VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D619/2000

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – separate question – costs.

APPLICANTS	Strato Filonis & Angelina Filonis
FIRST RESPONDENT	Housing Guarantee Fund Ltd (released from proceedings)
SECOND RESPONDENT	Orbit Homes Pty Ltd
THIRD RESPONDENT	The Mayor, Councillors and Citizens of Hume City Council (released from proceedings 1/8/02)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	In Chambers
DATE OF HEARING	11 November 2004, 18 February 2005, 8 April 2005 and 27 July 2005
DATE OF ORDER	22 May 2006

[2006] VCAT 875

ORDER

1. Order the Second Respondent to pay the party/party costs of the Applicants of and incidental to the hearing of the separate question.

2. In default of agreement by 19 June 2006, I refer the assessment of the same to the principal registrar who shall assess same according to the appropriate County Court scale. In that event the Applicant must file and serve a bill of costs in taxable form by 19 July 2006. The Second Respondent, if objecting, must do so in writing by documents filed and served by 19 August 2006. Thereafter the principal registrar must carry out his assessment.

SENIOR MEMBER D. CREMEAN

REASONS

1. On 1 September 2005 on the hearing of a preliminary issue I determined that the proceedings in this matter were maintainable in law against the Second Respondent.

2. On that occasion I reserved liberty to the Applicants or to either party to make any application(s) for costs.

3. Subsequently, and on 26 October 2005, I made the following directions on the question of costs:

   (a) the Applicants were to file and serve written submissions in support of their application by 18 November 2005;

   (b) the Second Respondent, if minded to do so, was required to file and serve any written submissions in response by 9 December 2005.

   (c) the Applicants, also if minded to do so, were to file and serve any written submissions in reply by 16 December 2005.

4. Each party has now filed submissions. The Applicants filed submissions dated 21 November 2005. The Applicants seek costs. The Second Respondent filed submissions dated 13 December 2005. The Second Respondent submits that costs be reserved. The Applicants then filed costs submissions in reply dated 5 January 2006.

5. There, the matter has rested for some reason I am unable to explain.

6. Nevertheless, I have read the detailed submissions of each party and, considering also s97 of the *Victorian Civil and Administrative Tribunal Act* 1998, am satisfied that the result I should reach is a fair one.

7. I must make some preliminary observations about s109 of the Act. As is clear now from a number of decisions the starting point under s109 is to be found in s109(1): each party must bear their own costs. The Tribunal is able to depart from this position under s109(2). It may do so, however, under s109(3) only if satisfied it is fair to do so having regard to criteria mentioned in sub-paragraphs (a) to (e). There is nothing in a Domestic Building List matter which means that a successful party can have an expectation of being ordered costs. See *Houltham v J G King Pty Ltd* [2006] VCAT 807. The fundamental provisions of s109 apply to Domestic Building cases as to other cases.

8. Costs do not therefore follow the event as in the courts and, thus, I reject the submission of the Applicants that they should get their costs because they were wholly successful on the preliminary point.

9. Nevertheless I do agree with them that the preliminary point was an exceedingly complex one. My reasons for decision occupy 68 paragraphs (not including detailed sub-paragraphs) on very difficult factual and legal matters largely to do with the question whether it was the Second Respondent or another entity now out of existence (Orbit Properties Pty Ltd) which was properly the party against whom proceedings should be held to be maintainable. Substantially on the ground of an estoppel operating in favour of the Applicants I found in their favour and held, as I say, that the proceedings were, and are, maintainable against the Second Respondent. I resolved that question to my satisfaction on 1 September 2005 but it had been set aside for hearing as early as 15 June 2004 when I made directions to that effect. The actual hearing of the question occupied 4 days including

final submissions – 11 November 2004; 18 February 2005; 8 April 2005; and 27 July 2005. At that hearing detailed evidence was given and deponents were cross-examined on their Affidavits. For the purposes of the last day, very lengthy final submissions were filed by the parties descending into great detail on the evidence and the relevant legal principles.

10. One factor under s109(3) is in paragraph (d) – "the nature and complexity of the proceeding". The Applicants rely on this in their submission on costs. They also draw my attention to paragraphs (a)(v) and (a)(vi) – the former relating to "attempting to deceive another party or the Tribunal" and the latter relating to "vexatiously conducting the proceeding".

11. As well, the Applicants rely on paragraph (c) of s109(3) – "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". Additionally, they refer me to paragraph (d) – "any other matter the Tribunal considers relevant".

12. Finally, to an extent, the Applicants rely on paragraph (b) of s109(3) – "whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding".

13. For the purposes of these Reasons, I have revisited my previous Reasons for Decision in order to understand better the matters being submitted to me. Having done so, I am satisfied I should reject the grounds relied on by the Applicants which include paragraphs (a) (v), (a) (vi) and (b) of s109(3). I cannot agree there has been any deception in the conduct of the proceedings or any attempt to deceive or any vexatious conduct of the proceedings by the Second Respondent. I am well aware of the fact, though, that I made certain unfavourable observations about the conduct of Mr Millson. But I

do not consider I have sufficient at my disposal to go any further than I did in making those observations.

14. I consider, however, that paragraphs (d) and (c) stand in a different category. To an extent this also applies to paragraph (e). As I recall very distinctly it was the Second Respondent's application made in the first instance that I should determine the separate question I set aside. The nature and complexity of that question were such that a long and difficult preliminary hearing was held. In the end I was satisfied of the view I expressed about the maintainability of the proceedings without any or much hesitation at all. I made the observation at one point about the attempt by the Second Respondent to say the proceedings were not maintainable because Mr Millson himself was at fault. I said it was "tempting in some cases to stigmatise a defence of this nature by a corporate party as shabby". In the circumstances though, it seems to me that, in the end, the Applicants had a strength about their position which was lacking from the perspective of the Second Respondent.

15. In what I have set out I am satisfied paragraphs (d) and (c) of s109(3) are attracted.

16. Under s109(2), I may depart from s109(1) and make an order for costs "[at] any time". I may order a party to "pay all or a specified part of the costs of another party in a proceeding".

17. I am of the view, moreover, that (d) is attracted on its own by the frank admission in the Second Respondent's submissions – that it "is accepted that the interlocutory hearing involved complex questions of law". The points raised in response by the Second Respondent to allegations of the Applicants directed to satisfying paragraphs (a) (v), (a) (vi) and (b) I do not need to deal with, in light of my comments above. If it is necessary to do

so, though, I must indicate my disagreement with the Second Respondent as regards paragraph (c). As I have said I reached my decision on the question of law – not without great difficulty but without much or any hesitation.

18. It is argued by the Second Respondent I should proceed to reserve costs pending the outcome being known of the proceedings as a whole. I cannot agree I should do this. I am not required to do it by the terms of s109 itself. Moreover s109(2), as I have pointed out, contemplates what I should call "intermediate" orders for costs being made. Furthermore, the Applicants did succeed on the preliminary issue (bearing in mind the terms of s109(3)(e)) and that was an issue which was directly raised by the Second Respondent itself. I would agree the Second Respondent had matters it could respectably put on instructions but I would not go so far as to say it had an "arguable" case as is alleged. I have already said enough about Mr Millson's conduct in the matter in that regard.

19. I do not consider it would be fair to reserve costs. I consider it would be most unfair to the Applicants in the circumstances I have outlined to do so. Accordingly, I shall not be doing so.

20. I am satisfied, having regard to s109(3)(d) and also, if need be, s109(3)(c) (and s109(3)(e)) that it is fair to make an order for costs under s109(2) of the Act and to depart from s109(1). I have that as my view for the reasons I have given. Bearing in mind that is my view, and considering also s97, I reject the invitation to make an order only reserving costs.

21. I order the Second Respondent to pay the party/party costs of the Applicants of and incidental to the preliminary hearing.

22. In default of agreement between the parties, I refer such costs to the principal registrar under s111 for assessment and I make directions accordingly.

SENIOR MEMBER D. CREMEAN