, a receiver manager arrived on its behalf. As Mr Marshall pointed out when yet another adjournment was sought, "...the money apparently wasn't there at the start ... there's no suggestion that it's going to be there ...". Clearly the matters which I am now raising go beyond an expansion of the reasons which I advanced on 5 March. However, it is possible that they may be of some assistance in attempting to interpret the behaviour of both Capital Bridge and Oakley Thompson & Co in this matter.*

29. *In summary, despite the temptation to order costs against Oakley Thompson & Co because of their highly unprofessional, if not unethical, behaviour, a*

> *combination of the facts of this particular case and the wording of the legislation prevented me from so doing. However, as I foreshadowed on 6 March, these reasons shall be drawn to the attention of the Law Institute of Victoria."*

6. In the circumstances outlined by his Honour, I am asked to make orders that Oakley Thompson & Co, solicitors, pay costs under s109(4) of the 1998 Act.

7. In support, at the hearing on 7 April 2005 I received and heard submissions from the Applicant and from the Joined Party. The Respondent was not represented. Messrs Oakley Thompson & Co were represented and made submissions.

8. It is apparent, from even a casual perusal of his Honour's reasons, that Oakley Thompson & Co have acted, in these matters, in a most unsatisfactory way. I repeat his Honour's observations from para 26 of his reasons: speaking of the behaviour of Oakley Thompson & Co he said:

> *"[t]heir behaviour towards both their fellow practitioners and the Tribunal was … appallingly poor and unprofessional."*

9. Despite his Honour's observations, however, I am not of the view that I should order Oakley Thompson & Co to pay the costs which are sought.

10. His Honour also in para 26 of his reasons refers to the "peculiar wording" of s109(4). I agree with him in this. Before a representative of a party can be ordered to pay costs, the Tribunal needs to be satisfied that it is the representative "rather than the party" who is responsible for the conduct mentioned. It is one or the other but not both – s109(4) requires the Tribunal to be satisfied it is the representative rather than the party which is responsible. But in this case his Honour could not form this view. He considered *both* the Respondent and Oakley Thompson & Co were at fault. That being so, he could not find it was Oakley Thompson & Co rather than the Respondent which was responsible.

11. I do not consider I should depart from his Honour's rulings in this regard. He had direct involvement in the matters and was of the view which he expressed. In any event, I would wish to make it clear, that, with respect, his rulings seem eminently reasonable and correct.

12. Moreover, and independently of his Honour, I could not be satisfied in this case that it was Oakley Thompson & Co, rather than the Respondent, that was responsible for the conduct mentioned in s109(3)(a) or (b) during the period(s) when costs orders are now sought against the firm. I am inclined to think that both the Respondent and Oakley Thompson & Co are at fault. If so, then I do not see how I can possibly say that Oakley Thompson & Co is responsible rather than the Respondent. The point was not lost on me either that a fair proportion of the preparation would have been required to be undertaken by the Applicant and the Joined Party in any event – irrespective of the behaviour of the Respondent or Oakley Thompson & Co – if the matter had gone to trial as it was envisaged it would.

13. There is also this consideration. Having ordered the Respondent to pay the costs, and not Oakley Thompson & Co, I consider that the Tribunal, since that time, has been precluded from considering whether Oakley Thompson & Co should be ordered to pay the costs in question. Because of the peculiar wording of s109(4) it seems to me that to order Oakley Thompson & Co now to pay costs would necessitate the costs orders against the Respondent being set aside. Two sets of costs orders – one against a party and the other in respect of the same or a similar amount against the party's representative – cannot co-exist under the terms of s109(4). As I have said, that provision allows the party or the representative to be ordered to pay costs, but not both. But the Tribunal has already discharged its functions in the matter, for the reasons given by his Honour, and ordered the Respondent to pay. I do not see how the Applicant and the Joined Party can now come back and ask for an order against Oakley Thompson & Co to be made.

Costs orders have already been made against the Respondent and not set aside subsequently.

14. I would have these views even if the costs now sought against Oakley Thompson & Co were in respect of a different period to those previously ordered against the Respondent. It would be an impossible task to separate out how a distinction might be drawn on the facts such as to say that in respect of one period both the Respondent and Oakley Thompson & Co are responsible but that only the Respondent should pay but that in respect of another period Oakley Thompson & Co rather than the Respondent should be ordered to pay.

15. I understand, of course, that his Honour in D497/2001 did adjourn to a date to be fixed the question whether Oakley Thompson & Co should pay costs but the exact basis of him having done this was not made clear to me. Apparently nothing can now be known of why his Honour reserved this question. I am sure his Honour, however, had very good reasons for doing so at the time.

16. In any event, I do not agree that the Tribunal can make costs orders against Oakley Thompson & Co supplementally. It is true that it is decided in *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 117 ALR 253 at 265 that once a judgment is entered the court lacks power to alter or set aside that judgment but that it has power, in appropriate cases, to make supplemental orders. However the Tribunal is not as widely equipped in its powers as a court. In any event the court in that case indicated that the cases where supplemental orders will be made requires "caution." I do not see how orders against Oakley Thompson & Co would be supplemental to the orders for costs his Honour has made against the Respondent. Nor, having made those orders, do I see how they could possibly be "supplemental" considering the terms of s109(4). They would be new and additional orders. Once the orders for costs were made against the Respondent then it seems to me that the possibility of making costs orders against Oakley Thompson & Co was lost forever.

17. Nor if costs orders were sought against Oakley Thompson & Co in respect of a different period, do I consider I could on the facts separate out, in a fashion which was just, a period where I could say that the firm, rather than the Respondent, should be ordered to pay. I consider I would not be acting with "caution" in such circumstances – if I assume I have power to make supplemental orders in the first place.

18. I must indicate that this is consistent with the view I took, for the reasons I took it, in *Zolis v Vero Insurance Ltd* [2004] VCAT 1753. I there said (at [18]) that "if an order is to be sought under s109(4), it should be sought at the time when costs themselves are under consideration and not later." There are very good reasons why this is so – not least being the possibility, otherwise, of inconsistent costs rulings in the one matter. For instance, if I should find that Oakley Thompson & Co is liable for the costs under s109(4) then it means I have formed the view that it, as the representative, "rather than the party", is responsible. But what happens to his Honour's view and ruling that this was not the case – that it was not Oakley Thompson & Co rather than the Respondent which was responsible? His Honour's ruling would be saying one thing and my later ruling would be saying the opposite. According to his Honour it *was not* the representative "rather than the party" which was responsible whereas I would be saying, if I made the order against Oakley Thompson, that it *was* the representative "rather than the party" which was responsible. The two rulings would be inconsistent and insupportable under s109(4) in the way in which it is expressed. I adhere, therefore, to the views I expressed in *Zolis* and do not agree that I should depart from the principle I there set out.

19. I am not to be taken as saying, by any of this, that I am not critical of Oakley Thompson & Co's conduct. I express the same views as his Honour did and for the reasons which he gave. I add only a reference to the statement of their Honours in the *Caboolture* decision (at 263) that it is "of the utmost importance

for the administration of justice in this court that legal practitioners acting in proceedings … are honest, candid with the court and neither obstruct the administration of justice … nor abuse the court's process." Those remarks apply, with equal effect, to practitioners on record in the Tribunal.

20. However, I am not satisfied, despite the able arguments, that I have the power to make the orders sought.

21. I dismiss the application(s) made against Oakley Thompson & Co.

22. Reserve liberty to apply. I should indicate though that it would be my view the Tribunal does not have power to order costs either for or against a non-party.

SENIOR MEMBER D CREMEAN