

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D395/2004

CATCHWORDS

Domestic building – Bias ruling – costs.

APPLICANT	Dr Jennifer Marie Martin
RESPONDENT	Fasham Johnson Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions
DATE OF HEARING	26 October 2006
DATE OF ORDER	26 October 2006
CITATION	Martin v Fasham Johnson Pty Ltd No 2 (Domestic Building) [2006] VCAT 2195

ORDER

- 1 By 10 November 2006 the Applicant must file and serve Amended Points of Claim either in the form taken to have been filed this day or in a different form.
- 2 No further opportunities to file and serve Amended Points of Claim will be provided by the Tribunal, unless an order is sought and applied for and granted.
- 3 By 21 November 2006 the Respondent, if minded to do so, must serve a document (which may be in letter form) on the Applicant specifying any contentions in respect of the Amended Points of Claim filed under paragraph 1 and giving details of the same.
- 4 By 28 November 2006 the Applicant, if served with a document referred to in paragraph 3 must respond in writing to the same in detail by document in reply (which may also be in letter form).
- 5 Thereafter the Respondent may, by request in writing, request the Principal Registrar of the Tribunal to list for hearing an application for dismissal or strike out under s75 or s78 of the *Victorian Civil and Administrative Tribunal Act 1998* and in that regard I adjourn over the Respondent's application currently before the Tribunal.

- 6 In the event such a request is received the Principal Registrar must arrange for the hearing and determination by me of the question of the sufficiency of the Amended Points of Claim.
- 7 In the event no such request is received I direct the Principal Registrar, otherwise, to list this matter for directions in the usual course.
- 8 I order the Applicant to pay the costs of and incidental to the Respondent of 31 May 2006 on an indemnity basis.
- 9 I am satisfied it is fair under s109 to order that the Respondent's costs otherwise in respect of this day (arising out of the events of 31 May 2006) be paid by the Applicant on County Court Scale "D". In default of agreement by 1 December 2006 I refer assessment of the same to the Principal Registrar under s111 of the Act. These costs shall include any costs incurred in respect of the Reasons for Decision delivered this day and the costs submissions made as a result.
- 10 I am also satisfied it is fair to order the Applicant to pay the Respondent's costs in respect of the balance of this day (not including the costs ordered under paragraph 9) on a party/party basis according to County Court Scale "D". In default of agreement by 1 December 2006 I refer the assessment of the same to the Principal Registrar under s111 of the Act.
- 11 I give liberty to the parties to make application in writing to re-mention before me for determination any question of costs calling for decision and I empower the Principal Registrar or his deputy upon notice to the parties to mention any such question to me also.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr D. Perkins of Counsel
For the Respondent	Mr A.J. Laird of Counsel

REASONS

- 1 I have made orders this day as follows:
 - “1 The application to disqualify myself is dismissed.
 - 2 I decline a stay.
 - 3 Referred to a continuing hearing on 26 October 2006”.
- 2 Application is now made for costs by the Respondent. I am referred to the *Victorian Civil and Administrative Tribunal Act 1998* s109.
- 3 In light of the outcome, I did not understand Counsel for the Applicant to be saying otherwise than that the mechanism for costs under s109 had been triggered.
- 4 Section 109 gives me, and me alone in this matter, a discretion which I must exercise in accordance with law. I must be satisfied it is fair to depart from s109(1) having regard to the criteria in s109(3). See s109(2).
- 5 I am satisfied, in light of the outcome, and the baseless application which was made, that under s109(2), having regard to s109(3), it is fair to depart from s109(1) and order costs in favour of the Respondent. Counsel for the Applicant is, thus, correct in identifying the mechanism in s109 as having been “triggered”.
- 6 I am asked, however, by the Respondent to order indemnity costs. This is opposed by Counsel for the Applicant.
- 7 Indemnity costs are sought also as including this day – in hearing judgement and considering costs submissions.
- 8 Indemnity costs may only be ordered in “extraordinary circumstances”: see *Pacific Underwriting Indemnity Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 at [91] – [92] per Nettle J A. They are intended to compensate, not to punish. In that regard I am asked by the Applicant to consider the pressure on litigants brought on by litigation as to, inter alia, remarks that may from time to time be made by the adjudicating officer.
- 9 I reject that analysis. The fact is I have ruled that the application for me to disqualify myself on 31 May 2006 is and was meritless. That means there are and were no grounds for it.
- 10 In light of my finding, I consider a party, properly advised, would not have made the application it did. I am satisfied the circumstances are relevantly “extraordinary”, therefore. The ground of the application was entirely lacking and had no foundation in law. I am not troubled by it being personally offensive I should add. Counsel must often make submissions which are unpopular or not likely to find favour. A matter does not become untenable in law only for that reason – that it is offensive or aggravating.
- 11 I order the Applicant to indemnify the Respondent in respect of all costs of and incidental to the application I heard on 31 May 2006 and determined

this day. I am able to separate out the Reasons I delivered this day from the events of 31 May 2006 however. The latter gave rise to the former which, in turn, has allowed an application for costs to be made which has been successful. But I do not see this as in itself “extraordinary”.

- 12 I do not include therefore, in the indemnity costs, the costs of and incidental to this day. I order those costs to be paid on County Court Scale “D”. In default of agreement by 1 December 2006 I refer the same for assessment to the Principal Registrar.
- 13 In default of agreement by 1 December 2006 I shall direct the Principal Registrar to carry out his assessment of indemnity costs which otherwise I have ordered (which I refer) under s111 of the Act.
- 14 For clarity, the indemnity costs I refer to in paragraph 11 (which I order the Applicant to pay) means full indemnity costs (not according to any scale) so that the Respondent is not out of pocket in respect of any expenses except any which are unreasonable.
- 15 I decline to hear and determine the Respondent’s application to dismiss the proceeding under ss 75 and 78 of the Act. Those sections give me a discretion to order dismissal or strike out: both are contemplated as alternatives. But the Points of Claim are already struck out. Therefore, the facts prevent me from having both the capacities mentioned to be able to do either. Neither section in my view operates in a way so as to enable only dismissal or nothing which would be their operation, this day, if I was to proceed to hear and determine the Respondent’s application. In any event, I rely upon remarks of Kirby J in *Linden v Commonwealth of Australia* (No 2) (1996) 136 ALR 251 at 256. I should not lightly proceed to hear an application for dismissal of a proceeding that, to this point, has not managed to get off the ground. That would not be fair or in accordance with either s97 or s98 of the Act. But the Applicant must realize that opportunities to replead her proceeding in proper form are clearly reducing and may close off.
- 16 It is preferable that I allow the Applicant to file the new Amended Points of Claim and to allow the Applicant to amend those or allow them to stand in their present form by a certain date. I can allow the Respondent to make its contentions, if any, by appropriate directions.
- 17 I accede to the submission that in respect of the balance of the day it is fair to order the Applicant to pay the Respondent’s costs on County Court Scale “D”. The Applicant, as acknowledged by her Counsel, has been granted an indulgence. The balance of the day has been devoted to matters pertaining to the Applicant’s Points of Claim. The Respondent is an innocent party and should have its costs, having regard to s109(3).
- 18 Again, I make directions and orders accordingly.

SENIOR MEMBER D. CREMEAN