

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D405/2006

CATCHWORDS

Application for costs by Respondent granted leave to be heard on Applicant's application under s81 of the *Victorian Civil and Administrative Tribunal Act 1998*, whether appropriate case for exercise of the Tribunal's discretion under s109(2) of the Act

APPLICANT	SC Land Richmond Pty Ltd (ACN 106 117 506)
RESPONDENT	Dura (Australia) Constructions Pty Ltd (ACN 004 284 191)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	6 February 2007
DATE OF ORDER	5 March 2007
CITATION	SC Land Richmond Pty Ltd v Dura (Australia) Constructions Pty Ltd (Domestic Building) [2007] VCAT 329

ORDER

1. There are no orders for costs of the Applicant's application under s81 of the *Victorian Civil and Administrative Tribunal Act 1998* determined on 8 December 2006, or for that part of the directions hearing on 6 February 2007 when the Respondent's application for costs was heard.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant

Mr A.J. Laird of Counsel

For Respondent

Mr A Herskope of Counsel

REASONS

- 1 The application by the Applicant for an order under s81 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*') that Concept Hiring Services Pty Ltd produce various documents was dismissed on 8 December 2006. Costs were reserved with any application for costs to be heard at the directions hearing scheduled for 6 February 2006.
- 2 I granted the Respondent leave to be heard in relation to the application being of the view that it would not be fair to deny them that opportunity (paragraph 16 of my Reasons).
- 3 The Respondent now seeks an order for its costs of the application on an indemnity basis, or alternatively on the Supreme Court Scale. This is opposed by the Applicant, which on this occasion was represented by Mr Laird of Counsel. Unfortunately, Mr Laird had not been provided with a copy of the Respondent's written submission relied on at the hearing of the s81 application.
- 4 Mr Herskope of Counsel, who appeared on behalf of the Respondent, submitted that in determining whether to exercise the Tribunal's discretion under s109(2) of the *VCAT Act* I should have regard to s109(3)(d) and (e) which provide:
 - (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
...
 - (d) the nature and complexity of the proceeding;
 - (e) any other matter the Tribunal considers relevant.
- 5 He drew my attention to a number of findings and comments I made in my Reasons: in particular that the application was premature, and the concerns I expressed in paragraph 15:

...I should mention that I find it surprising that, rather than filing a supporting affidavit from Mr Chu, a director of the Applicant, the Applicant seeks to rely on an affidavit from its solicitor, Mr Zaparas, in which he deposes to matters about which he has been informed by Mr Chu. Although the Tribunal is not bound by the rules of evidence, direct evidence carries significantly more weight than hearsay, particularly where Mr Zaparas' affidavit, whilst setting out what he had been told by Mr Chu, is decidedly lacking in detail, and as such is of little assistance.
- 6 In support of his submission that any order for costs should be on an indemnity basis, Mr Herskope said that the Respondent was entitled to provide the contrary argument to the s81 application by way of assistance to the tribunal, and that, in circumstances where those arguments were accepted, the Respondent should not be out of pocket.

- 7 Mr Laird submitted that the appropriate order is that there be no order as to costs. He said it is plain that under s109(1) costs do not follow the event, and that the only relevant factor in considering whether to exercise the Tribunal's discretion are the factors set out in s109(3)(d) – the nature and complexity of the application. Although the proceeding concerns a large contractual dispute concerning significant sums of money, he submitted this is not sufficient reason on its own for exercising the Tribunal's discretion under s109(2).
- 8 The Applicant contends that the appropriate order is that there be no order as to costs because:
- the Respondent was not a party to the application;
 - the Applicant did not seek orders for production of any documents by the Respondent;
 - Concept (in respect of who the order was sought) failed to attend;
 - the Tribunal can only speculate as to why the Respondent opposed the application;
 - the Respondent's opposition to the application was made without notice, and in the absence of any material;
 - there was no communication from or on behalf of the Applicant in relation to the s81 application;
 - prior to this decision there did not appear to be any considered decision by the Tribunal of the applicable test under s81 and that the Reasons for decision would provide guidance to practitioners when making future s81 applications.
- 9 It is perhaps appropriate to consider the last submission first. Whether or not decisions provide guidance to practitioners is not, in my view, a matter to be properly taken into consideration in deciding whether it is appropriate to exercise the Tribunal's discretion under s109(2). As is apparent from my Reasons, I was referred to a number of relevant authorities. Although the legislation considered in those authorities are those applicable to the specific jurisdictions, the principles are equally applicable to applications under s81 of the *VCAT Act*.
- 10 It is not appropriate for me to speculate as to the reasons why the Respondent opposed this application. This is clearly a complex matter. Both parties have been before the Tribunal on a number of occasions in relation to this proceeding and a related proceeding. I mention this, in passing, merely as indicative of the serious approach of each party to the litigation, not as a matter to be taken into account in deciding whether to exercise the Tribunal's discretion.
- 11 Irrespective of the Applicant's criticisms of the Respondent's involvement in the s81 application, as is clear from my Reasons, leave was granted for it

to be heard having regard to s97 of the *VCAT Act*. However, the granting of such leave is not of itself a reason to order costs in its favour. The Respondent was not a party to the application and having sought and been granted leave to be heard, I am not persuaded I should depart from the usual rule in s109(1) that each party bear its own costs. It is true that this is a complex dispute, the quantum involved is significant and there are serious legal questions to be determined. However, the Respondent made a positive decision to seek leave to be heard and I am of the view that, in such circumstances, it should bear its own costs of which was, after all, an indulgence granted to it.

- 12 Similarly, there will be no order for costs as to that part of the directions hearing on 6 February 2007 applicable to the hearing of the Respondent's application for costs of the s81 application.

DEPUTY PRESIDENT C. AIRD