

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D845/2008

**CATCHWORDS**

Section 104 *Victorian Civil and Administrative Tribunal Act* 1998, legal costs incurred by non-party in complying with summons to appear and produce documents – no jurisdiction to order costs

<b>APPLICANT</b>	Owners Corporation Plan No PS 438902Q
<b>RESPONDENT</b>	Suncorp Metway Insurance Ltd ACN 075 695 966
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Directions hearing
<b>DATE OF HEARING</b>	30 July 2010
<b>DATE OF RULING</b>	10 August 2010
<b>CITATION</b>	Owners Corporation Plan No PS 438902Q v Suncorp Metway Insurance Ltd (Domestic Building) [2010] VCAT 1316

**RULING**

The tribunal has no power to order costs in favour of a person answering a Summons to Appear.

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant	Mr L Schwarz, solicitor
For Respondent	Mr B Powell, solicitor
For 27 Inkerman Pty Ltd and Riverside Properties Pty Ltd	Mr A Clifford, solicitor

## RULING

- 1 27 Inkerman Pty Ltd and Riverside Properties Pty Ltd were summonsed at the request of the applicant, an owners corporation, to appear and produce various documents to the tribunal. The Summonses were issued on 22 March 2010 and the first return date was 29 March 2010
- 2 At the first return date 27 Inkerman Pty Ltd and Riverside Properties Pty Ltd were represented by Mr Tartaka of Counsel who, after seeking clarification of the classes of documents sought, sought an extension of time for the return of the Summonses to 30 April 2010.
- 3 Subsequently, the return dates for the Summonses were extended to 6 July, 20 July and ultimately to 30 July 2010. On 20 July Mr Clifford, solicitor, of Gadens Lawyers appeared on behalf of 27 Inkerman Pty Ltd and Riverside Properties Pty Ltd and, despite previously having agreed to consent orders extending the dates by which the documents would be produced to the tribunal, asked that the requirement for the documents to be produced to the tribunal be waived. He explained that his clients were involved in Supreme Court proceedings for which the documents were required to complete discovery by 13 August 2010, and that it would be time consuming to extract the subpoenaed documents and produce them to the tribunal. Not surprisingly Mr Schwarz, solicitor for the owners corporation, expressed concern about the difficulties this might create for his client in inspecting the documents and comparing them with documents which had been produced to the tribunal by the City of Port Phillip in response to a similar summons.
- 4 However, Mr Schwarz indicated that he would be content if photocopies of the documents were produced, kept by the tribunal for a limited period and returned to Gadens when they had been inspected and any copies taken.
- 5 The date for compliance with the Summonses was extended yet again - to 30 July 2010, and a 15 minute directions hearing listed for their receipt. The documents produced are numerous, comprising eight rolls of drawings, two boxes and two lever arch folders.
- 6 At the 30 July directions hearing Mr Clifford applied for his clients' costs of complying with the summonses. This application was made under s104(4) of the *Victorian Civil and Administrative Tribunal Act 1998* which provides:
  - (4) A person who attends in answer to a summons is entitled to be paid the prescribed fees and allowances or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the Tribunal.
- 7 Mr Clifford confirmed the amount sought by his clients was \$3,500: \$2,500 for counsel's fees for the appearance on 29 March 2010, and \$1,000 for correspondence passing between the solicitors. He sought to categorise the

costs claimed as fees and allowances. However, as Judge Bowman said in *Rewal v IBM Australia Ltd* [2003] VCAT 1340 at [15]

There also seems to me to be a clear distinction between the fees and allowances payable pursuant to s.104 of the Act, and legal costs payable pursuant to s.109.

And at [19]

...I am also far from convinced that the wording of s.104 permits more than the payment of fees and allowances which, to my mind, is clearly distinguishable from costs.

- 8 Mr Schwarz opposed the application relying on the decision of Judge Bowman in *State of Victoria v Bradto Pty Ltd* [2006] VCAT 685 where his Honour ruled the tribunal does not have jurisdiction to make an order for costs in favour of, or against, a non-party in answering a subpoena. His Honour's analysis and consideration of the authorities is very thorough and helpful, particularly in relation to the distinction between the broad discretion conferred on the Supreme Court under the *Supreme Court Act* 1986 and the more limited discretion conferred on the tribunal under s109 of the VCAT Act. At [23] he said:

...the power of a Tribunal to award costs depends on statute, and there is no common law jurisdiction in a Tribunal to order costs – see *Walton v McBride*. In relation to the last mentioned proposition, it is to be recalled that, in any event, this Tribunal is a creature of statute. Its powers and jurisdiction are to be found in the Act and in enabling enactments. It cannot, for example, confer upon itself some manner of equitable jurisdiction. Accordingly, and whilst some assistance in relation to interpretation may be found in *Victoria Legal Aid*, to which I shall return, the essential starting point is to be found in the provisions of the Act. The power of the Tribunal to order costs is to be found in s.109. Whilst the discretion contained in s.109 is quite broad, it is not of the breadth to be found in s.24(1) of the *Supreme Court Act*.

And at [27]

In any event, it was determined by Byrne J in *Pyramid Building Society (in liq.) & Ors v Farrow Finance Corporation (in liq.) & Ors; ex parte Farrow, Clarke and Lawson* 1995 1 VR 464 that a person attending a proceeding in response to a subpoena, at least for the purposes of Order 42.08(1), is not a party within the meaning of the statutory definition. If such a person is not a party for the purposes of the broader statutory definition contained in the *Supreme Court Act*, *a fortiori* such a person would not be a party for the purposes of s.59 of the Act.

- 9 Further, the precise wording of s104(4) should be noted. It concerns the 'fees and allowances' of 'a person who attends in answer to a summons'. Even if I were satisfied that fees and allowances included legal costs, which

I am not<sup>1</sup>, s104(4) only extends to the fees and allowances incurred in attending the tribunal. It does not say 'in complying with the summons to attend'.

- 10 Even though it is unlikely in the circumstances of this case, where the solicitors for the owners corporation and those for 27 Inkerman Pty Ltd and Riverside Properties Pty Ltd have engaged in what can only be described as an extraordinary exchange of correspondence, I would have made any order for costs even if there had been jurisdiction to do so, I share Judge Bowman's sentiments in *Bradto* at [44], which I repeat:

Thus, regrettably, in my opinion the Tribunal has no power to make an order either in favour of or against a non-party in relation to legal costs. This is a highly unsatisfactory state of affairs. As discussed by Byrne J in *Pyramid Building Society*, there will be situations where it is proper for the interested of a non-party to be protected by legal representation. In those circumstances, and if the situation warrants it, the principle of basic fairness would seem to me to require that the cost of that representation be met. It is also desirable that, in such a situation, the Tribunal and the parties receive the full cooperation of, and assistance from, a non-party, something which not always occur if it is known that legal costs so incurred cannot be recovered.

- 11 Accordingly, the application must fail.

## **DEPUTY PRESIDENT C AIRD**

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<sup>1</sup> *State of Victoria v Bradto Pty Ltd* [2006] VCAT 685 at 42 and 43