VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D181/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.109 – failed s.75 application – whether costs should be ordered – discrete and complex issue – scale of costs.

[2005] VCAT 1769

APPLICANT:	Arrow International Australia Limited
FIRST RESPONDENT:	Indevelco Pty Ltd
SECOND RESPONDENT:	Perpetual Nominees Ltd as custodian of the Colonial First State Income Fund
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Bowman
DATE OF HEARING:	8 August 2005
DATE OF RULING:	17 August 2005

ORDERS

1. Second Respondent to pay Applicant's costs of and associated with the hearing of 9 February 2005, including the costs of any relevant direction hearings, such costs to be taxed in default of agreement on Scale "D" of the County Court Scales.
2. Liberty to apply.

Judge Bowman
Vice President

APPEARANCES:

For Perpetual Nominees Ltd:	Mr N Frenkel of Counsel
For Arrow International Australia Pty Ltd:	Mr B Miller of Counsel

RULING AS TO COSTS

BACKGROUND

1 In a decision dated 24th February 2005 I ruled that an application pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") by the second respondent, Perpetual Nominees Ltd ("Perpetual"), seeking to strike out or dismiss the proceeding brought against it by the applicant, Arrow International Australia Limited ("Arrow") be itself dismissed. On that occasion, I ordered that costs be reserved.

2 Arrow has now returned seeking its costs of the failed s.75 application. Mr Miller of counsel again represented Arrow and Mr Frenkel of counsel again represented Perpetual. Again, each counsel spoke to very helpful written submissions.

3 A preliminary issue concerned the circumstances in which I had reserved costs on 24th February 2005. Mr Miller's recollection, with which I tentatively agreed, was that it was determined by me to be premature to deal with the question of costs on that occasion as the applicant had not filed and served Amended Points of Claim upon which it intended to rely, and I reserved the question of costs accordingly. It is to be recalled that I was asked to deal with the application pursuant to s.75 on the basis that such Amended Points of Claim had been formally filed and served. I commented upon the slightly unusual nature of this situation in paragraph 9 of the Reasons for Decision of 24th February 2005. The recollection of Mr Frenkel was that I had made a general reservation of costs rather than ordering same against a party, and that such reservation was not a temporary one contingent upon the filing of the Amended Points of Claim.

4 Given the passage of time and the number of matters in which counsel (not to mention myself) have since been involved it is no surprise that recollections differ, and it is no criticism of either counsel, both of whom have been extremely helpful, that one recollection should prove to be correct and one incorrect. Whilst, for reasons that shall be discussed, it does not seem to me that markedly disparate outcomes result from the differing recollections, I indicated to counsel that I would play back the recording of the proceedings of 24th February and check the circumstances in which costs were reserved. Counsel were agreeable to this course of action. The result is that the recollection of Mr Miller and my faint recollection are correct. I determined that, in the absence of the properly filed and served Amended Points of Claim, it was premature to deal with the question of costs. They were reserved accordingly.

5 As stated, it may not in fact make a great deal of difference to the issue of whether or not the applicant can seek its costs. Even if costs of the application had been reserved in the more general sense, it seems to me that Arrow could bring on an application for its costs in relation to the s.75 application without awaiting determination of other issues. It seems to me that, as is the situation with the courts, the Tribunal can, having reserved costs, subsequently direct by and to whom costs are to be paid. In any event, the circumstances in the present situation are that the question of costs was reserved because of the proposed

lodging of the Amended Points of Claim. If, for example, Arrow did not proceed to file and serve Amended Points of Claim, or if they were substantially different from those upon which the s.75 application had proceeded, the issue of costs might take on a different complexion. However, it is not suggested that either of these scenarios has in fact eventuated.

RULING

6 As stated, very helpful submissions complete with relevant authorities were made by counsel. Mr Miller, on behalf of Arrow, referred to decisions such as that of Deputy President Macnamara in *Maltall Pty Ltd & Anor v Bevendale Pty Ltd* (delivered 10th November 1998) and of Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (delivered 5th May 1999). With all due respect to Mr Young, and as I stated in the costs ruling in *Sabroni Pty Ltd v Catalano* (delivered 1st March 2005), I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs award will be made in its favour. As I stated in that ruling, and it is a view which I still hold, I prefer the approach adopted by Deputy President Macnamara in *Pure Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31st October 2002) to the effect that there is nothing in the nature of a proceeding in the Domestic Building List that would justify departure from the presumption contained in s.109 and the exceptions thereto. Each case must be viewed on its merits, and I am not of the opinion that some type of general approach should be adopted.

7 When this application is viewed on its merits, and despite the well reasoned submissions of Mr Frenkel, I am of the view that Arrow is entitled to its costs. In arriving at that conclusion, I am particularly conscious of the exceptions contained in s.109(3)(d) and (e) of the Act. As has been stated many times, the Tribunal has a wide discretion in relation to costs, and the width of that discretion is illustrated by s.109(3)(e). The application by Perpetual pursuant to s.75 involved a discrete and quite complex issue, very capably argued by experienced counsel, and argued against a background of litigation that is itself very complex and which has been conducted very much in the manner of a commercial cause. Both the proceeding itself and the application before me have been conducted in an adversarial fashion. A very considerable amount of money is involved. Numerous authorities were referred to, and detailed submissions presented. As in *Sabroni*, the whole presentation of this quite technical legal argument was as one would expect in a court of law and considerable effort had been put into the preparation of the competing submissions. Perpetual opted to endeavour to have the case against it struck out or dismissed without proceeding to a hearing on the merits. It failed. In exercising my discretion and bearing in mind the provisions of s.109 of the Act, it should now pay Arrow's costs.

8 In relation to the scale of such costs, Mr Miller submitted that, given the large amount of money involved (an amount in excess of $400,000) costs, if ordered, should be on the Supreme Court Scale. Mr Frenkel argued that such costs should be on County Court Scale "D". Despite the overall amount involved, I am of the

view that Mr Frenkel is correct and that the appropriate scale for an application such as this before this Tribunal should be County Court Scale "D".

9 Accordingly, I order that Perpetual Nominees Ltd pay to Arrow International Australia Limited its costs of and associated with the hearing of 9 February 2005, including the costs of any relevant directions hearings. In default of agreement, such costs are to be taxed on Scale "D" of the County Court Scales.

Judge Bowman
Vice President