

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D173/2004

CATCHWORDS

Domestic building, costs, scale of costs, indemnity costs.

APPLICANT	The Professional Group Pty Ltd (ACN 076 578 393)
FIRST RESPONDENT	Scott Rickard
SECOND RESPONDENT	Robin Brown
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	2 June 2006
DATE OF ORDER	3 August 2006
CITATION	The Professional Group v Rickard (Domestic Building) [2006] VCAT 1569

ORDER

The Applicant shall pay the Respondents' costs, including all reserved costs up to and including 2 November 2005 on County Court Scale D and thereafter on County Court scale C. In default of agreement, such costs to be taxed by the Principal Registrar under Section 111 of the *Victorian Civil and Administrative Tribunal Act 1998*. I certify for Mr Buchanan, the Owner's expert, with respect to the hearing, for one hour's preparation and four hours attendance.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr Parker, Director of the Applicant
For the First Respondent	Mr T. Whitehead, Solicitor
For the Second Respondent:	Mr T. Whitehead, Solicitor

REASONS

- 1 On 3 February 2006 I made an order that the Applicant Builder (the Respondent by cross-claim) pay the Respondent Owners \$31,841.00 which was corrected on 2 March 2006 to order that the Applicant pay the Respondents \$34,786.00, of their counter-claim of approximately \$43,000.00. I also gave the parties leave to apply for costs. I heard the Owners' application for costs on 2 June 2006.
- 2 The Owners' claim is for costs totalling \$36,311.30.
- 3 The history of the proceeding is that the Builder made a claim against the Owners for money allegedly unpaid, which included an allegation that the Owners had colluded with an ex-employee of the Builder against the interests of the Builder. The Builder's claim as originally articulated was for over \$88,000.00. The Owners cross-claimed for incomplete and defective work.
- 4 Mr Whitehead, solicitor appearing for the Owners, said from the bar table that on 21 April 2005 the Owners' solicitors wrote to the Builder's then solicitors in a letter headed "without prejudice save as to costs" offering to settle the matter on the basis that each party bear their own costs and withdraw. I was not provided with a copy of the offer and as it was apparently only open for seven days, it is not an offer to which section 112 of the Act responds. While such offers are admirable, it has not been taken into account in coming to this decision.
- 5 On 2 November 2005 the Builder's application was struck out for failing to comply with directions of the Tribunal to file and serve witness statements by 25 October 2005. The Order of 14 October 2005 which had required the Builder to file and serve witness statements by 25 October noted that the previous failure to comply with directions had caused the Owners disadvantage pursuant to s78 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act") and that continuing failure would entitle the Owners to have the Builder's claim struck out.
- 6 The Owners submitted that the Builder caused adjournments on a number of occasions and also claimed for quantum meruit against the Owners, which claim could not succeed in circumstances where I found in the substantive decision that there was a pattern of repudiatory conduct by the Builder. Similarly, the Builder's claim that it had unilaterally varied the contract with the Owners could not succeed.
- 7 The Owners' claim is for all costs of the Builder's claim up to and including the date that the claim was struck out, party-party costs on County Court scale D for the remainder of costs up to and including 2 November 2005 and costs on County Court scale C thereafter. The Owners seek disbursements of \$19,428.20 which include Counsel's fees, filing fees, hearing fees, the cost of experts and photocopying.

8 The Builder has not been legally represented since its previous solicitors filed notice that they ceased to act on 28 October 2005.

THE LAW

- **Entitlement to costs**

9 Section 109(1), (2) and (3) of the Act provides:

109. Power to award costs

- (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 sub-section (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.

10 In the Court of Appeal decision, *Pacific Indemnity Underwriting Agency v Maclaw no 651* [2005] VSCA 165 (“Maclaw”), Ormiston J.A said in his judgment:

“ ... there should be no presumption, as seems to have been assumed in both the Tribunal and the Trial Division, that costs ought to be paid in favour of claimants in domestic building disputes brought in VCAT. In other words, s.109 and the subsequent sections should be allowed to operate according to the natural construction of their language.”

11 In other words, I start with the assumption that each party bears its own costs and then consider whether the Owners are entitled to the benefit of an exception. The weakness of the Builder's claim is a reason, as is the Builder's repeated failure to follow directions of the Tribunal.

12 It is found, under section 109(3) that it is reasonable that the Builder should pay at least part of the Owners' costs.

- **Type of costs**

13 Justice Nettle said in *Maclaw*:

“Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in Domestic Building List proceedings on an indemnity basis. But those occasions will be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the Supreme Court (General Civil Procedure) Rules 1996.”

14 The learned author Williams¹ said in his commentary on Rule 63.28(c) that indemnity costs are:

“... being reserved for cases where the losing party has engaged in unmeritorious or deliberate or high-handed or other improper conduct as to warrant the court showing its disapproval and at the same time preventing the successful party being left out-of-pocket.”

15 I do not know why the Builder failed to follow the directions of the Tribunal. It might be because the Builder's case was doomed from the start. On the other hand, it might also be because the Builder could not afford the cost of its own legal representation. Whatever the cause, the Builder's application was struck out, not on the merits, but because it did not fulfil its obligations to comply with directions. Party-party costs are appropriate in the case before me.

- **Scale of costs**

16 The Owners' recommendation regarding scales of costs is appropriate. The amount claimed by the Builder fell into County Court Scale D and the amount counter-claimed by the Owners into County Court Scale C. Up to 2 November 2005 when the Builder's claim was struck out, the whole dispute is appropriately governed by County Court Scale D.

17 I find it is reasonable for the Builder to pay the Owners costs up to and including 2 November 2005 on County Court Scale D and thereafter on

¹ Williams Supreme Court Practice, 63.02.180

County Court scale C. In accordance with the note at paragraph 103 of my decision of 3 January 2006, I certify for Mr Buchanan, the Owner's expert, with respect to the hearing, for one hour's preparation and four hours attendance.

SENIOR MEMBER M. LOTHIAN