VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D114/2003

CATCHWORDS

Slip rule, Application to hear further evidence, costs, ulterior motive, indemnity costs

APPLICANT	Antony John Pratley
RESPONDENTS	Brian and Lynette Racine
WHERE HELD	Melbourne
BEFORE	Senior Member R.J. Young
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 December 2006
DATE OF ORDER	31 January 2006
CITATION	Pratley v Racine (Domestic Building) [2007] VCAT 159

REASONS

1 This directions hearing arose as a result of my decision in relation to an application by the applicant that I amend my substantive determination in this proceeding of 29 October 2004 under Section 119 of the *VCAT Act* (*'the Act'*) to correct what the applicant submitted were errors in the assessment of damages in that determination and reduce the quantum of damages that I had ordered the applicant to pay the respondent by $16,381.00.

2 The sum by which the applicant sought to correct my determination of $16,314, in his second amended application, was reduced from the amount sought in the original application of 25 August 2006 in the sum of $34,412.00. In my determination of 22 November 2006, I dismissed the applicant's application and I ordered this directions hearing to consider any further applications the parties may wish to make, including any

applications the parties wished to make in respect of costs. At the commencement of this directions hearing the respondents indicated that they would be seeking their costs of the applicant's failed application under the slip rule.

3 Before that application was made the applicant submitted that I should re-open the hearing as to the applicant's submission under the slip rule to hear further evidence from the experts, notwithstanding my determination of 22 November 2006. I requested from Ms Moorehouse-Perks why I was not *'functus officio'* in relation to my determination on the applicant's application under the slip rule? I considered this to be a second attempt by the applicant to get me to re-open my decision on my substantive determination of 29 October 2004. After considering the submissions put before me at the hearing of Mr Pratley's application under the slip rule on 8 November 2006, I had dismissed the application in my determination of 22 November 2006 on the basis that it would have required me to hear evidence as to the bona fides of the consents between the parties and an application under the slip rule was not the appropriate forum for such a challenge; further, no error was established on the face of the record and the applicant had given no explanation for his delay of some 22 months in bringing this application. Once made I cannot reassess my reasoning and resulting determination other than to correct minor slips or omissions. Further, I do not consider such reassessment is appropriate, it would defeat the proper administration of justice; it would mean that any dissatisfied party could apply to the adjudicator to have a decision reassessed. This would defeat a principal purpose of the administration of justice that there be an end to disputation, it would also diminish the public's confidence in the judicial (and quasi judicial), system.

4 If I ceded to the request of the applicant this application would provide a good example as to how such a decision could frustrate the proper administration of justice. The facts of this application under the slip rule are the applicant's application under the slip rule was made nearly two

years after my substantive determination was published, the facts as set out in the affidavits supporting the application and in the submissions made by the applicant's legal representatives do not contain any facts that became apparent after the publication of my substantive decision and no propositions of law were put that could have only arisen in the recent past. Since the publication of my substantive determination of 29 October 2004 the applicant has not paid the damages awarded in my determination and the respondent took action in the Ringwood Magistrates Court to enforce the determination of my decision. That Court made an order on 28 February 2005 that the applicant pay the respondent the award of damages in the sum of $95,848, the amount of the award. The applicant, subsequent to the order of the Court, applied for an instalment order under the *Judgment Debt Recovery Act* 1984 and the Court made a varied instalment order under that Act requiring the applicant to pay the respondent $2,100 per month. Thus, both parties have taken substantial steps since the original determination on 29 October 2004 and now the applicant seeks to re-open the reasoning in my determination. I consider it would not be in the interests of justice to do so.

5 Further, I requested Ms Moorehouse-Perks to produce an authority upon which she could show I had the power to open my original substantive decision, as well as, my decision to refuse the applicant's application under the slip rule. She had no decided authority but submitted she had participated in a case where the President of the Tribunal, Morris J., had re-opened a case after the close of evidence and joined a party. She could not recall in which List of the Tribunal this proceeding took place. This is not analogous to the situation we have here; from the facts given by Ms Moorehouse-Perks it was obvious that the hearing had not closed and the President had not reached a concluded decision at the time at which he allowed the case to be re-opened and a party joined. The circumstances of this case are that the substantive determination in this proceeding has been

signed off, authenticated and issued and has been relied upon in a number of other proceedings by both parties.

6 When Ms Moorehouse-Perks persisted with her submission that I should allow the experts to be recalled and hear their evidence as to what their consents mean, I informed Ms Moorehouse-Perks that such an application could only be brought on notice to the other side and the Tribunal. Further, I informed her that from my understanding of the Lists in the Tribunal it appeared that the case to which she referred was held in the VCAT List and it may be more appropriate for her to attempt to have her submission heard in that List. She then declined to pursue her submission that I reopen the hearing of the slip rule application and I now turn to the respondents' application for costs.

7 Mr Archer, for the respondents, made an application for their costs submitting that such costs should be assessed on an indemnity basis for the following reasons:-

(a) the application to have the amount of damages reduced under the slip rule was vexatious because:-

(i) of the amount of time that has passed from the time of the publication of the substantive determination until the applicant made the application, approximately 22 months;

(ii) of the fact that the application was filed a short time, approximately five business days, before the hearing fixed before the Senior Registrar for the assessment of the respondent's costs of the proceeding, which I had ordered the applicant to pay;

(iii) the application under the slip rule was set down for hearing on the 25 September 2006 but the affidavit produced by the applicant's counsel had not been attested by the applicant and

the matter had to be adjourned to another day when the applicant was properly prepared; and,

(iv) submissions had been made (presumably at the adjourned hearing of the application under the slip rule) that Mr Pratley had no legal representation; however, Mr Pratley's letter that accompanied the original application under the slip rule was clearly drafted by a lawyer and this reflects on the conduct of Mr Pratley as the applicant;

(b) the respondents submit that the application was brought for a collateral purpose in that it was brought at a time that would require the hearing set down for the assessment of costs before the Senior Registrar of 4 September to be adjourned; this was the case; and,

(c) the application was manifestly groundless and had no reasonable prospects of success.

8 Ms Moorehouse-Perks submitted that the respondent's application under the slip rule was not groundless as the substantive determination did not indicate that the double charging in that determination was accepted or agreed or whether it was the quantum or liability that was agreed in any such consents; it was not apparent on the face of the substantive determination as to what was meant by accepted or agreed. She submitted that the application under the slip rule did not have a collateral purpose as the assessment of the respondent's costs was still proceeding and a substantive amount had been taxed off. She submitted that the primary reason for the applicant's application under the slip rule was to avoid the possibility of a void judgment.

9 Before going to the specific contentions of the parties in relation to costs I wish to comment upon Ms Moorehouse-Perks' submission that where a consent or agreement between the parties is referred to in the determination, it is not clear as to whether the consent specified is a complete consent or whether such consent was partial, in that it is only referring to liability or,

alternatively, quantum. As I recall the hearing in relation to the application under the slip rule of 8 November 2006, applicant's Counsel did not raise the contention that the applicant could not perceive the type of consent or which specific elements of the action to which such consent applied. I consider this was a new submission raised at the directions hearing to dispose of a matter and it was not raised at the substantive hearing of the application under the slip rule and as such it at least had to be made on notice and, on first impressions, I would consider that it could not be made at all. However, I wish to say a few words in relation to the proposition. I consider that the construction of the words on the face of the substantive determination should be interpreted according to their natural and normal meaning. Thereby, a consent by the applicant to pay a sum certain in relation to a specific allegation of defective or unsatisfactory work made by the respondents must by inference contain a consent to all of the elements that make up that action and that includes liability and quantum for that specific allegation as agreed between the parties. To have to spell out the elements of the consent in each individual case of the consent would result in unwarranted verbage.

10 Secondly, I recall the substantive hearing in this proceeding, which involved a very large number of allegations of defective and unsatisfactory work to be considered by a substantial number of expert witnesses. In discussions with the parties at the commencement of the hearing it was agreed to have meetings of experts to discuss the allegations within their expertise and to present the Tribunal with joint reports as to their considerations. This resulted in many allegations and elements of allegations being settled between the parties. This resulted in the tables set out in the substantive determination which were prepared by the parties and submitted to the Tribunal to show those allegations of the respondents that had been settled between the parties and those that remained in dispute and which would require my adjudication. This approach substantially cut down the amount of expert evidence it was necessary to hear. Further, by

hearing the experts in conclave allowed their opinions to put in open and clear comparison, which made the adjudicating task simpler. I recall that prior to the close of the hearing I had the parties address each table specifically and to inform me what allegations were consented to and what allegations were in dispute, and, if so as to what element; eg. liability, quantum or both; and this is noted in the tables. I was aware of the allegations that remained on foot, and which elements thereof, and upon which I was required to adjudicate. There was no equivocation from any party at the hearing that the consents as set out in the tables which I received from the parties and transposed into the substantive determination were not complete consents to the extent stated in the tables.

11 To establish if I am correct or not in what I have just set down would require either the parties to give evidence as to what they meant by their consents and I would have to reassess my substantive determination, this is not appropriate under the slip rule. The appropriate means to challenge the consents is by way of a new action commenced in the Tribunal: *Ainsworth v Wilding* [1896] 1 Ch 673; or, if a party considers that my substantive determination is wrong at law they should appeal under Section 148 of the Act.

12 Now turning to the respondent's application for costs. I consider that the factors bearing on this issue are:-

(a) as set out in the paragraph above, the appropriate method to challenge items consented to by the parties is to initiate a new proceeding and the appropriate method by which to challenge my findings in the substantive determination is by way of appeal;

(b) the application was brought far too late after substantial further legal proceedings had been issued and finalised, being nearly two years after the issue of my substantive determination when:-

(i) the applicant has made no attempt to explain the delay; *Gould v Vaggelas* (1985) 157 CLR 215 at paragraph 9, where the High

Court referred to the fact that there had not been *'undue delay'* and that there had been an explanation for what delay had occurred; and, *Currabubula and Paola v State Bank New South Wales* [2000] NSWSC 232 where Einstein J at paragraph 51 observed that:-

> *'The court possesses a discretion as to whether to employ the slip rule to correct an inadvertent mistake or admission. Relevant considerations are fairness and the justice of the amendment and any delay of the party seeking the amendment: Gould (supra)';* and

(ii) that no new facts or propositions of law were advanced of which the applicant would not be aware of at the time of publication of my substantive determination;

(c) the applicant brought the application for a collateral or ulterior purpose, I will set out my considerations and findings on this aspect below;

(d) that under my determination on costs of 18 March 2005, I found that the respondent had made a valid offer to settle under Section 112 of the Act and that the quantum of damages fixed by my determination was in excess of that offer and; thereby, the respondents were entitled from the date of the service of the offer of 11 May 2004 to their costs assessed on an indemnity basis; where the applicant makes an application under the slip rule subsequent to that determination and that application fails the respondents' right to have their costs on an indemnity basis as a result of the previous successful offer remains the same and is a factor I should take into account when assessing the basis upon which the costs of this application should be awarded;

(e) when viewed through the lens made up of the reasoning and findings of my determination on the application under the slip rule of 22 November 2006, it is apparent that the applicant's case was untenable;

I found that further evidence would need to be heard to factually ground any of the specific allegations made in that application; the applicant in its written submission to the hearing of the slip rule application on 8 November 2006 submitted to the Tribunal that such further evidence would not be required; and, by implication from that statement, that such evidence could not be required in an application under the slip rule.

13 In relation to the respondents' contention that the applicant brought this application under the slip rule for a collateral purpose, this is a question of fact: *Commissioner of State Revenue v Purdale Holdings Pty Ltd* [2003] VSC 289 at paragraph 26 per Nettle J. I consider that the relevant facts are:-

(a) the delay between the order sought to be amended and the application was some 22 months;

(b) the application contained no allegations of fact or submissions of law that were not existing or apparent at the time of the publication of the determination;

(c) the application under the slip rule is dated 1st August 2006 but it was not filed in the Tribunal until 25 August 2006;

(d) the amount by which the applicant sought to reduce my determination in the application dated 1 August 2006 was $34,412.00, this amount if successful, could have resulted in the award made in my substantive determination being reduced to an amount that was less than the offer made by the respondents and upon which I had based my decision as to the appropriate basis upon which the respondent's costs would be assessed; thereby, the correctness of that decision would be thrown into doubt;

(e) at the time the application was filed a hearing to finalise the assessment of the respondents' costs was set down for 4 September

2006 before Senior Registrar Jacobs, therefore, the application was filed some five business days from the date of the assessment of costs hearing; there was no explanation for the delay between the date of preparation of the application of 1 August 2006 and its filing;

(e) in an undated letter that accompanied the application, the applicant noted that the effect of the amount by which he sought to have the original award of damages reduced could vitiate my decision as to costs of 18 March 2006 and, on that basis, he requested that the assessment of costs be dismissed ;or, alternatively, adjourned for directions to the day upon which the application under the slip rule was fixed for hearing;

(f) the applicant filed a further letter in the Tribunal on 25 August 2006 in relation to the pending hearing on the assessment of costs and reiterated his contention that such assessment could not proceed due to the irregularity of the original judgment;

(g) on 28 August 2006 the applicant filed an amended application by facsimile transmission, deleting that the application was one made under the slip rule and stating in his covering letter that what he now sought was that the judgment be set aside on the basis that it was the respondents or the Tribunal's responsibility to amend an irregular order; at the same time he filed an amended affidavit that was substantially the same as the affidavit which accompanied the original application on 25 August 2006, except for the deletion that it was an application under Section 119 of the act and as to the orders sought.

(h) in response to the Tribunal's facsimile transmission of 25 August 2006 informing the applicant that to comply with his request for an adjournment of 25 August 2006 he would require the respondent's consent; Mr Pratley reiterated in a letter filed in the Tribunal on 28 August 2006 that he objected to having obtained the consent of the respondents to the adjournment and stated that as the original

determination was clearly irregular the assessment of costs should be postponed; he submitted that:-

'*The mistakes that led to the sum being entered as due that was in excess of what was due are clear from the judgment.'*;

(i) the assessment of costs of 4 September 2006 before senior Registrar Jacobs was adjourned sine die;

(j) at the directions hearing of 25 September 2006 in relation to the subject application I found that Mr Pratley's affidavit had not been sworn and upon my request Counsel for the applicant rang Mr Pratley and requested he attend the Tribunal to swear his affidavit; Mr Pratley declined as he said he was working; the hearing of the application was then adjourned to 8 November 2006 and the parties given directions to file and serve all further materials upon which they intended to rely at the hearing of the subject application;

(k) on 16 November 2006 Mr Pratley, via facsimile transmission equipment in the office of Ms Moorehouse-Perks, Solicitor, filed a second amended application with the Tribunal amending his application from requesting a setting aside of the substantive determination to reinstating the application under the slip rule as well as reducing the amount by which the primary damages award was sought to be reduced from $34,412 in the original and amended application to $16,301 in the second amended application. the reduction in the amount by which damages was sought to be reduced now meant that if the applicant was successful it would not reduce the substantive amount of damages below the respondents offer of settlement of 11 May 2004 and thereby my decision as to the basis upon which the respondents' costs should be assessed could not be challenged on this ground;

(l) the adjourned assessment of costs hearing took place on 8 December 2006, at which Senior Registrar Jacobs made an order that the respondent's costs were assessed in the sum of $129,310.39.

14 When the unexplained delay of 22 months from the substantive determination, over which time there was no complaint as to the specific amount of the quantum in the substantive determination or as to the quality of the applicant's consents, is compared with the numerous applications, correspondence and amendments immediately prior to the assessment of costs hearing set down for 4 September 2006 and the subsequent second amended application reducing the sum by which the applicant sought the quantum of damages to be corrected, so that, in effect, it meant that the assessment of costs hearing of 4 September 2006 need not have been adjourned, all of these shifts by the applicant have taken place without any explanation as to the reasons for the amendments in the application or any explanation for why the sum in the application filed 25 August 2006 by which the quantum of damages were sought to be reduced was itself , by the applicant's second amended application, more than halved prior to the hearing of this subject application; from all this I consider there is a clear inference that can be drawn that a dominant purpose for which the applicant brought the application was an attempt, preferably, to have the assessment of costs dismissed ;or, secondly, to have it postponed for as long as possible. This is to use the rights given to a party under the slip rule for a purpose for which the rule was not intended; and, I, thereby, consider such application was made for a collateral or ulterior purpose: *Williams and Ors v Spautz* (1992) 174 CLR 509. As such I can take this ulterior purpose into account as a factor in indicating that a basis for costs other than a party and party may be appropriate in this case.

15 The normal rule for costs in this Tribunal is that each party bear their own costs: Section 109 of the Act; whereas, in the Courts the normal rule is that costs follow the event. Therefore, it is obvious that the principles apparent in decisions on costs arising in the court system cannot be applied directly

in the Tribunal as the threshold from which the two systems start is different in each case, I consider that to reflect the difference the legislature intended between the systems in relation to the discretion as to whether to award costs, that difference in threshold needs to be kept in mind in any analysis of the basis on which a parties' costs should properly be assessed. Thus, I consider that the existence of *'special circumstances'* in a hearing that indicate that a basis for the assessment of a parties' costs other than party and party is appropriate in the court system is not sufficient in the Tribunal. I consider that the same types of behaviour or forms of action that constitute *'special circumstances'* in the court system are relevant to be taken into account in exercising a discretion in the Tribunal under S.109 but that it needs to be more than one circumstance or they need to be apparent to a significantly greater degree in the Tribunal before it is indicative that a basis of costing greater than party and party is appropriate.

16 The special circumstances that have been identified in the Court system that indicate that possibly an alternative basis for costs assessment is appropriate is set out in *Fountain Selected Meats (Sales) Pty Ltd v Int Produce Merchants* (1988) 81 ALR 397 at 401 where Woodward J said:-

> *'I believe that it is appropriate to consider awarding solicitor and client or 'indemnity costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of known facts or the clearly established law. Such cases are, fortunately rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion'.*

In the court system any one of these aspects is sufficient if it exists in sufficient degree for the court to find that an award of costs more onerous than party and party is appropriate.

17 In the circumstances of this case I consider that the applicant brought this case for an ulterior purpose and that he would have, or reasonably should have been, aware that his case was untenable and had no chance of success as it was brought in the wrong forum and that one of the primary factors which he needed to ground if the Tribunal was to use its discretion ie. a satisfactory and proper explanation for the delay; was not addressed in any way by the applicant. Given the existence of these factors and the degree to which they are apparent in the applicant's case, I consider that it is appropriate under Section 109 of the Act to order that the applicant pay the respondents' costs on an indemnity basis.

Senior Member R.J. Young

RJY:RB