

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D894/2008

CATCHWORDS

Costs – s109 *Victorian Civil and Administrative Tribunal Act 1998* – whether allegations about conduct of party's solicitor a relevant consideration – whether indemnity costs should be ordered

APPLICANT	Victorian Managed Insurance Authority
RESPONDENT	Dura (Australia) Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	20 March 2009
DATE OF ORDER	27 April 2009
CITATION	Victorian Managed Insurance Authority v Dura (Australia) Constructions Pty Ltd (Domestic Building) [2009] VCAT 719

ORDER

1. The respondent shall pay the applicant's costs of and incidental to the hearing on 26 February 2009, and the costs of preparation for the hearing of its costs application heard at the directions hearing on 20 March 2009, fixed in the sum of \$2,500.00.
2. The costs of the directions hearing on 20 March 2009 are otherwise reserved.

The tribunal further orders:

It having come to my attention that the orders of 20 March 2009 contain an error caused by a clerical mistake I amend such order under s119 of the *Victorian Civil and Administrative Tribunal Act 1998* as follows:

1. **In order 5 the date of 14 August 2009 is substituted for 17 July 2009 as the date for the compulsory conference.**
2. The orders of 20 March 2009 are otherwise confirmed

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant

Mr L Schwarz, solicitor

For Respondents

Mr R Andrew of Counsel

REASONS

- 1 On 4 March 2009 (following a hearing on 26 February 2009) I dismissed the respondent's application the proceeding be dismissed under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* or alternatively for a stay of this proceeding pending the outcome of the appeal to the Court of Appeal in proceeding 3883/2008 (D330/2008).¹ The applicant seeks orders that the respondent pay its costs of and incidental to the hearing on 26 February 2009 on an indemnity basis, alternatively on a solicitor/client basis or party/party basis. The applicant also seeks its costs of and incidental to the hearing of this application for costs. At the hearing on 26 February, the applicant was represented by Mr Stuckey of counsel, and by its solicitor, Mr Schwarz at this directions hearing. The respondent was represented on both occasions by Mr Andrew of counsel.
- 2 In considering any application for costs I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act 1998* which provides that each party must bear its own costs of a proceeding unless the tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109 provides:

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

¹*Victorian Managed Insurance Authority v Dura (Australia) Constructions Pty Ltd* [2009] VCAT 359

- 3 In support of its application under s75 the respondent contended that the commencement of this proceeding was an abuse of process, vexatious and unduly burdensome or oppressive. I did not find any of the grounds relied on in support of its application were made out. The application was complex, but was clearly without merit and I am satisfied it is fair to exercise the tribunal's discretion under s109(2) having regard to s109(3)(c) and (d).

Should costs be ordered on an indemnity basis?

- 4 The applicant seeks costs on an indemnity basis essentially, as I understand it, because of what its solicitor considers are allegations of impropriety about his conduct of the proceedings. He relies on an affidavit sworn by the respondent's solicitor in support of the application, comments made by counsel at the earlier hearing and in his written submissions. These include the allegation that the applicant was secretive in commencing this application referring to its failure to mention it at a directions hearing before Master Lansdowne (as her Honour then was) on 4 December 2008. However, as I noted in my previous Reasons '*... it is difficult to understand why VMIA should have mentioned this application in a directions hearing in the Supreme Court concerning an appeal in a different, albeit one might argue, related proceeding*' [18].

- 5 The Court of Appeal has made it clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. As Nettle JA said in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165:

... where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional ...' [91-92]

- 6 Whilst the applicant's solicitor is clearly upset by what he regards as an impugning of his reputation and allegations of impropriety, this is not the appropriate forum to consider them. In my view, in deciding first whether to exercise the tribunal's discretion under s109(2), and secondly whether costs should be awarded on an indemnity, solicitor/client or party/party basis, I must have regard to the parties' conduct of the proceeding. Whilst it is true that solicitor and counsel are the parties' representatives, I am not persuaded that comments made by them, in their affidavits or submissions, are properly matters to be taken into account in considering whether the respondent has conducted the proceeding in a way which disadvantages the applicant. I found that the application was without merit and dismissed it. I am satisfied that there should be an order for costs in favour of the applicant but I cannot be satisfied that there is anything exceptional about the respondent's conduct which would warrant an order that costs be paid on

anything other than a party/party basis. If the applicant's solicitor is concerned there are, of course, other avenues which he can pursue.

- 7 Solicitor for the applicant submitted that if orders were made that the respondent pay its costs on a party/party basis that in default of agreement the costs should be assessed on County Court Scale 'D' but that I should nevertheless certify for counsel (\$3000) and solicitor (\$1250 for preparation, attendances and attendance to instruct) of the earlier hearing, together with \$180.30 for the transcript. I note that the earlier hearing lasted for less than one hour. If I were to certify the amounts set out above, I would effectively be ordering costs on a solicitor/client basis. It is appropriate to fix the applicant's costs. Taking into account the seriousness and complexity of the issues raised, noting that had the s75 application been successful the proceeding would have been summarily dismissed, I consider \$2,500 to be fair and reasonable and will accordingly so order. This includes an allowance for preparation by the applicant's solicitors for the costs application heard at the directions hearing on 20 March 2009 but the costs of that directions hearing are otherwise reserved.

DEPUTY PRESIDENT C AIRD