

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D685/2007

CATCHWORDS

Domestic Building, interlocutory proceeding, costs

APPLICANT	Owners Corporation PS 414106B
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Hallmarc Construction Pty Ltd (formerly Adamco Constructions Pty Ltd)
THIRD RESPONDENT	MEA Australia Pty Ltd (ACN 076 338 399) trading as Malcolm Elliott Architects
FOURTH RESPONDENT	Irwinconsult Pty Ltd (ACN 050 214 894)
FIFTH RESPONDENT	Philip Chun & Associates Pty Ltd (ACN 007 401 649)
SIXTH RESPONDENT	Belrose Landscaping Pty Ltd (ACN 072 529 401)
WHERE HELD	Melbourne
BEFORE	Senior Member M Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 May 2009
DATE OF ORDER	14 May 2009
DATE OF REASONS	16 July 2009
CITATION	Owners Corporation PS 414106B v Victorian Managed Insurance Authority & Ors (Domestic Building) [2009] VCAT 119

REASONS

- 1 On 14 May 2009 this proceeding came before me on the application of the Second Respondent, Hallmarc, for its costs of and in relation to the directions hearing of 17 April 2009 to be paid by the applicant Owners Corporation.
- 2 On that day I ordered:

For the reasons given orally today each party must bear their own costs of and associated with the Directions Hearing of 17 April 2009 and of and associated with today's cost hearing.

Hallmarc has sought reasons for my decision.

- 3 The background to the application of 17 April 2009 is that on 23 March 2009 the Owners Corporation filed and served amended points of claim which mentioned for the first time a new defect claimed against Hallmarc, being an allegedly leaking swimming pool. The amended points of claim were filed in accordance with my order of 12 February 2009 and a broad reading of those orders could contemplate the inclusion of the swimming pool defect, but there is no doubt that it took Hallmarc by surprise and would have been likely to necessitate joinder of the swimming pool contractor ("Neptune") as an additional party. The order was:

By 15 April 2009 the Applicant has leave to file and serve Amended Points of Claim which shall include fully itemised particulars of the claim, loss and damage claimed, and the relief or remedy sought and which may claim against any or all of the respondents.
- 4 The context of that order was that additional parties had just been joined on the application of Hallmarc for the purpose of apportionment of responsibility under Part IVAA of the *Wrongs Act 1958* and it was contemplated that the Owners Corporation might want to claim against them.
- 5 On 31 March 2009 Hallmarc made applications for directions and sought orders that:
 - the amended points of claim be struck out and removed from the file. or
 - proper particulars of the swimming pool defect be provided, or
 - Neptune be joined as a respondent, and
 - Hallmarc have leave to file and serve an amended defence, and
 - the Owners Corporation pay Hallmarc's costs on an indemnity or solicitor-own client basis.
- 6 By 17 April 2009 the issue regarding Neptune had been resolved. The Owners Corporation and Neptune had reached an agreement between them and there was an order by consent that Further Amended Points of Claim dated 15 April 2009 and served on 16 April 2009 would stand as the Owners Corporation's points of claim. Unfortunately the business of the tribunal on that day did not allow the parties to argue costs then; hence the costs hearing of 14 May 2009.
- 7 There had been correspondence between solicitors for the parties which appeared to go beyond normally robust exchanges between lawyers.

8 Ms Kirton of counsel for Hallmarc submitted that I should order the Owners Corporation pay its costs either under s109(3)(c) of the *Victorian Civil and Administrative Tribunal Act 1998*, under s109(3)(e), or 109(3)(a)(vi). As she said in her submissions, as emphasised by the Supreme Court in *Vero Insurance Ltd v Gombac Group* [2007] VSC 117, the Tribunal should approach the question of whether a party is entitled to cost on a step-by-step basis:

- (i) The prima facie rule is that each party should bear their own costs of the proceeding.
- (ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.
- (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

9 The oral reasons I gave on the day were:

I am concerned that adding the pleading about ... the pool [defect] ... is a little bit cute. Yes, there was leave given to [Hallmarc] to serve Amended Points of Claim. It was given in the context where we were talking about the possibility that the [Owners Corporation] might want to make claims directly against the Third to Sixth Respondents and there was no mention made of the swimming pool at that time which is probably not surprising. Because it sounds as though nobody knew about the swimming pool at that time, or it was around about that time when the swimming pool fault was discovered and it's not just the same as a pleading that adds a letter or that adds a fault which is clearly a fault for which the builder was [solely] responsible. It's adding a fault which necessitated a prudent party joining the swimming pool installer.

If time had permitted then it's likely that I would have ... prevented the Owners Corporation taking the step that it took without seeking specific leave regarding the Neptune pleading. On the other hand ... we [must] look at s109 of the VCAT Act. [Considering] section 109(3)(c), I am with you Mr Oliver [of Counsel, for the Owners Corporation] on the basis that it doesn't follow that there was no tenable basis in fact for making this particular or seeking to make this particular amendment. Perhaps there might be circumstances in which an amendment is so outlandish that this [provision of the Act] would [be satisfied] in an interlocutory proceeding, but it doesn't in this case.

As far as "any other matter that the Tribunal considers relevant" - [s109(3)(e)] - something that causes me concern and will probably be more relevant to any application for costs regarding today is the outbreak of hostilities between the solicitors. I am not satisfied that any of the matters that have been raised are sufficient to fall under s109(3)(e) and as Ms Kirton has properly said, the amendment can't

be regarded as vexatious in circumstances where [the Owners Corporation has] only just discovered, ... late in the piece, that the swimming pool might have leaked. So I decline to make an order for costs in favour of Hallmarc in this case. I am inclined ... to say that the parties must bear their own costs. In fact, that's what I'm going to do.

- 10 Mr Oliver then handed up a letter of 5 May 2009 from his instructing solicitors to solicitors for Hallmarc. The letter offered Hallmarc a solution that was at least as good as my decision regarding the directions hearing of 17 April, which if accepted would have avoided the necessity for the costs hearing. On the basis of this letter Mr Oliver sought his client's costs of the affidavit of Ms Camillo of 12 May 2009 and of his appearance on 14 May 2009.
- 11 I said that until I read Ms Camillo's affidavit I was inclined to make an order for costs against the Owners Corporation. However, as the offer in the letter was only open for acceptance until 5:00pm on 7 May and the affidavit was not served until the 12th, I did not consider it fair to take the letter into account under s109(3). I therefore also ordered that each party bear its own costs of and associated with the costs hearing of 14 May 2009.
- 12 It is most regrettable that this argument about costs has taken on a life of its own. It is not the main issue between the parties, but has absorbed considerable legal resources, at least for the Owners Corporation and Hallmarc.

SENIOR MEMBER M. LOTHIAN