VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE: D193/2003

CATCHWORDS

Domestic Building, interpretation of terms of settlement, costs.

APPLICANT:	Ann Myilly Milankovic
FIRST RESPONDENT:	Binyun Pty Ltd
SECOND RESPONDENT:	David Plotnik
FOURTH RESPONDENT:	Gevah Constructions Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Senior Member M. Lothian
HEARING TYPE:	Reinstatement Hearing
DATE OF HEARING:	9 October 2009
DATE OF ORDER:	9 October 2009
CITATION:	Milankovic v Binyun Pty Ltd & Ors (Domestic Building) [2009] VCAT 2227

ORDER

1 The First, Second and Fourth Respondents shall pay the party/party costs (including reserved costs) of the Applicant in the proceeding as agreed and if not agreed to be assessed by the Principal Registrar pursuant to section 111 of the Victorian Civil and Administrative Tribunal Act 1998 on County Court Scale "C", such costs to be paid within 30 days of said agreement or assessment as the case may be. "The proceeding" means the proceeding since the application was filed on 9 April 2003.

2 I reserve costs of and incidental to this application with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr D. Pumpa of Counsel
For the First, Second and Fourth Respondents	Mr V Ruta of Counsel

REASONS

1 The application before me concerns the interpretation of terms of settlement entered by the Applicant, the First to Fourth Respondents and the First Joined Party on 12 March 2009 ("ToS2"). Clause 9 of ToS2 states:

> The 1st, 2nd and 4th Respondent shall pay the party/party costs (including reserved costs) of the Applicant in the proceeding as agreed and if not agreed, to be assessed (by the Principal Registrar of VCAT) on County Court Scale "C" such costs to be paid within 30 days of agreement or assessment. [Emphasis added]

2 The issue between the relevant parties (the Applicant and the First, Second and Fourth Respondents) is whether, as the Applicant submits, the costs to be paid are from the commencement of the proceeding in 2003, or whether, as the First, Second and Fourth Respondents submit, the costs to be paid are from just after reinstatement of the proceeding in August 2008.

THE APPLICATION

3 On 10 July 2009 the Applicant applied:

> That the proceeding be re-instated and that the Tribunal made the following orders:
>
> 1. The First, Second and Fourth Respondents shall pay the party/party costs (including reserved costs) of the Applicant in the proceeding as agreed and if not agreed to be assessed by the Principal Registrar pursuant to section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on County Court Scale "C", such costs to be paid within 30 days of said agreement or assessment as the case may be.
>
> 2. The First, Second and Fourth Respondents shall pay the Applicant's costs of and incidental to this application.

4 I reinstated the proceeding on 27 August 2009, but the First, Second and Fourth Respondents indicated through their Counsel, Mr V. Ruta, that there was other evidence and argument they wished to raise before the Tribunal, I adjourned the question of appropriate orders arising out of the reinstatement to 9 October 2009.

HISTORY

5 A brief history of the proceeding is that a settlement was entered on 8 April 2005 ("ToS1") requiring Respondents 1, 2 and 4 to carry out a scope of works at the Applicant's premises, in accordance with drawings and computations by CIR Consulting Engineers Pty Ltd (later "Joined Party 1"). Although the Second Respondent, Mr David Plotnik, was obliged to carry out these works and he was the sole director and shareholder of Respondents 1 and 4, his were not the hands that undertook the works. This was because clause 9 of ToS1 provided:

> Mr David Plotnik shall not personally undertake any works on the Premises.

6 As mentioned above, the Applicant complained of the works undertaken subsequent to ToS1 and the proceeding was reinstated for the first time.

7 ToS2 settled the proceeding for the second time, this time for a monetary sum, not for work to be done. The First, Second and Fourth Respondents agreed to pay the Applicant $41,000.00 and the First Joined Party agreed to pay her $9,000.00. These sums have been paid.

EVIDENCE AND SUBMISSIONS

8 I have not been assisted by the Second Respondent's affidavit of 18 September 2009. The only matters that might have been relevant to the interpretation of ToS2 is that he understood:

> that reference to the proceeding referred to in [clause] 9 of the second Terms of Settlement referred to the costs of the proceeding incurred after 19 August, 2008, the Applicant having already had an assessment and being paid for all costs in the original proceedings prior to that date. [Emphasis added]

9 The costs which had been paid were referred to in paragraph 12 of the Second Respondent's affidavit. They are costs ordered by the member who ordered the reinstatement and they are not "all costs in the original proceedings" but as ordered on 19 August 2008, they are:

> in respect of the directions hearing on 24 April 2008 and in respect of the hearing on 16 July 2008 and of and incidental to the latter.

I am concerned that the Second Respondent, represented by experienced practitioners, should make a statement in an affidavit, inadvertently or otherwise, which could have misled the Tribunal.

10 Mr Pumpa of Counsel for the Applicant submitted that the plain meaning of clause 9 of ToS2 is that the cost of the proceeding means the entirety of the proceeding. In answer to my question about whether such an interpretation could amount to a windfall to the Applicant, he pointed out that under ToS1, the First, Second and Fourth Respondents were not released regarding costs. Clause 18 provided in part:

> Subject to the performance of these terms of settlement the [Applicant] and the [the First, Second and Fourth Respondents] release each other from all claims, demands and suits howsoever arising out of or connected with the proceeding which were known or reasonably ought to have been known to exist at the time that these terms were signed, save and except for … in relation to the legal and consultant's costs incurred by both parties ("the Legal Costs"). Failing agreement between the Owner and the Builder as to the payment of … Legal Costs either party may request the Tribunal for an order … in relation to the … Legal Costs and to assess those costs. [Emphasis added]

I am satisfied that at the signing of ToS1 there was no final agreement as to the costs incurred up to and including that date.

11 Mr Ruta submitted that "in the proceeding" meant not from the date of commencement of the proceeding in 2003, but from reinstatement. The reasons he gave were:

- Although the Tribunal commonly strikes out proceedings and allows for them to be reinstated, if it were in a court it is likely that fresh proceedings would have been brought to sue on ToS1.
- The Second Respondent's hands were not those that did the work under ToS1.
- Additional parties - the Joined Parties - came into the proceeding after the first reinstatement.
- New Points of Claim were ordered after the reinstatement and were filed and served on 12 September 2008. They referred to "the proceeding", pleaded a breach of ToS1 and sought "damages, interest and costs" which, Mr Ruta submitted "could only be costs since reinstatement".
- In the preamble to ToS2 "the works" means the repair works under ToS1 and "the dispute" means the dispute regarding the works.

12 With respect to these points I find:

- The parties agreed, in paragraph 21 of ToS1, that the "proceeding" would be struck out with a right of reinstatement. Further, every time the parties or the Tribunal have used "proceeding" or "proceedings" it is consistent with the proceeding since 2003. For example, order 1 of 17 July 2008 is "I reinstate the proceedings". To treat "proceeding" as meaning since reinstatement in 2008 is an artificial construction, particularly in this proceeding where ToS1 provided both for reinstatement - at clause 21 - and for institution of fresh proceedings at clause 23(f):

  > Nothing in this paragraph prejudices the right of a party to institute proceedings to enforce payment due under these terms of settlement or to seek injunctive or urgent declaratory relief.

  The distinction cannot have been lost upon the parties as it was referred to in the reasons for the orders of 17 July 2008.

- It is common ground that the Second Respondent was not on site and his hands did not do the work, but this was the deal struck by the parties in ToS1. I am unaware to what degree he was responsible for arranging the works. He and the First and Fourth Respondents were ultimately responsible for them.
- The Joined Parties did come into the proceeding after the first reinstatement, but it is not unusual for parties to enter and leave proceedings without the necessity to commence new proceedings.

- The points of claim of 12 September 2008 are not headed "Amended Points of Claim" in circumstances where points of claim were also filed with the application on 9 April 2003. However, the 2008 points of claim briefly recite the whole relationship between the parties and at paragraph 24 the Applicant defines "the proceeding" as consequential upon actions (or inactions) by the First to Fourth Respondents in or about 2002.
- It is not clear that the preamble to ToS2 refers only to repair work and the dispute arising out of the allegedly defective repair work.

13 Tellingly, I asked Mr Ruta why ToS2 had not included a date from which costs would be payable and he responded that he was not present when ToS2 was drafted. I am satisfied that the plain meaning of ToS2 is that the Applicant is entitled to costs of the proceeding from its commencement in 2003.

COSTS OF THIS APPLICATION

14 The Applicant applied for costs of this application on 10 July 2009 but I was not addressed on this point. It is likely that under s109(3)(c) of the *Victorian Civil and Administrative Tribunal Act* 1998 that an order for costs should be made in favour of the Applicant in similar terms to order 1, however as I have not heard submissions I reserve costs of and incidental to this application with liberty to apply.

SENIOR MEMBER M. LOTHIAN