

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO.D736/2008, D743/2008,
D744/2008, D748/2008, D751/2008, D634/2010,
D635/2010, D636/2010, D637/2010 AND D638/2010

APPLICANT	Leslie Joseph Spiteri & Wesfarmers General Insurance Ltd t/as Lumley Insurance & Ors
RESPONDENT	Stonehenge Homes & Associates Pty Ltd
JOINED PARTY	Civil Test Pty Ltd
WHERE HELD	Melbourne
BEFORE	Judge Lacava, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	12 December 2011
DATE OF ORDER	19 December 2011
CITATION	Spiteri & Ors v Stonehenge Homes & Associates Pty Ltd (Domestic Building) [2011] VCAT 2383

ORDER

- 1 In application D736/2008, the first respondent pay to the applicants the sum of \$58,500 inclusive of interest, together with the applicant's costs to be agreed or taxed on the County Court Scale of Costs.
- 2 In application D743/2008, the first respondent is to pay to the applicants the sum of \$81,900 inclusive of interest, together the applicant's costs to be agreed or taxed on the County Court Scale of Costs.
- 3 In application D744/2008, the first respondent is to pay to the applicants the sum of \$85,800 inclusive of interest, together with costs to be agreed or taxed on the County Court Scale of Costs.
- 4 In application D748/2008, the first respondent is to pay to the applicants the sum of \$70,200 inclusive of interest, together with costs to be agreed or taxed on the County Court Scale of Costs.

REASONS

- 11 On 2 December 2011, I gave Reasons for my decision answering questions of fact and law posed by the parties. Those Reasons affected what I have described in my Reasons as ‘the primary proceedings’ and ‘the appeal proceedings’.
- 12 On 5 December 2011, I made orders in the primary proceedings dismissing applications brought by the respondent, Stonehenge Homes & Associates Pty Ltd against the joined party, Civil Test Pty Ltd.
- 13 I also made an order that the costs of Civil Test Pty Ltd in the primary proceedings be taxed on the County Court Scale and when taxed be paid by the first respondent Stonehenge Homes & Associates Pty Ltd. These further Reasons need to be read in the light of my Reasons for Decision dated 2 December 2011.
- 14 The orders that I made on 5 December 2011 concluded the primary proceedings so far as determination of issues of liability were concerned. I adjourned those proceedings to 12 December 2011 to hear evidence on and determine questions of damages in the primary proceedings.
- 15 Upon resuming the hearing in the primary proceedings on 12 December 2011, the tribunal was advised by counsel for both parties that the applicants and the respondent, Stonehenge Homes & Associates Pty Ltd, had compromised each proceeding with the respondent agreeing to pay to the applicants a total sum of \$390,000 inclusive of interest to date.
- 16 Mr Laird of Counsel, who appears on behalf of the applicants, told the tribunal the amount agreed to be paid in settlement was to be apportioned amongst the various claims as follows:

Lot	Owner	Proceeding	% of overall payment made by Lumley	
10	Spiteri	D736/2008	15%	\$ 58,500
4	Sloan	D743/2008	21%	81,900
8	Cantwell	D744/2008	22%	85,800
6	Larmer	D748/2008	18%	70,200
2	Willems	D751/2008	24%	93,600
			100%	\$ 390,000

- 17 Mr Laird seeks an order on each application in accordance with the above schedule together with an order for costs.
- 18 Mr Lithgow, who appears as counsel for the respondent in the primary proceedings, did not make any submissions concerning how the applicants apportion the settlement sum taking the approach that that was a matter for

the applicants themselves to decide. He did not oppose an order on each application in accordance with the schedule. Mr Lithgow did, however, oppose any order being made in the applicant's favour for costs.

- 19 So far as the appeal proceedings were concerned, following my decision on 2 December 2011, there will be orders made formally dismissing each of those applications. In each of the appeal proceedings Mr Laird seeks an order the applicant pay the respondent's costs. Mr Lithgow also opposes that order being made in each application in the appeal proceedings.
- 20 In both sets of proceedings, Mr Laird points to the fact that Stonehenge Homes & Associates Pty Ltd, the respondent in the primary proceedings, has been entirely unsuccessful in the arguments it has advanced. He argues the proceedings were made unnecessarily complicated by the unsuccessful joinder of Civil Test Pty Ltd.
- 21 Mr Laird argues that the tribunal should exercise its discretion to make an order for costs in each of the applications in the primary proceedings relying upon s 109(3)(c) and (d) of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act). Pointing to s 109(3)(c), Mr Laird argues that the arguments raised by the respondent in the primary proceedings and in the appeal proceedings have no tenable basis in fact and law as was found by me in my Reasons delivered on 2 December 2011.
- 22 Relying upon s 109(3)(d), Mr Laird pointed to the various defences raised by the respondent in the primary proceedings which, he submitted, added to the nature and complexity of the primary proceedings especially.
- 23 Mr Lithgow submitted that there should be no order as to costs and s 109(1) of the VCAT Act should apply in this case. Mr Lithgow submitted all of the parties co-operated for an expeditious and quick resolution of what amounted to 10 separate applications. Mr Lithgow submitted his client was entitled to have the issues raised by it decided by the tribunal. He submitted the arguments raised by the respondent, which were answered by my decision of 2 December 2011, were proper points of law to be decided having regard to the facts of this case and his client should not be penalised by a costs order.
- 24 The applicants have been entirely successful in the primary proceedings and have succeeded as respondent in defeating the appeal proceedings. In my judgment, the defences raised by the respondent in the primary proceedings and by the claim in the appeal proceedings greatly added to the complexity of each proceeding before the tribunal. As can be seen from my Reasons for Decision dated 2 December 2011, the issues that I was required to rule upon were complex and, in my view, were outside the ambit and complexity of issues which the tribunal would normally be called upon to decide. For those reasons, the applicants are entitled, in my judgment, to an order for costs in both sets of proceedings.

- 25 Mr Laird seeks an order for costs on an indemnity basis from 4 September 2011. This claim for costs on an indemnity basis is centred upon a letter in Calderbank form dated 19 August 2011 from Mr Laird's instructors to the respondent's solicitors. That letter contained an offer which was not accepted.
- 26 The offer was a conditional offer made to both the respondent and to Civil Test Pty Ltd. I do not have to consider this matter further. In my view, the offer, being as it was, conditional on acceptance by both parties, cannot now be used as a basis to claim indemnity costs against only one of those parties. For those reasons, I decline to make an order for indemnity costs.
- 27 Mr Laird also seeks an order in each primary proceeding in the sum of \$4,555.28 in favour of the secondnamed applicant, Wesfarmers Insurers Ltd, being the amount of costs paid by the second respondent as insurer to each insured applicant for costs of each proceeding up until the point where Wesfarmers took over each application subrogating to the rights of each insured applicant. Mr Lithgow opposes such an order being made.
- 28 I decline to make the order sought by Mr Laird. In my view, the appropriate order is simply an order for costs in each application with the amount to be decided by the Tax Court. Apportionment of costs recovered as between the insured and the insurer in each application can then be decided between those two parties allowing for the fact that the insurer has already reimbursed the insured the sum of \$4,555.28 in each instance. The orders of the tribunal will be as follows:
- (1) In application D736/2008, the first respondent pay to the applicants the sum of \$58,500 inclusive of interest, together with the applicant's costs to be agreed or taxed on the County Court Scale of Costs.
 - (2) In application D743/2008, the first respondent is to pay to the applicants the sum of \$81,900 inclusive of interest, together the applicant's costs to be agreed or taxed on the County Court Scale of Costs.
 - (3) In application D744/2008, the first respondent is to pay to the applicants the sum of \$85,800 inclusive of interest, together with costs to be agreed or taxed on the County Court Scale of Costs.
 - (4) In application D748/2008, the first respondent is to pay to the applicants the sum of \$70,200 inclusive of interest, together with costs to be agreed or taxed on the County Court Scale of Costs.
 - (5) In application D751/2008, the first respondent is to pay to the applicants the sum of \$93,600 inclusive of interest, together with the applicant's costs to be agreed or taxed on the County Court Scale of Costs.

- (6) In application D634/2010, the application is dismissed and the applicant is to pay the respondent's costs to be agreed or taxed on the County Court Scale of Costs.
- (7) In application D735/2010, the application is dismissed and the applicant is to pay the respondent's costs to be agreed or taxed on the County Court Scale of Costs.
- (8) In application D636/2010, the application is dismissed and the applicant is to pay the respondent's costs to be agreed or taxed on the County Court Scale of Costs.
- (9) In application D637/2010, the application is dismissed and the applicant is to pay the respondent's costs to be agreed or taxed on the County Court Scale of Costs.
- (10) In application D638/2010, the application is dismissed and the applicant is to pay the respondent's costs to be agreed or taxed on the County Court Scale of Costs.

Judge Lacava
Vice President