VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D696/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – relevant criteria – untenable basis in law.

APPLICANT	Dura (Australia) Constructions Pty Ltd (ACN 004 284 191)
RESPONDENT	SC Land Richmond Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Costs Hearing
DATE OF HEARING	19 December 2006
DATE OF ORDER	20 December 2006
CITATION	Dura v SC Land Richmond Pty Ltd (Domestic Building) [2006] VCAT 2613

ORDER

1 Order Applicant to pay Respondent's costs on Supreme Court Scale (including any reserved costs) of and incidental to this proceeding, and its hearing, on 21 September 2006; 6 October 2006; 12 and 13 October 2006; and 19 October 2006. Reserve liberty to apply for costs of 19 December 2006.

2 In default of agreement by 15 February 2007, refer assessment of 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 A. Herskope of Counsel
For the Respondent	Mr A.J. Laird of Counsel

REASONS

1 The Respondent is applying for costs in this matter.

2 This is opposed by the Applicant which submits that costs should be reserved or that costs should be costs in the proceeding.

3 The Respondent is applying for costs, on Supreme Court scale, in respect of four separate occasions – the initial hearing on 21 September 2006; the hearing on 6 October 2006 which was adjourned; the 2 day hearing before me on 12 and 13 October 2006; and the occasion on 19 October 2006 when I handed down my decision. No mention is made of this costs hearing itself. That may be a simple oversight I will address later.

4 In awarding costs, the Tribunal is governed by s109 of the *Victorian Civil and Administrative Tribunal Act* 1998, except where a case is one arising under s75(2). Sections 109(1), (2) and (3) provide 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.

5 It is submitted that, having regard to s109(3) of the Act, I should be satisfied it is fair to depart from the opening position established under

s109(1) by applying s109(2). The provisions of s109(3), to which my attention is directed by the Respondent, include ss109(3)(a)(i), 109(3)(1)(iii) and 109(3)(h) together with ss109(3)(c), 109(3)(d) and 109(3)(e).

6 Although the Applicant, via its Counsel, addressed each of the Respondent's submissions, and referred me also to certain authorities, I am satisfied in the end that I should order costs in favour of the Respondent. That is to say, I am satisfied, under s109(2), that it is fair to depart from s109(1) having regard to s109(3). The authorities to which I was referred by the Applicant, and which I have read, do not persuade me I should do otherwise. In particular I am not persuaded I should simply reserve costs or order that costs should be costs in the proceeding.

7 In my view each of paragraphs (a), (b), (c), (d) and (e) of s109 of the Act is attracted in the case in the ways submitted to me in the Respondent's written submissions. I wish to say something, in particular, however, about s109(3)(c). In my view, it would be sufficient to depart from s109(1) having regard to that provision alone.

8 I consider, for the reasons I gave on 19 October 2006, that the Applicant had no tenable basis in law for seeking the injunction it sought or the continuance of the same. My view was then, and still is, that I was bound by the decision of Lush J in *Porter v Hannah Builders Pty Ltd* [1969] VR 673. I am not free to depart from binding Supreme Court authority and Lush J's decision in that case makes the position plain – that there was no serious question in law to be tried. But it is made even plainer by the fact that he applied High Court of Australia authority in *Cowell v Rosehill Racecourse Pty Ltd* (1937) 56 CLR 605. I am not free to depart from binding Supreme Court authority and I am certainly not free to depart from binding High Court authority. Nor was Lush J.

9 It is pointed out to me that in the appeal in this matter Whelan J. considered I may have committed an error of law in this regard: see [2006] VSC 428 at [10]. I am far from persuaded that this is what his Honour had in mind. It is true he said "it is arguable, I think, that Dr Cremean made an error of law in this part of his decision". He said, however, that he thought only that it was "arguable". Earlier, however, he said: "I am not at all persuaded that any error of law was made by Dr Cremean in this respect". That is, it seems, in the respect that *Porter's* case laid down an invariable rule. Further he said (at [16.1]) that in the matter before him "the case as to error of law is not strong". Therefore, I am not persuaded by the Applicant's submissions on this point. But, I should point out, I am not endeavouring to comment, as such, on his Honour's ruling.

10 In any event, I am satisfied that the Applicant's position was not tenable in law bearing in mind the balance of convenience and the issue of damages as an adequate remedy. His Honour, Whelan J., agreed with me in both these regards (which he treated as the one question or "balance of convenience").

11 In light of these observations alone, I think it would be unfair to deprive the Respondent of its costs. I have regard as well to s97 of the Act. The position on costs in the Supreme Court is not directly applicable. The decisions in *Independent Fuels Australia Pty Ltd v Jamieson (No 2)* [2002] VSC 45 and *Tower v Ambridge Investments Pty Ltd* [2003] VSC 478 do not materially assist me.

12 I have no idea what the ultimate outcome of the proceedings will be but I am satisfied, on the injunction issue, that the position is as I have set it out, in particular, in my Reasons of 19 October 2006.

13 Considering the matters advanced by the Respondent, I am satisfied I should make the costs orders sought. The Supreme Court scale is appropriate because of the complexity of the matter and the amounts involved. Use of Senior and Junior Counsel was appropriate. It is unnecessary for me to decide whether full and proper disclosure was made on the ex parte application made on 21 September 2006 and I refrain from doing so.

14 I make orders accordingly.

15 It would follow, I think, that by parity of reasoning the Respondent should have an order for costs in its favour in respect of 19 December. To recover its costs previously, it had to be heard on 19 December. But no actual application for the same was made, as I recall, and I reserve liberty to apply for the same, if need be. It would be unjust if I did not do so.

16 I so order.

SENIOR MEMBER D. CREMEAN