

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D6/2009

CATCHWORDS

Domestic Building, costs, *Victorian Civil and Administrative Tribunal Act 1998* ss 109(3)(a)(iv), (b), (c) and (d); vexatious conduct, prolonging time - whether entitling to costs of the whole proceeding, relative strengths of cases, nature and complexity, success against one respondent but not against another where there are common pleadings, fairness.

APPLICANT	Pacrete Industries Pty Ltd (ACN 104 585 426)
FIRST AND SECOND RESPONDENTS	Karen Hendriks, Peter Hendriks
THIRD RESPONDENT	Maxine Amanda Kakouris
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	26 May 2010
DATE OF ORDER	8 June 2010
CITATION	Pacrete Industries Pty Ltd v Hendriks & Ors (Domestic Building) [2010] VCAT 1114

ORDERS

1. The First Respondent must pay the Applicant's costs of the proceeding with the exception of costs exclusively associated with the proceeding against the Second Respondent.
2. Each party must bear their own costs of parts of the proceeding exclusively associated with the proceeding against the Second Respondent.
3. Where parts of the Applicant's claim against the Second Respondent are identical to parts of its claim against the First Respondent but for identifying names, the First Respondent must pay the Applicant's costs of those parts as if the claim had been against the First Respondent alone.
4. There is no order for costs of or to the Third Respondent, but the First Respondent must pay the Applicant's costs associated with calling the Third Respondent as its witness.

5. Each party must bear their own costs of and associated with the filing of the Third Further Amended Points of Claim filed on 27 January 2010 and of the proportion of the costs of and associated with these applications for costs that relate to the Third Respondent's application.
6. Should the Applicant and First Respondent fail to agree on the amount of costs to be paid by 21 June 2010, costs shall be assessed by the Victorian Costs Court on a party-party basis on County Court Scale C. Costs include reserved costs.

SENIOR MEMBER M LOTHIAN

APPEARANCES:

For Applicant	Mr B. Carr of Counsel
For First and Second Respondents	Mr R. Fink of Counsel
For Third Respondent	No appearance

REASONS

- 1 On 10 February 2010 I ordered that the First and Third Respondents, Mrs Hendricks and Ms Kakouris respectively, pay the Applicant, Pacrete, \$35,610.36. I made no order against the Second Respondent, Mr Hendriks.
- 2 Pacrete seeks costs against Mrs Hendriks. Mr Hendriks seeks his costs against Pacrete. Both seek costs under s109 of the *Victorian Civil and Administrative Tribunal Act 1998* (“Act”). No-one seeks costs against Ms Kakouris who was called as a witness for Pacrete, agreed to be joined to the proceeding as Third Respondent and admitted liability to Pacrete.

COSTS

- 3 Section 109 of the Act says in part:
s.109:
 - (1) Subject to this Division, each party is to bear their own costs in the proceeding.
 - (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
 - (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to-
 - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –
 - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
 - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
 - (iii) asking for an adjournment as a result of (i) or (ii);
 - (iv) causing an adjournment;
 - (v) attempting to deceive another party or the Tribunal;
 - (vi) vexatiously conducting the proceeding;
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
 - (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;
 - (d) the nature and complexity of the proceeding;
 - (e) any other matter the Tribunal considers relevant.
- 4 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs 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 matters stated in s.109(3). 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.

PACRETE'S CLAIM AGAINST MRS HENDRIKS

5 Pacrete bases its claim against Mrs Hendriks on one or more of s.109(3)(a)(iv), (b), (c) and (d) of the Act.

s.109(3)(a)(iv) – Vexatiously conducting the proceeding

6 Mr Carr of Counsel for Pacrete submitted that evidence for Mrs Hendriks of Ms Kakouris' alleged physical attack on their father, Mr McNiece was vexatious conduct and an attempt to intimidate Pacrete by attacking Ms Kakouris who was its witness. The evidence of the attack was unconvincing and the issue was irrelevant, except as I said in the first paragraph of the reasons of 10 February 2010 ("Reasons"):

The allegations family members make against each other include forgery by one and violence by another. They have not been taken into account, except to note the relationship between family members is bitter.

7 This alone is sufficient to justify an order that Mrs Hendriks pay Pacrete's costs of the time spent concerning this issue. This aspect of Mrs Hendriks' case was vexatious, but it was a relatively minor and discrete issue and did not render the whole conduct of her case vexatious.

s.109(3)(b) – Prolonging Unreasonably the Time Taken to Complete the Proceeding

8 Mr Carr submitted that there were a number of occasions when Mr and Mrs Hendriks failed to comply with directions of the Tribunal, causing delays. This is true, but costs have been awarded for those occasions and I do not find the delays are individually or cumulatively so great as to justify an order for costs of the whole of the proceeding, rather than for the individual occasions of delay.

s.109(3)(c) – The Relative Strengths of the Claims made by each of the Parties

9 Pacrete's claim against Mrs Henriks was substantially successful as was its defence against her counterclaim. Pacrete claimed \$43,150 of which it was awarded \$39,420, less \$3,810 for edge rebates. The sum of \$3,810 was the

only amount of Mrs Hendriks' counterclaim of \$121,640.02 that she recovered. She abandoned \$95,885 of this counterclaim, but did not do so until final submissions.

- 10 Pacrete was forced to take action to recover sums owed to it by the partnership between Mrs Hendriks, Ms Kakouris and Mr McNeice, and its case was strong although it did not succeed completely.

s.109(3)(d) – The Nature and Complexity of the Proceeding

- 11 The claim was for a substantial amount met by a counterclaim for almost three times that amount. I find that the size of the claim and counterclaim contribute to characterising its nature as falling within s109(3)(d).
- 12 The proceeding was made complex, in part by Mrs Hendriks' defence and counterclaim. In particular Mrs Hendriks submitted that the purpose of the partnership which engaged Pacrete was to "develop" but not to "build" which might have brought parts of the *Domestic Building Contracts Act 1995* to bear on the outcome of the proceeding, and there were also submissions concerning the operation of the *Partnership Act 1958*.
- 13 I am satisfied that the nature and complexity of the proceeding was sufficient to warrant an order for costs.

Ms Kakouris as Pacrete's witness

- 14 Although Ms Kakouris became the Third Respondent on the first day of the hearing, she was Pacrete's witness and it is entitled to costs arising out of her role as its witness.

Third Further Amended Points of Claim

- 15 This pleading was filed and served on the first day of the hearing. Its purpose was to add Ms Kakouris as the Third Respondent. Pacrete should not have needed to re-plead at this point and it is not fair that Mrs Hendriks should bear the costs of and associated with it.

Conclusion regarding Pacrete's claim

- 16 It is fair that, with the exceptions discussed above, Mrs Hendriks should pay Pacrete's costs, having regard to both the relative strengths of Pacrete's claim and its defence against her counterclaim, and the nature and complexity of the proceeding.

MR HENDRIKS' CLAIM AGAINST PACRETE

- 17 Mr Hendriks bases his claim against Pacrete on s.109(3)(c) of the Act – that Mr Hendriks was entirely successful in the defence of the claim against him. I found on balance that Ms Kakouris' obligations to Pacrete were not novated to Mr Hendriks, although there was some evidence in support of novation. Further, Mr Hendriks was the author of much of the dispute between the parties to the proceedings, his evidence was unreliable and he

exacerbated the unfair conduct to which Pacrete was subjected by Mrs Hendriks.

- 18 Having regard to what is fair between the parties, I find that both Pacrete and Mr Hendriks should bear their own costs of and associated with parts of Pacrete's claim against Mr Hendriks which differ from its claims against Mrs Hendriks, his defence and the parts of his witness statement that relate exclusively to his defence. They must also bear their own costs of the proportion of the costs of and associated with these applications for costs that relate to Mr Hendriks' application.

OVERLAP BETWEEN MR AND MRS HENDRIKS' COSTS

- 19 As recited in the Reasons, most of the claims against Mr and Mrs Hendriks are common, as are their defences. A significant proportion of the witness statements of Mr and Mrs Hendriks are identical or almost identical.
- 20 I find that it is fair in this case that to the extent the legal work including pleadings and witness statements are common, they should be regarded as costs for which Mrs Hendriks must pay Pacrete. If Mr Hendriks had not been a party, Pacrete would have had to incur the same costs pursuing Mrs Hendriks. I characterise the common case against Mr and Mrs Hendriks as a claim against "the partnership" - the case against Mr Hendriks alone was to determine whether he was part of the partnership. As Mrs Hendriks was the only party of the partnership whom Pacrete sued and who resisted its claim, it is reasonable that she alone should be responsible for costs incurred because of its resistance.
- 21 I accept the submission of Mr Fink for Mr and Mrs Hendriks that as between his clients it is likely that they are jointly and severally liable for their legal costs to their lawyers. He also referred me to *Rogers v Kabriel (No 2)*¹. He referred me, among others, to paragraph 15:
- The rule is that in the absence of any evidence as to how the defendants have retained their solicitor the court infers that each is liable to pay an aliquot part of the costs, so that if successful the only order in their favour is an aliquot part of the total costs.
- 22 However, in that case there is no suggestion that there was common pleading against the defendants and there was a transaction pleaded where the plaintiff did not succeed:
- ... they did not need most of the factual material proffered and in all the circumstances they should get fifty percent of their costs.
- 23 I have taken costs against Mr Hendriks into account above. I make no further deduction for costs common to the action against Mr and Mrs Hendriks.
- 24 Mrs Hendriks was the only counter-claimant and is solely responsible for costs arising out of the counter-claim.

¹ [1999]NSWSC 474

SCALE AND CERTIFYING FOR COUNSEL

- 25 Pacrete submitted that I should order costs in its favour on County Court Scale C, which I do, and certify for Counsel. I decline to certify for Counsel in this proceeding where the obligations to pay costs are not simple and the merits of the claims for costs are far from straight-forward.

SENIOR MEMBER M LOTHIAN