

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D292/2005

CATCHWORDS

Domestic building – freezing orders – costs.

APPLICANTS	Steven Makrenos, Stam Makrenos
FIRST RESPONDENT	Konstantinos Papaioannou
SECOND RESPONDENT	Evridiki Papaioannou
THIRD RESPONDENT	Barnabas Papaioannou
JOINED PARTY	Combined Building Consultants Pty Ltd (ACN 067 407 943)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	16 April 2007
DATE OF ORDER	20 April 2007
CITATION	Makrenos v Papaioannou (Domestic Building) [2007] VCAT 641

ORDER

1. The Application is dismissed.
2. I order the Applicants to pay the costs of the First and Second Respondents of and incidental to this Application on an indemnity basis.
3. I order the Applicants to pay the costs of the Third and the Fourth Respondents of and incidental to this Application on the appropriate County Court Scale “D”.
4. In default of agreement by 18 May 2007 with any party I refer the question of that Party’s costs to the Principal Registrar under s.111 of the *Victorian Civil and Administrative Tribunal Act 1998* who shall carry out his assessment accordingly. In that event the party or parties must file and serve a Bill of Costs in taxable form by 15 June 2007 and the Applicants if

objecting to the same must do so in writing by document filed and served by 13 July 2007.

5. As to the orders made on 16 February 2007 I provide additionally as follows:
- (a) By 27 April 2007 the Joined Party must file and serve any additional or supplementary Report of an Expert.
 - (b) I extend time under paragraph 6 of the same to substitute the date 20 April 2007 for the date 13 April 2007.
 - (c) I extend time under paragraph 7 of the same to substitute the date 18 May 2007 for the date 27 April 2007.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr A. Herskope of Counsel
For the First and Second Respondents	Mr J. Twigg of Counsel
For the Third Respondent	Mr A.P. Dickenson of Counsel
For the Joined Party	Ms A. Grice, Solicitor

REASONS

- 1 Application is made for orders set out in Application for Directions/Orders filed on or about 12 April 2007.
- 2 Those Orders sought include so-called “freezing orders” (formerly Mareva orders) and such “further or other orders” as may be appropriate.
- 3 An affidavit in support is sworn by Darren John Noble also on 12 April 2007.
- 4 At the hearing this day I received into evidence an affidavit of Konstantinos Papaioannou sworn 16 April 2007.
- 5 As a result of that affidavit, matters evidently have been clarified, for the Applicants, now wish me to allow them to withdraw their Application or to dismiss it. They apply for costs based on the considerations they advance.
- 6 The First and Second Respondents also apply for costs on an indemnity basis in light of the matter not proceeding.
- 7 As well the Third Respondent and Joined Party apply for costs – also on an indemnity basis.
- 8 The starting point for any costs application is s109 of the *Victorian Civil and Administrative Tribunal Act 1998* which provides in sub sections (1), (2) and (3) 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.

- 9 As regards the First and Second Respondents it seems to me they have an entitlement to their costs. This matter is not proceeding. That is the fundamental fact. It is true it is not proceeding after the Applicants have perused the affidavit. But in my view it was a matter which should never have been proceeding in any event. Mr Noble's affidavit, as regards the threat of dissipation of assets – which I agree is a critical element – is in my view singularly weak. See paragraph 19 of same where all he deposes to is, in effect, a “heightened concern” that the First and Second Respondents will, unless, restrained, further encumber a property so as to put it out of reach in the event that the Applicants succeed in their action. This follows correspondence passing between Solicitors as is deposed to. But that takes the matter nowhere near the kind of threat of dissipation which must exist – historically as well – before a freezing order may be made. The matter is one merely of surmise or suspicion.
- 10 I rely upon s109(2), having regard to s109(3), to depart from the starting point set by s109(1) and I am satisfied it is fair to do so.
- 11 I am asked to order that the costs be indemnity costs. It is firmly established that indemnity costs (which may be ordered under s109) should not be ordered unless the case is “extraordinary”. I am satisfied, as regards the First and Second Respondents that the case is in reality an “extraordinary” one. The remedy sought against them is an exceptional one because of its far-reaching consequences. It is one, of necessity, sought to be brought on at short-notice. But it is one which should not lightly be brought on at all. I am satisfied there was no proper basis for bringing this one. In my view it would fail at the outset, even if *ex parte*, because of a failure to satisfy the “threat” aspect, if I may call it that. It seems to me in these circumstances that the Applicants, properly advised, would not have sought freezing the orders they did. That, it seems to me, in accordance with authority, justifies indemnity costs.
- 12 I order the Applicants to pay the costs of the First and Second Respondents of and incidental to this day on an indemnity basis.
- 13 I reject the notion that the Applicants are entitled to their costs. Even allowing for a lack of communication between solicitors – which I make no distinct findings about – there was no basis for the application being brought in the first place, as I have said. This means an application for costs by the Applicants is entirely misconceived. It is they who have withdrawn and put parties to expense – not the other way round.

- 14 As regards the Third Respondent and Joined Party I am satisfied they are entitled to their costs also.
- 15 They attended the Tribunal in answer to the Tribunal's command contained in correspondence which warns that "if a party fails to appear VCAT may proceed to make orders and directions in that party's absence including final orders". There is also the relief sought by the Applicants which as I have noted seeks "further or other" orders as may be appropriate. How are the Third Respondent and Joined Party to know what might happen if they fail to appear – despite what might be apparent on the face of the documentation?
- 16 I was asked to "see through" their attendance as a "cheap trick" or a "cheap shot". I find such stigmatization of their conduct as quite shabby.
- 17 I rely upon s109(2), having regard to s109(3), to depart from s109(1) to order costs in their favour which I am satisfied it is fair to do so. Each applied for indemnity costs. I cannot agree, in the case of either, that I should order the same. They attended routinely in my view. They were not, in reality, the focus of the Applicants' application. No freezing orders were sought against them. They did not find any need to respond by affidavit.
- 18 I consider their costs should be "of and incidental" to this day according to the appropriate County Court Scale (which is "D").
- 19 In the event of any disagreements over costs I shall refer the same to the Principal Registrar under s111 of the Act with appropriate directions.

SENIOR MEMBER D. CREMEAN