

CATCHWORDS

Water Act 1989 s 19, application for injunction, application dismissed with oral reasons; Application for costs by Second Respondent, application dismissed.

APPLICANT	Gary John Mason
FIRST RESPONDENT	Robin Glenn Hill
SECOND RESPONDENT	Baw Baw Shire Council
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Directions Hearing
DATE OF HEARING	24 September 2014
DATE OF ORDERS	24 September 2014
DATE OF REASONS IN RELATION TO COSTS	23 October 2014
CITATION	Mason v Hill (Building and Property) [2014] VCAT 1346

ORDERS

- 1 The application for an injunction is dismissed.
- 2 The Second Respondent is not prevented from performing works within the road reserve adjoining properties situated at 450 and 448 Princes Way, Longwarry North (the 'Road Reserve').
- 3 Subject to further budget allocation, should the Second Respondent undertake works in the Road Reserve, those works are to be generally in accordance with the layout and section plan amended on 15 September 2014.
- 4 It is noted that the First Respondent provided a schedule of works in accordance with Order 2(b) of the Tribunal's Orders made 3 September 2014. The First Respondent undertakes to complete such Schedule of Works by no later than 31 December 2014.
- 5 The Second Respondent's application for costs against the Applicant is dismissed.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant

For First Respondent

For Second Respondent

Mr G Mason, in person

Mr C Drenen, Solicitor

Ms J Sharp of Counsel

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REASONS

APPLICATION FOR COSTS

- 1 The Second Respondent (the Council) made an application for costs against Gary Mason (the Applicant) pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the Act).
- 2 Written reasons for the substantive findings were not sought and accordingly these Reasons only briefly touch upon the background to this Application.
- 3 Section 109 of the Act sets out the Tribunal's power to award costs in proceedings. The starting point is that each party will bear their own costs (sub-s 109(1)). In limited circumstances, the Tribunal has a discretion to award costs, where it is satisfied that it is fair to do so having regard to a number of factors set out in sub-s 109(3).
- 4 Those factors relevantly include para 109(3)(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' and para 109(3)(e) 'any other matter the Tribunal considers relevant'.
- 5 In broad terms, according to the Applicant, the catalyst for this proceeding was the action of the First Respondent (Mr Hill), a neighbour sharing the eastern boundary of his property.
- 6 The Applicant claims that Mr Hill purchased a 'swamp', drained the land and changed the levels. Some of the water was drained and pumped onto the Applicant's property, other water was pumped to the north of the property. The pumping and run-off onto the Applicant's property caused such property to be flooded.
- 7 Mr Hill's pumping of water to the north to the Road Reserve, and specifically to the western side of his driveway, led to pooling of water across the northern part of Mr Hill and the Applicant's properties.
- 8 Council assessed the pooling at the Road Reserve and determined that the most cost effective way to disperse the water was to build a culvert under the Applicant's driveway to allow the water to flow to the west, where it would disperse across the land.
- 9 The Applicant, having lived on his property for many years, was adamant that the natural flow of the land was to the east. If drainage was installed, it would only be effective if the water was drained in that direction.
- 10 The Applicant sought an injunction restraining the Council and Mr Hill from undertaking any work.
- 11 The hearing of the injunction was delayed for over a year as the parties attended two compulsory conferences and conducted their own private meetings. Further expert reports were obtained. Both Council and the

Applicant remained steadfast in their views and the matter was required to come back to the Tribunal for determination.

- 12 At the hearing, it was clear from the preponderance of expert evidence that the Council's solution was the most cost effective way to solve the pooling issue. In regards to Mr Hill, he first agreed to pump his excess water to the east or south of his property (away from the Applicant's property) until the injunction was heard. He has since undertaken to complete a Schedule of Works to remove drains to the west and divert water eastwards away from the Applicant's property.
- 13 In summary, the Council submits that:
 - (a) The Application for an injunction, as against Council, was one with no basis in fact or law;
 - (b) The proceeding was really a dispute between the Applicant and Mr Hill. That is a civil issue;
 - (c) It was involved only because it was required to find a solution to the issue of pooling at the Road Reserve;
 - (d) It first suggested a solution to the pooling problem in September 2012, before the Applicant's Application for an injunction was filed. Two years later, the Tribunal has confirmed that the Council's proposal is appropriate; and
 - (e) It has incurred significant costs in opposing the Application. Legal costs are estimated to be \$52,000 for solicitor's fees and \$16,700 for Counsel, excluding GST. Furthermore, the proceeding has been a drain on the Council's intellectual resources, with internal engineers required to produce reports and affidavits, and to attend compulsory conferences, meetings and hearings.
- 14 The Council further submits to the effect that it has behaved as a model litigant. In particular:
 - (a) It has offered to pay for the works under the driveway which is normally a cost incurred by the land owner;
 - (b) It has put the Applicant on notice that it will seek costs;
 - (c) The Applicant has had the option to withdraw against the Council but has never taken that option;
 - (d) It had properly notified a private building surveyor and advised him that water was not being discharged at the legal point of discharge from Mr Hill's property. The surveyor then notified Mr Hill and a building order was issued. It is usual practice for the Council to notify persons and ask them to fix the problem in the first instance; and
 - (e) Council tried to minimise its costs by briefing a Junior Counsel and engaging a more junior member of Maddocks, Solicitors.

- 15 In the above circumstances, the Council submit that the Tribunal should exercise its discretion and award some or all of its costs.
- 16 In response, the Applicant contends that:
 - (a) If the Council had acted in a timely manner to prevent Mr Hill from ‘flooding them out’, they would not have been in the situation where they needed to urgently seek an injunction;
 - (b) The Applicant had a reasonable basis for apprehending that the works proposed by the Council would not be effective and that alternative works should be explored; and
 - (c) The Applicant had also incurred significant expense; had devoted a significant amount of his time; and had endeavoured to give an accurate and truthful account throughout the proceeding.
- 17 The Council acknowledge that their efforts to procure compliance by Mr Hill with the legal point of discharge of water from his property, were ineffective.

FINDING ON THE COSTS APPLICATION

- 18 I have declined to depart from the starting position that parties should bear their own costs for the following reasons.
- 19 This has been a vexed and contentious dispute. However, the Tribunal is satisfied that the Applicant has acted in good faith. In particular, the Tribunal is satisfied that the Applicant genuinely believed, relying upon historic drainage patterns and his detailed knowledge and experience of the terrain, that the proposal made by Council was neither cost efficient nor likely to be practically effective. There is no suggestion that the Applicant was motivated by personal greed or other ulterior motive.
- 20 During the course of the hearing it became apparent that the Applicant had become somewhat sidetracked in pursuing alternative drainage options. Equally, the Applicant perceived that the Council did not diligently enforce the legal point of discharge applicable to Mr Hill’s property; and the Applicant’s protestations of flooding appeared to be being ignored.
- 21 When the Applicant discovered that the Council was proposing to undertake certain drainage works, the Applicant found himself in a predicament. The Application for an injunction was intended to urgently address his flooding problem, as well as resolve an effective means of addressing the pooling problem.
- 22 While the Council may have taken a more proactive approach toward Mr Hill, with the benefit of hindsight, the Tribunal acknowledges that it did take such action as it reasonably thought appropriate and adequate in the first instance. Furthermore, the Tribunal acknowledges that the Council otherwise thoroughly researched and documented the works and drainage

plan which they propose for the Road Reserve adjoining the properties situated at 450 and 448 Princes Way, Longwarry North.

- 23 In the circumstances, the action taken by the Applicant was not unreasonable. Although the works proposed by the Council have ultimately been endorsed, the Tribunal is satisfied that the Applicant's stated position in relation to drainage was neither hopeless nor without merit. It is not fair and reasonable to require the Applicant to pay the Council's costs.
- 24 I have made orders that the Council's application for costs against the Applicant is dismissed.

Judge Jenkins
Vice President