VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D1166/2012

CATCHWORDS

Domestic building – application for costs of application for preliminary hearing of separate question – relevant considerations - *Victorian Civil and Administrative Tribunal Act 1998* s109

APPLICANT	Waterford Towers Owners Corporation (447493)
RESPONDENT	Burbank Australia Pty ltd Ltd (ACN: 007 099 872)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	31 January 2017
DATE OF ORDER	15 February 2017
CITATION	Waterford Towers Owners Corporation v Burbank Australia Pty Ltd (Building and Property) [2017] VCAT 218

ORDERS

1. The respondent must pay the applicant its costs of and incidental to the hearing of the respondent's Application for Directions Hearing or Orders dated 26 August 2016. In default of agreement such costs are to be assessed by the Victorian Costs Court on the County Court Scale on a standard basis.

2. Costs of the applicant's Application for Directions Hearing or Orders dated 25 January 2017 are reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr J Moss of Counsel
For Respondents	Mr N Phillpott of Counsel

REASONS

1 On 1 December 2016 I dismissed the respondent builder's application that there be a preliminary question to determine a separate question ('the Application'). I reserved costs with liberty to apply. The applicant ('the OC') applies for its costs of and incidental to the hearing of the Application, on an indemnity basis or alternatively on a standard basis. The application for costs is opposed by the builder which submits that the current order, that costs are reserved, is the appropriate order.

2 Mr Moss of Counsel, who spoke to written submissions handed up at the commencement of the directions hearing, appeared on behalf of the OC and Mr Phillpott of Counsel appeared on behalf of the builder. The OC also relies on the affidavit of its solicitor, Liam James Murray dated 25 January 2017, filed in support of its application for costs.

SECTION 109

3 In considering any application for costs I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') 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.

4 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs under s109:

> i. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

5 The OC relies on ss109(3)(c) and (e).

Section 109(3)(c)

6 Section 109(3)(c) provides:

> The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (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;

7 The OC contends that when considering the relative strengths of the parties' positions in relation to the Application, that the OC should now be *compensated for the expense it has incurred*, particularly in circumstances where it had put the builder on notice that the Application was *a premature*

and misconceived application that was 'doomed to fail' from the outset. Alternatively, the application had no tenable basis in fact or law.[1] During the directions hearing, Mr Moss indicated he was not pressing the alternative contention.

8 In *Murphy v State of Victoria & Anor*[2] Nettle AP, Santamaria and Beach JJA set out, with approval, at [28], the trial judge's summary of the principles for determining whether a separate trial of a discrete question should be ordered. It is clear in considering those principles, and their Honours' observations that whether to order a preliminary hearing remain an exercise of the Tribunal's discretion, to be exercised with caution. The principles set out in *Murphy* are not hard and fast 'rules' – rather, they provide guidance as to when it is appropriate to exercise the discretion.

9 Whilst I refused to exercise the Tribunal's discretion to order a preliminary hearing, taking into account the principles enunciated in *Murphy*, as noted in my earlier Reasons, I observe that at the hearing of the application, it was submitted by counsel for the builder, that the defects were agreed. This was rejected by the OC and ultimately I was satisfied that the controversy as to the nature and location of the defects could only be determined after conducting a hearing into the substantive issues in the proceeding.

10 The OC contends that the controversy was apparent from the material filed in relation to the hearing of the application. I agree. The controversy as to the nature and physical location of the defects was identified in the affidavits of the OC's solicitor, Liam Murray, filed in opposition to the Application which exhibited and referred to various expert reports. Mr Murray's supplementary affidavit dated 26 September 2016, and filed approximately one month prior to the hearing of the application, includes a Table of Evidence prepared by its expert, Rob Lees. It is clear from this Table that the exact nature and location of the defects are not agreed, yet at the hearing of the application it was submitted on behalf of the builder that they were agreed.

11 Considering these matters I am satisfied that the first part of s109(3)(c) is satisfied – the OC's position was far stronger than the builder's.

Section 109(3)(e)

12 Section 109(3)(e) provides:

> The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (c) any other matter the Tribunal considers relevant.

13 The OC submits that *the financial resilience and disparity between the parties* is a relevant factor to be taken into account under s109(3)(e). I reject this. Section 109 is quite clear. Each party must be their own costs of a

[1] Applicant's submissions dated 31 January 2017 at [27]
[2] [2014] VSCA 238

proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3), and it is satisfied it is fair to do so. I am not persuaded that the parties' respective financial capacity is a relevant factor in deciding whether it is fair to exercise the discretion, particularly in circumstances where the OC is the applicant in the proceeding.

14 The OC also submits that costs are frequently awarded in the Building and Property List where the litigation is undertaken on an adversarial basis. That might well be the case following the final hearing and determination of a proceeding. However, this was an application for a preliminary hearing to determine a separate question.

15 The OC also relies on three letters sent by its solicitors to those for the builder. In the first, dated 15 August 2016, before the Application was filed, the OC's solicitor states:

> …
>
> …your client seeks to have VCAT determine the above preliminary question [who owns the defects?] prior to the hearing of the compulsory conference are premature, misconceived and inappropriate in all the circumstances. It is well established by the relevant authorities that the determination of a preliminary question should only be embarked on when their utility, economy and fairness to the parties are beyond question.
>
> It is also stressed that orders permitting the hearing of preliminary questions are only made in clear cases, and then only upon the Court or Tribunal exercising great caution.
>
> …
>
> …it is likely that any separate determination of the preliminary question (once finalised) will involve overlap between the factual issues both at the time of the hearing of the preliminary question (if ordered) and at trial…
>
> If your client persists with its application, our client intends to rely on this correspondence and to tender it to the Tribunal in relation to any question of costs (including any application for indemnity costs).

16 In their letter of 21 September 2106 the OC's solicitor again state that:

> …
>
> We reiterate our previous concerns that your client's application is both premature and misconceived and our client intends to pursue its costs of and incidental to the application if your client's application is unsuccessful.
>
> …

17 Despite my decision to refuse the Application having been handed down on 1 December 2016, on 23 January 2017, two day before the OC filed its application for costs, and a week before this directions hearing, the OC's

solicitors once again wrote to the builder's solicitors. This letter is effectively a letter of demand for payment of the OC's costs. In that letter its solicitors state:

> Our client incurred reasonable costs in the sum of $11,594.51 (ex. GST) in respect of your client's Preliminary Point Application.
>
> We refer to our letter dated 15 August 2016, which summarised our client's Counsel's submissions on why the Preliminary Point Application was *"premature, misconceived and inappropriate in all the circumstances"*/ That letter also put your client on notice that, if it persisted with the application, the letter would be tendered on the question of costs, including any application for indemnity costs.
>
> We also refer to our letter dated 21 September 2016, wherein we reiterated our previous concerns and its intention to pursue *"costs arising from and incidental to the application if* [Burbank's] *application is unsuccessful.*
>
> ...
>
> We invite your client to consent to making a single payment of $12,753.97 (inc GST) to our client in respect of costs incurred to successfully defend the Preliminary Point Application.
>
> …

18 Surprisingly, no details of the calculation of the costs said to have been incurred by the OC were included with the 23 January letter, exhibited to the affidavit of Liam Murray of 25 January 2017 or provided at the directions hearing when its application for costs was heard.

THE BUILDER'S POSITION

19 Mr Phillpott submitted on behalf of the builder, that the appropriate order is that the costs of the Application be reserved to be determined after the final hearing and determination of the substantive issues.

20 In particular, Mr Phillpott urged me to take into account the conduct of one of the lot owners between the hearing of the Application and my decision on 1 December 2016, which he contended is inconsistent with the position adopted by the OC in this proceeding. He handed up a letter from the OC's solicitor to those for the builder, dated 1 December 2016, referring to works being carried out to Lot 505 by contractors engaged by the owner of that lot. In this letter the OC's solicitors, after setting out the works to be carried out to the balconies and wall cladding of Lot 505, state:

> …
>
> The Works are necessary to prevent further loss and damage to common and private property, particularly within the ceiling of Lot 409 owned by [the owner]

21 It was suggested by Mr Phillpott that the works being carried out were inconsistent with the controversy asserted by the OC at the hearing of the

Application as to the nature and location of the defects. However, it is impossible to determine whether there is any inconsistency on the evidence before me, and without hearing from the experts. In any event, this is not relevant to my determination of the OC's application for costs of the Application, although it may be a relevant factor in respect of other applications which may be made in the future.

Discussion

22 A careful consideration of the affidavit material filed on behalf of the OC, and the relevant authorities, which although not referred to by the OC in its correspondence, were known to the builder, should have persuaded the builder that the application was unlikely to be successful.

23 I am persuaded that it is fair to exercise the Tribunal's discretion under s109(2) of the VCAT Act and order the builder to pay the OC's costs of and incidental to the Application.

24 I have noted the correspondence from the OC's solicitor to the builder's solicitor referred to above, but have not taken it into account in deciding to exercise the Tribunal's discretion under s109(2). Although the OC's solicitor state in each of the letters that they consider the Application to be misconceived and premature, they do not explain why. They do not refer to the controversy about the exact nature and location of the defects, nor do they refer to any specific authorities.

SHOULD INDEMNITY COSTS BE ORDERED?

25 The OC relies on the correspondence referred to above in support of its application that costs be ordered on an indemnity basis. However, as noted above, I have not taken that correspondence into account in deciding to exercise the Tribunal's discretion under s109(2) and order the builder to pay the OC's costs.

26 It is well established that indemnity costs should only be ordered in the Tribunal in exceptional circumstances.[3]

27 The OC relies on *Ugly Tribe & Co Pty Ltd v Sikola*[4] where Harper J set out a number of factors to be considered when deciding an application for indemnity costs. It is not necessary to set them out here, as the only one relied upon by the OC is whether there was disregard for known facts or clearly established law. However, in *Ugly Tribe* his Honour was considering an application for costs where the proceeding was commenced and then, his Honour found, continued in wilful disregard of known facts or clearly established law. That is quite a different situation to the one here where an interlocutory application was made seeking orders requiring the Tribunal to exercise its discretion to order a preliminary hearing on a separate point.

[3] *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651* [2005] VSC 165.
[4] [2001] VSC 1189

28 Mr Moss also referred me to a recent decision of this Tribunal in *Zheng v Sunning Pty Ltd*[5] where Davis SM ordered the respondent to pay the applicant's costs on an indemnity basis. However, that order was following the final hearing and determination of the proceeding and in quite different circumstances. In *Zheng* Davis SM made the following observations about the manner in which the applicants had conducted the proceeding:

> 48. …the conduct of the applicants was extremely deceptive and not to be encouraged. It seems to me that the applicants conducted the case in the way they did was in the hopes of obtaining some money to which they were not entitled. Also while the applicants' conduct fell short of contempt, in my view, they certainly disobeyed orders of this Tribunal being orders I made on several occasions.
>
> …
>
> 49. It has been said that this Tribunal is set up as a 'low cost place'. It is also said that orders in court proceedings, costs usually follow the event. In this Tribunal, costs do not usually follow the event and I refer to section 109(1). It is further been said by a number of cases that indemnity costs are rare in court and therefore they should be even rarer in this Tribunal. I agree with that.
>
> 50. Looking at all the matters which I have referred to in this decision and in particular the matters that were referred to in the *Ugly Tribe* case, in my view there is sufficient reason for indemnity costs to be awarded. The applicants have put these parties to great expense. The respondents have had to endure a seven-day hearing and an adjournment last October. There have been several pleadings and amendments, there were many witnesses called. There has been the expense of obtaining and calling two professional witnesses were required. These are all matters that could have been avoided had the applicants conducted themselves differently. The applicants through their conduct have just "ploughed on" with complete disregard to the cost that they were incurring on others.
>
> 51. I have been sitting at this Tribunal for many years. I have rarely seen a case where it has proceeded for such a long time where there were little or no basis on which the claim could be brought…
>
> 52. It was quite clear that these proceedings were obviously brought for some other ulterior motive which I cannot identify… Given these circumstances I will award indemnity costs…

29 The OC has succeeded in displacing the ordinary rule in s109(1) that each party bears their own costs, but I am not persuaded that there is anything so exceptional about the Application that would warrant an order for indemnity costs.

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[5] [2016] VCAT 1306

30 Accordingly, I will order the builder to pay the OC's costs of and incidental to the hearing of the Application on a standard basis. In the absence of any details of the calculation of the costs sought by the OC, I decline to fix the costs, and will order that in default of agreement such costs are to be assessed by the Victorian Costs Court on the County Court Scale on a standard basis.

31 I consider it appropriate to reserve the costs of the OC's application for costs. There will be liberty to apply. However, I note that only part of the directions hearing on 31 January 2017 was concerned with hearing the application for costs – there were a number of matters raised by the parties in relation to the appropriate interlocutory orders; the OC's written submissions addressed those issues as well as its application for costs; the affidavit filed by its solicitor in support of the application for costs was no more than a chronology with the first 4 exhibits being the Tribunal's orders dated 4 August 2016, the Application for Directions Hearing or Orders dated 25 August 2016, Mr Murray's affidavit of 8 September 2016, expert reports and my decision of 1 December 2016, all of which are on the Tribunal's file.

DEPUTY PRESIDENT C AIRD