

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D502/2006

**CATCHWORDS**

Domestic building – costs – indemnity costs.

<b>APPLICANT</b>	Classic Period Homes Pty Ltd (ACN: 096 046 105)
<b>RESPONDENT</b>	David Appleby
<b>WHERE HELD</b>	Senior Member D. Cremean
<b>BEFORE</b>	Thexton Lawyers
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5 October 2007
<b>DATE OF ORDER</b>	5 October 2007
<b>CITATION</b>	Classic Period Homes Pty Ltd v Appleby (Domestic Building) [2007] VCAT 1964

**ORDER**

- 1 In accordance with paragraph 4 of the orders I made on 25 July 2007 I order the Applicant to pay the Respondent the sum of \$29,015.50 (subtracting the sum of \$10,500.00 from \$39,515.50).
- 2 I order the Applicant to pay the costs (including all reserved costs) of the Respondent as follows:
  - (a) until 23 March 2007 on County Court Scale “C” on a party/party basis.
  - (b) after 23 March 2007 on an indemnity basis (not including that period represented by the costs order I made against Mr Thexton personally).
- 3 In default of agreement by 5 November 2007 I refer the assessment of such costs to the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act 1998*.

**SENIOR MEMBER D. CREMEAN**

**APPEARANCES:**

For the Applicant

Mr B. Clunie, Director

For the Respondent

Mr A. Beck-Godoy of Counsel

## REASONS

- 1 I am satisfied I should proceed to complete the orders I made on 25 July 2007 by ordering the Applicant to pay the Respondent the sum of \$29,015.50 (the balance after I deduct the sum of \$10,500.00 from \$39,515.50).
- 2 The Respondent now applies for costs under s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 3 This is opposed by Mr Clunie, director of the Applicant who appears without legal representation – he and Mr Thexton, apparently, having parted ways.
- 4 The starting point under s109(1) is that each party must bear its own costs. I may depart from this under s109(2) if I am satisfied it is fair to do so, having regard to s109(3).
- 5 Having regard to s109(3) I am satisfied it is fair to do so. I rely upon s109(3)(c) in particular and s109(3)(d).
- 6 The Respondent has achieved a substantial victory in a matter which has been a very trying and expensive one for him. It should have been resolved earlier, very plainly in my view.
- 7 The Applicant has had a history, via its legal representative or otherwise, of not complying with directions. The conduct of the Applicant in this matter has been, to say the least unfortunate. Unfounded allegations of bias on my part have been made and hardly any testing of witnesses on the other side occurred. The contract ordered to be produced still has not been produced.
- 8 As well an offer of compromise of a very reasonable sum made on 23 March 2007 was rejected. That offer was easily exceeded at the hearing by the orders made.
- 9 Properly advised, I am satisfied the Applicant would not and should not have conducted the proceeding as it did.
- 10 The case in my view warrants an exercise of discretion in favour of the Respondent.
- 11 In my view he should not be out of pocket at all from 23 March 2007. Prior to that, I do not believe that the case however is sufficiently “exceptional” to warrant solicitor client costs. I reply upon the remarks of Nettle J A in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 at [91] – [92]. I shall order party/party costs on the appropriate County Court Scale.

- 12 I consider the Applicant, I should add, may have rights against his former legal practitioner (Mr Thexton) at least since the date the formal offer was rejected.

**SENIOR MEMBER D. CREMEAN**