VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D19/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – relevant considerations – order that Applicants' pay Joined Party's costs directly

APPLICANTS	Tawab Afzal, Najiba Afzal
RESPONDENT	John Tomiczek
JOINED PARTY	John Van Bree
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Costs Hearing
DATE OF HEARING	10 November 2006
DATE OF ORDER	21 November 2006
CITATION	Afzal v Tomiczek (Domestic Building) [2006] VCAT 2360

ORDER

1 Order that the Applicants pay the Respondent's costs of this proceeding, including any reserved costs and the costs of this application for costs, such costs if not agreed to be assessed by the Registrar in accordance with Scale "C" of the County Court Scale.

2 Order that the Applicants pay the Joined Party's costs of this proceeding, including any reserved costs and the costs of this application for costs, such costs if not agreed to be assessed by the Registrar in accordance with Scale "C" of the County Court Scale.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr B. Miller of Counsel
For the Respondent	Mr J. Kotsifas, Solicitor
For the Joined Party	Mr G. O'Hara of Counsel

REASONS

Background

1. In this proceeding the Applicants ("the Owners") unsuccessfully sued John Tomiczek ("the Builder") for loss said to have been caused by the faulty connection of a refrigerator to a tap in a house he constructed for them. The plumber who had installed the tap, Mr Van Bree ("the Plumber") was joined to the proceeding as a Joined Party on the application of the Builder.

2. In his Points of Claim against the Plumber the Builder refers to the allegations of the Owners in the principal claim and then states in paragraph 4 as follows:

> "The Respondent seeks indemnity from the Joined Party in the event that the damage sustained by the Applicants was caused as a consequence of the actions and services supplied by the Joined Party".

3. In his Points of Defence to the Builder's claim the Plumber says that although he installed the tap he did not connect the refrigerator to it. He said that was done by the supplier of the refrigerator, one Clive Peeters Pty Ltd or by an agent of that company.

4. There was no claim made by the Owners directly against the Plumber.

The hearing

5. After a hearing extending over four days I found that the Plumber was correct and that the refrigerator had in fact been connected by Clive Peeters Pty Ltd or by an agent of that company. Accordingly, the Owners' claim against the Builder was dismissed and, since the claim by the Builder against the Plumber was conditional upon it being found that the damage arose as a consequence of the Plumber's defective workmanship, the Builder's claim against the Plumber was also dismissed.

Costs

6. I now have before me two claims of costs. The Plumber claims his costs from the Builder and, if they are not paid, from the Owners. The Builder claims his costs from the Owners together with any costs he has to pay to the Plumber.

7. The matter came before me for argument on 10 November and I heard submissions from Counsel for the Plumber, Mr O'Hara, the solicitor for the Builder, Mr Kotsifas and Counsel for the Owners, Mr Miller.

8. The power to award costs is to be found in s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the VCAT Act") which, where relevant, states as follows:

> "(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.

Decision

9. After considering Counsel's extensive submissions I have concluded that it is appropriate to make an order for the costs of both the Joined Party and the Respondent directly against the Owners. I now provide reasons for that decision.

The difficulty of the case

10. Both Mr O'Hara and Mr Kotsifas submitted that the proceeding was complex, and lengthy and also, that the Owners' claim was weak whereas the claims by the Builder and the Plumber were strong. Mr Miller submitted that it was not a complex case but a very simple one. I do not agree that this was a simple case. Certainly, there were no difficult questions of law. It was essentially a factual dispute. Nevertheless, expert evidence was called by both the Owners and the Plumber and there was extensive cross-examination of the experts.

The evidence ultimately relied upon

11. Mr Miller pointed out that much of the hearing was taken up with the issue of the source of the water and the quantification of damage. He said that I did not make any finding on either of these issues because, in the end, it was not necessary for me to do so. That is so, but this evidence was led on

behalf of the Owners and had to be answered because neither of the other parties could assume that it would have been unnecessary for me to decide them. The evidence led on each issue was extensive and, as to the source of the water, there was considerable doubt cast upon the veracity of the Owners' account. Although I did not need to find where the water came from it is by no means certain what my decision would have been. Accordingly, the costs expended by the Builder and the Plumber on these issues were certainly not wasted.

The strength of the owners' case

12. Mr Miller submitted that there was no suggestion that the Owners did not have a tenable claim. There was no suggestion made in those terms but I found their claim was weak. There was abundant evidence that the Plumber had supplied the tap to which the refrigerator was connected and that was not disputed. The issue was, who connected the refrigerator to the tap and as to that, there was very little evidence available to the Owners. Notwithstanding that obvious absence of critical evidence, they chose to prosecute this proceeding.

Can the joined party's costs be awarded?

13. As to the costs of the Plumber, Mr Miller submitted that there was no provision in the VCAT Act for third party claims which, he suggested, had the consequence that there was no reference in the Domestic Building List Practice Notes to third party claims. It is nonetheless a common practice in both the Domestic Building List and the Civil Claims List for a builder to join a subcontractor to a proceeding where part of the claim includes a complaint about the work of that particular subcontractor. Upon joinder, the subcontractor becomes a party to the proceeding.

Was the Plumber's work "Domestic Building Work" within the meaning of the *Domestic Building Contracts Act* 1995?

14. Mr Miller submitted that the work done by the Plumber in this case was not "domestic building work" and consequently the Tribunal does not have jurisdiction to deal with any complaint about that work. No such argument was raised at the hearing, albeit there were no proceedings as between the Owners and the Plumber.

15. Mr Miller referred to the definition of domestic building work in s.5 of the *Domestic Building Contracts Act* 1995 and said that by regulation 4(1)(i) of the Domestic Building Contracts and Tribunal (General) Regulations 1996, work to be carried out under a contract that applies only to (inter alia) plumbing is not building work to which the Act applies. It is also not work done "in relation to a domestic building contract" between the Owners and the Builder within the meaning of s54(1)(b)(iii) (see *Chartin Group Pty Ltd v L U Simon Builders Pty* Ltd [2004] VSC 531 per Osborn J.). As a consequence, it follows, he said, that the dispute between the Builder and

the Plumber cannot be a "domestic building dispute" within the meaning of that act.

16. Mr Miller submitted therefore that the Tribunal therefore had no jurisdiction to hear the dispute between the Builder and the Plumber. I do not agree. Even if the Plumber's work was not domestic building work, the contract between the Builder and the Plumber for the plumbing work for the house was nonetheless an agreement for services within the meaning of s107 of the *Fair Trading Act* 1999. By s108 of that Act the Tribunal has power to deal with disputes arising under such contracts. When I suggested this to Mr Miller he submitted that this was not argued at the hearing but lack of jurisdiction was not argued at the hearing either and this is not a court of pleading. There is no doubt the Tribunal had power to determine the dispute between the Plumber and the Builder and I have done so.

What orders should be made as to costs?

17. I am satisfied that, in all the circumstances, I ought to make an order for the payment by the Owners of the Builder's costs. I am also satisfied that they should also be ordered to pay the Plumber's costs, notwithstanding that there was no direct claim by the Owners against the Plumber.

18. The Owners' complaint was that the Plumber had done certain work which was defective. There was no contract directly between the Owners and the Builder so they sued the Builder with whom they did have a contract. The Builder was in a position where, if the Plumber's work was defective, he would be entitled to seek indemnity from the Plumber. It was therefore reasonable for him to join the Plumber to the proceeding.

19. The Owners, the Builder and the Plumber are all parties to the Owners' proceeding. As stated above, the effect of an order joining a party under s.60 of the VCAT Act is that the party so joined becomes a party to the proceeding. The Owners, the Builder and the Plumber are therefore all parties to the Owners' proceeding even though no claim is made directly by the Owners against the Plumber.

20. That being so, there is a power to order the Owners as parties to pay the costs of other parties namely, the Builder and the Plumber. By s109(2) and (3) the Tribunal may order that a party pay all or a specified part of the costs of another party to the proceeding if satisfied that it is fair to do so having regard to the matters referred to in sub-section (3).

21. It would be possible of course to order that the Builder pay the Plumber's cost and then consider whether an order should then be made that the Owners pay the Builder the amount of costs that he has to pay the Plumber, akin to a Bullock Order. However I do not think that is appropriate. What should be made is something in the nature of a Sanderson Order, where the party who caused the costs to be incurred is ordered to pay them directly.

22. In addition to the matters specifically mentioned in sub-section (3) namely, the relative strengths of the claims and the nature and complexity of the

proceedings which I have already dealt with, there was also the matter of the Owners bringing a proceeding against the Builder in circumstances whereby it was reasonable for the Builder to join the Plumber who would, if the Owners' contentions were correct, be the party ultimately responsible. He did so and the Owners' allegations against the Plumber proved to be unjustified. In these circumstances I think I should order that the costs be paid by the Owners to the Plumber directly.

The scale of costs

23. Mr O'Hara sought costs on a solicitor/client basis. The ground for this was a letter sent by the Plumber's solicitors to the Builder's solicitors offering to bear his own costs if the Builder withdrew the proceeding against him. Mr O'Hara said that this would have produced a result more favourable to the Respondent than the result of the hearing. I do not think the Respondent can be criticised for not accepting the offer. He could not be certain that the Owners' claim about the Plumber's work would fail. Costs are always in the discretion of the Tribunal and, where they are ordered, the general rule is that "costs" means party/party costs (see *Pacific Indemnity Underwriting Agency Pty Ltd v. Maclaw* [2005] VSCA 165).

24. Mr Miller submitted that costs should be on the Magistrates' Court Scale but I think that this case was not in the nature of a summary proceeding but rather, a substantial piece of litigation fought over four days using experienced counsel. It was more akin to a County Court proceeding and the general practice in the Tribunal in such cases is to use the County Court Scale as a guide for the assessment of costs. I think that would be appropriate here.

Order

25. There will be an order that the Owners pay the Builder's costs of the proceeding including any reserved costs and the costs of this application, such costs to be assessed if not agreed by the registrar on Scale "C" of the County Court Scale. There will also be an order that the Owners pay the Plumber's costs on the same basis.

SENIOR MEMBER R. WALKER