VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D527/2003

DOMESTIC BUILDING LIST

CATCHWORDS

Costs of reinstatement proceeding, Section 109 VCAT Act 1998, Relevant issues considered, Terms of mediation settlement not complied with by Respondent – frustration of Tribunal's proper function, Request for reinstatement itself seen to be justified and warranting costs order, Reinstatement sought on apparently limited issues, all issues dismissed on all bases – hopeless and baseless. Despite that, issue of intrinsic complexity pursued at length, Presentation repetitive, prolix and lacking structure, Costs application itself similarly canvassed and dismissed, Solicitor/client costs in favour of Respondent seen to be fair pursuant to Section 109(3).

[2006] VCAT 807

APPLICANT	Patricia Doreen Houltham
RESPONDENT	J. G. King Pty Ltd. (ACN 006 627 210)
WHERE HELD	Melbourne
BEFORE	Member M. Walsh
HEARING TYPE	Directions/Application for costs orders
DATE OF HEARING	14 February 2006 & 14 March 2006
DATE OF ORDER	10 May 2006

ORDER

1. The Respondent to pay the Applicant's costs of and in relation to the 'reinstatement hearing' days of 10 February 2005 and 24 March 2005 on a party/party basis. In default of agreement, such costs are to be taxed by the principal registrar pursuant to Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on Scale A of the County Court Scale of Costs.

2. The Applicant to pay the Respondent's costs of and in relation to the 'reinstatement hearing' days of 26 April 2005, the half day on 5 August 2005, and the 'costs hearing' days of 14 February 2006 and the half day on 14 March 2006 on a solicitor/client basis having particular regard to Section 109(3)(b) and (c) of the *Victorian Civil and Administrative Tribunal Act* 1998. In default of agreement, such costs are to be taxed by the principal registrar pursuant to Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on Scale A of the County Court Scale of Costs.

3. An issue of the Respondent in relation to costs (refer paragraph 8.4) reserved.

MEMBER M. WALSH

APPEARANCES:

For the Applicant	Mr P Graham, Solicitor
For the Respondent	Mr M Champion, Solicitor

REASONS

1. Application D527/2003 was lodged with the Tribunal by the Applicant on 10 August 2003 seeking determination by the Tribunal of a domestic building dispute with the Respondent arising from the carrying out of a domestic building contract entered into between the parties.

2. Prior to determination by the Tribunal, the dispute was settled consequent upon a mediation scheduled on 28 October 2003 by the Tribunal and with the assistance of a mediator appointed by the Tribunal. The settlement arrangement was incorporated in a 'Terms of Settlement' document signed by the Applicant and by the solicitor for the Respondent.

3. Following that settlement, an order was made by the Tribunal on 5 November 2003 in the following terms:

> "By Consent.
>
> 1. This proceeding struck out with a right to apply for reinstatement".

4. By letter of 27 October 2004, the Applicant's solicitor wrote that:

> "Our client seeks to have this proceeding reinstated so that questions regarding the Respondent's compliance with the Terms of Settlement may be determined and directions given regarding the disbursement of the monies still held in trust".

5. After a number of date fixtures and adjournments, the Applicant's reinstatement request was listed as a Directions Hearing before Senior Member Walker on 10 February 2005. At that hearing, Mr Walker made a number of detailed Directions including fixing the application to reinstate the proceeding for a Small Claim Hearing at 10.00 a.m. on 24 March 2005.

6. It was on 24 March 2005 that the reinstatement proceeding came on for hearing before me and as a result of which I made my determination and Orders initially of 29 March 2005 and subsequently of 8 September 2005 after hearing days of 24 March 2005, 26 April 2005 and for a half day on 5 August 2005. One of the Orders I made was:

> "Costs of this reinstatement proceeding reserved with liberty to apply concerning such. Any costs application shall be listed before me".

7. This current proceeding is one initiated in the exercise of that reserved liberty.

8.1. Although subsequent to the Tribunal's previous determination there had been some communications initiated by the Respondent's solicitors about a possibly unresolved aspect of the previous proceeding, it is clear and accepted by all that this proceeding was initiated by the Applicant. This was raised at the commencement of the hearing and was acceded to by the parties. However, the history leading to that situation warrants some reference.

8.2. By letter of 23 September 2005, the Applicant's solicitor wrote that:

> "We hereby request that this matter be listed for further hearing on the issue of the applicant's claim for costs against the respondent."

Subsequently, under cover of a letter of 4 October 2005, the Applicant's solicitor filed an 'Application for Directions/Orders' in which the Order sought was that 'The Respondent to pay the Applicant's costs of this proceeding.' The time estimated by the Applicant's solicitor to be required was 4 hours.

8.3. In the result, a Directions Hearing was listed by the Tribunal initially for 5 December 2005. This date was vacated at the request of both parties and the matter was subsequently listed for 14 February 2006 (and 14 March 2006). The Tribunal's Notice of Directions Hearing of 7 November 2005 stated that 'The purpose of the Directions Hearing is to consider your correspondence to VCAT dated 4 October 2005 (application for costs)'. The 'correspondence to VCAT' is that referred to above at paragraph 8.2.

8.4. In addition, by letter of 27 September 2005, the Respondent's solicitor, referring to the Applicant's solicitor's letter of 23 September 2005, wrote:

> "In view of the applicant's application, please take note that at the hearing of any such application, our client will make application that its costs be paid".

In that same letter, the Respondent's solicitor referred also to an aspect of its own which it perceives to be unresolved from the Applicant's original reinstatement application and apparently relating to Clause 3.2 of the Terms of Settlement – a matter referred to at the commencement of paragraph 8.1 above.

8.5. Consequently, three aspects were adverted to at the commencement of this proceeding. These were the Applicant's application for costs, the Respondent's application for its costs and the Respondent's perceived unresolved aspect.

8.6. The Respondent's solicitor proposed a course which the Tribunal acceded to whereby it would not prosecute the third aspect pending the Tribunal's determination of the initial two aspects.

9. Whether the Tribunal should make an order that one party pay any and what costs of another party is governed by Statute, namely Section 109 of the

Victorian Civil and Administrative Tribunal Act 1998 which in part provides:

> ***109. Power to award costs***
>
> (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.

The one and only essential criterion is that of fairness and this issue is to be determined on the merits of the case in each instance. That there is no presumption of entitlement to costs in VCAT was again made quite clear recently by Ormiston J. in *Pacific Indemnity Underwriting v Maclaw* [2005] VSCA 165. That the merits of each case at the determination of the Tribunal must decide the criterion of fairness was reinforced and reiterated

recently by His Honour, Judge Bowman in *Sabroni Pty Ltd v Antony Catalano* [2005] VCAT 374.

9.1. A broad overview of the evidence adduced before me leaves me in no doubt that, subsequent to the mediation settlement, 'the Works' (as defined) were not attended to in the most expeditious manner. Further, although it was only one remaining item which required attention on 24 March 2005, there were other of the required Works which certainly had not been attended to by 10 December 2003. Indeed, in a document entitled 'Amended Further Particulars of Breaches of Terms of Settlement pursuant to orders dated 10 February, 2005' and filed on 11 March 2005 pursuant to one of the Orders made by Senior Member Walker on 10 February 2005, the Applicant's solicitor listed 22 items allegedly still requiring attention when the reinstatement request was made. Yet, on the first day of the hearing before me on 24 March 2005, there were no items alleged to still require attention. The last item had been attended to on the day prior to that day.

9.2. The evidence available to the Tribunal indicates that the principal reason for the adjournment of at least one of the dates fixed for the Directions hearing relative to the Applicant's reinstatement request was to enable outstanding works to be attended to and they were attended to. Obviously, in a period of approximately 19 weeks, 22 items had been satisfactorily attended to.

10. A number of aspects of the above command observation.

10.1. The number of items allegedly still requiring attention as at 27 October 2004 appears on its face to be disproportionate to the number of 'the Works' as defined and requiring attention pursuant to the Terms of Settlement. In part, the reasons for this appear to be the much more detailed manner of articulation in the former document when compared with the latter and the fact that many of the items in the latter document

pertain to the allegedly unworkmanlike and unacceptable manner of rectification.

10.2. There was a repeated rhetorical question raised by the Respondent's solicitor as to what course the Respondent could have followed in the circumstances in which it found itself. It could, amongst others, have done at least one simple thing. If the Respondent had simply worked in an orderly way through the items comprising 'the Works' to be attended to pursuant to the Terms of Settlement, it would have ascertained that the garage roller door lock was inoperable simply because of a problem with the key. It seems that it didn't do that. In any event, it didn't attend to the problem until 23 March 2005.

10.3 There were issues of appropriate communication channels. Specifically, there were the two clients, their respective solicitors as well as an employee of the Respondent, Mr Tony Coyle and the Respondent's sub-contractors. This mix created issues of its own. For instance, the Applicant's solicitor wrote to the Respondent's solicitor on 18 November 2004 stating in part:

> "Our client has left telephone messages for Mr Tony Coyle on at least the following occasions; namely, 19 March 2004, 30 March 2004, 6 April 2004, 16 April 2004 and 13 May 2004. Our client also wrote via e-mail to Mr Coyle on 1 June 2004".

In turn, the Respondent's solicitor advised the Applicant's solicitor on 19 November 2004 that:

> "Mr Coyle has not been employed by our client for quite some time. Please can she (or you) forward us a copy of the email said to have been sent".

10.4. Despite the apparent expression of frustration by the Applicant's solicitor, it appears and I accept that the Respondent and/or its sub-

contractors attended the site to carry out 'the Works' or other remedial works on at least 7 occasions.

11. It is not possible to canvass in these Reasons all details of evidence and submissions relative to the issue of costs pertaining to the reinstatement proceeding. I have nevertheless had particular regard to the following considerations:

11.1. I refer to and repeat the findings and determinations already made in my orders of 29 March 2005 that:

(i) "The Respondent had breached the Terms of Settlement by its failure to undertake all the works referred to in clause 6 of those Terms by 4.00 p.m. on 10 December 2003".

(ii) "The Applicant …….. has been moved to seek reinstatement of the proceeding to enforce any remedy which may be available pursuant to the application".

(iii) "The Applicant has suffered loss and damage as a consequence of such breach ….."

11.2. The Tribunal's broad role is to dispose of disputes which are the subject of applications before it in as efficient, timely, cost-effective and expeditious a manner as possible. One way of doing this is by way of hearing and determination. Another is by way of alternative dispute resolution leading to settlement of the dispute on Terms of Settlement agreed to by the parties. Compliance by the parties with their respective obligations is an essential element of that alternative process. Non-compliance frustrates and negates proper achievement of the Tribunal's very function and purpose.

11.3. A party which fails to comply with a Term of Settlement without any good reason and causes an application for reinstatement to be made by

the other party should bear the costs of and in relation to at least applying for the reinstatement. It is fair that it does so, particularly having regard to Section 109(3)(b) & (c) of the *Victorian Civil and Administrative Tribunal Act* 1998.

12.1. The first hearing before me on 24 March 2005 was principally directed to whether the application should be reinstated and what was in issue to be heard and determined.

12.2. As to what was in issue, I said in my previous Reasons:

> "8. The Applicant also alleged that she has not received the benefit from a third party (Windsor Homes Pty. Ltd.) of certain alleged entitlements relating to fencing and landscaping pursuant to some arrangements between the Respondent and Windsor Homes Pty. Ltd. Further, that she has not received such because the balance of monies due to be paid to the Respondent in fulfilment of the contract but pursuant to the Terms of Settlement have not been paid and that they have not been paid because they were to be paid only on completion of 'the works' to be attended to pursuant to the 'Terms of Settlement'. The relevant provision is clause 1 of those Terms and is as follows:
>
> *"1. The Applicant will pay the Respondent the sum of $4,125.43 inclusive of costs and interest as follows:*
>
> *1.1 Upon completion of the Works (as defined)*
>
> *1.2 From the sum of $5,625.43 held in the Applicant's solicitors trust account ("the due date")"*
>
> *("the settlement sum")*

and

> 11. The issue primarily before me was therefore that referred to in paragraph 8. In addition, there are related and peripheral issues such as:
>
> (a) The fact that the sum payable to the Respondent by the Applicant pursuant to clause 1 of the Terms of Settlement still has not been paid. (There is no application on foot by the

Respondent in respect of this – the concern is that of the Applicant's solicitor who holds that amount undisbursed in his trust account). This refers to the second reason given by the Applicant for seeking reinstatement (refer paragraph 2).

(b) Whether the sum referred to in '(a)' above can or should be allocated to satisfy any order which may be made by the Tribunal in respect of paragraph 8 or any order for costs in favour of the Applicant should such subsequently be made".

12.3. All evidence pertaining to all aspects, including costs, was adduced on that first day. The manner of presentation of the case was very much within the control of the Applicant's solicitor and for the most part this also governed the Respondent's agenda.

12.4. One may rightly raise an issue whether it was necessary for all the evidence which was canvassed on behalf of the Applicant on that day to be so canvassed in order to determine the base question whether the proceeding should be reinstated. However, the circumstances of that day were that the proceeding had been listed as a 'Small Claim Hearing' – normally a half day or one day hearing. Moreover, on being advised that the last outstanding matter requiring attention, the elusive garage roller door key, had been attended to on the day prior to the hearing before me on 24 March 2005, one may have anticipated the hearing would be a fairly short one relating only to the costs of the reinstatement application, the 'lost opportunity' issue and the other seemingly simple peripheral issues referred to at paragraph 12 above. I expressed that view to the parties early on that first day. Nevertheless in the above circumstances, the adducing of all evidence relating to all issues on that day is understandable.

12.5. The 'costs of reinstatement' issue remained live and was reserved in any event. (Refer paragraph 10 of my Reasons for Decision of 8 September 2005 in relation to the previous proceeding). The 'periferal' issues were

canvassed at less length. In the result, the 24 March 2005 hearing, as well as the subsequent hearings on 26 April 2005 and on 5 August 2005 for a half day, was significantly devoted to the 'lost opportunity' issue which, together with the following aspect, dominated the proceeding.

12.6. There was also significant canvassing on those days in a somewhat repetitive, prolix and seemingly unstructured manner of the general conduct of the parties and in particular that pertaining to their compliance with the Terms of Settlement. This was done presumably with a view to the subsequent determination of the overall costs issue and was initiated more on the part of the Applicant's representative than that of the Respondent who naturally was for the most part in a responding position. The causing of unnecessary disadvantage to another party or responsibility for the unreasonable prolongation of the time taken to complete the proceeding are considerations to which the Tribunal may properly have regard in determining whether it is fair to make a costs order.

13. It was because of the perceived lack of structure and repetition in both the latter stages of the reinstatement hearing and in this costs proceeding that I subsequently requested the parties to each prepare, file and serve brief, succinct submissions summarising their points and arguments in relation to costs.

14. I have taken those submissions into account and also have taken into account all verbal submissions and evidence as well as the authorities to which my attention was directed. It is not possible within the reasonable constraints of these Reasons to canvass and respond to every detail of those. However, in addition to the above observations, I make reference to some other relevant aspects.

15. The ‘lost opportunity’ issue in relation to reimbursement of ‘fencing and landscaping’ costs was initially put on the agenda by the Respondent by way of the original building contract and related documents. Reference was subsequently made to it at the mediation which gave rise to the Terms of Settlement. The Tribunal dismissed the application for remedy or relief in respect of the ‘fencing and landscaping’ issue. A conclusion is not necessarily to be drawn from that mere fact that the seeking of such was so weak as to warrant a costs order against the Applicant for such. As Deputy President Aird observed in the *Gombac Group v Vero Insurance* [2006] VCAT 238, “The mere fact that the builder (in that instance) was successful is not sufficient reason for me to depart from the provisions of Section 109(1).” However, the provisions referring to and providing for the ‘fencing and landscaping’ entitlement are so obtuse, fragmented and convoluted that one may wonder how many persons in the Applicant’s position actually received the ‘fencing and landscaping’ entitlement or could substantiate their entitlement to such in a legal environment.

16. However, it is clear from a perusal of the Reasons for Decision in the previous proceeding that, because of the chain of satisfactions required, and in all the circumstances pertaining at the time, the Applicant’s pursuance of remedy in this regard could never succeed on the basis of a legally sustainable argument. It was always a hopeless trail.

16.1. The reinstatement proceeding was based upon non-compliance with the Terms of Settlement including that pertaining to the ‘fencing and landscaping’ issue. The opening words of the relevant provision and the first of the chain of satisfactions required was “Upon payment of all monies due to the Respondent pursuant to this agreement …..”. All monies due had not been paid. Such were not due to be paid until all works had been done. These had not been done until 23 March 2005. Enforcement of the entitlement in the context of the reinstatement

proceeding could never have succeeded. The attempt was hopeless. The Applicant's attempt to do so was not by way of a reasoned and structured argument which I attempted to elicit from her representative on more than one occasion. The response was to direct my attention to the number of 'references' to the 'fencing and landscaping' entitlement in relevant documentation and to her 'expectation' of it. As I said in paragraph 18 of my previous Reasons for Decision:

> "…..Mr Graham summarised the basis of the Applicant's claim to that amount as being her 'expectation' of it and the various 'references' to it - those in the contract documents as well as the Terms of Settlement. The Applicant's alleged entitlement was not presented in any clearer, better substantiated or more precise terms than that".

17. One cannot help but believe that the Applicant had a particular agenda in this whole proceeding and that this was twofold. In the first instance, it was to demonstrate what it perceived to be the simple failure to get on with the job subsequent to the mediation and attending to all matters requiring attention as soon as possible. In the second instance, it was to highlight and pursue what may have been perceived to have been hung out like a carrot at the contract negotiation phase – namely the 'fencing and landscaping' entitlement. However, except for the canvassing of relevant and reasonably arguable issues, it is inappropriate to use the forum of a Tribunal hearing for such purposes.

18. Likewise, the likelihood of successfully persuading the Tribunal that it should make orders/directions concerning monies the subject of the trust was always hopeless. As I said in paragraph 49 of my previous Reasons for Decision,

> "49. I can see no basis whatsoever for acceding to what I believed to be a suggestion by the Applicant's solicitor that, despite the terms of the trust, I might make some order amending those terms to the end that the sum held in trust might remain

available pending finalisation of this proceeding including any determination and orders as to costs".

19. The above observations, together with those factors referred to in paragraphs 13 and 17 make it fair in my view for the Respondent to not be required to bear the costs of the latter days of the reinstatement hearing and for me to order that these should be paid by the Applicant on a solicitor/client basis.

20. In the 'Applicant's Submissions' of 14 February 2006 and in particular in the 'Chronology of Events' of that Submission, comprising twelve and a half pages of close-typed material, Item 22 refers to an Offer of Settlement made on 6 May 2005. Apart from the fact that no 'evidence' (apart from that reference in the 'Submission') was given to the Tribunal, there is no basis on which I could reasonably find that, as required by Section 112(1)(d), the orders now made by the Tribunal are not more favourable to the other party (the Respondent) than the offer. The Tribunal comes to this view having regard to the terms of the offer itself and Section 112(3). The terms of the offer as recounted in the Applicant's 'Chronology of Events' of 14 February 2006 were as follows:

> *"TAKE NOTICE that, in accordance with Section 112 of the Victorian Civil & Administrative Tribunal Act, the Applicant offers to settle these proceedings on the following terms*:
>
> ***(i) THAT the Respondent pay to the Applicant the sum of Four thousand One hundred and Twenty Five dollars and Forty Three cents ($4,125.43) ("the settlement sum") inclusive of interest and costs and in full and final settlement of the Applicant's claim as described in the Applicant's application herein.***
>
> *(ii) THAT in the event of the Respondent's acceptance of the Applicant's Offer:*
>
> *(A) The Respondent consents to the money presently held in trust by the Applicant's solicitors being paid to the Applicant (or in*

accordance with her instructions) in satisfaction of the Respondent's obligations under paragraph 1:

(B) The Respondent releases the Applicant's Solicitors from all liability in connection with the trust that arose out of the Terms of Settlement between the parties and dated 28 October 2003 ("the Terms of Settlement").

(C) the Respondent covenants not to hereafter bring any proceedings or pursue any claim or demand whatsoever against the Applicant in any way arising from or relating to the Building Contract;

(D) the Applicant agrees to accept the settlement sum in satisfaction of the Applicant's rights under the Terms of Settlement including the breaches of the warranties that form part of the Building Contract pursuant to the provisions of section 8 of the Domestic Building Contract Act 1995, in so far as those rights and breaches are known to exist at the time of the making of this offer and, to that extent, the Applicant must not hereafter bring any proceedings or pursue any claim or demand whatsoever against the Respondent in any way arising from or relating to the Building Contract and/or the Terms of Settlement.

(E) the Applicant shall forthwith file and serve a Notice of Discontinuance of this proceeding.

(iii) THAT this Offer of Settlement shall remain open for a period of 14 days from the date of service of this Notice and not thereafter.

(iv) THAT this Offer of Settlement is made on a without prejudice basis".

21. I have set out above the provisions of the *Victorian Civil and Administrative Tribunal Act* 1998 (Section 109) insofar as they determine costs. Ever since the morning of the first day of the hearing before me, there has always been every intimation that at least the Applicant's application for costs of the reinstatement application itself might receive favourable consideration. I have now canvassed above many of the considerations relevant to the provisions of the Act so far as they pertain to the other issues. I have taken into account all others. I have made clear

in these Reasons my views and findings concerning the matters canvassed and the Applicant's method of canvassing those matters on the latter days of the reinstatement application. Having regard to those and to my previous Reasons for Decision, I find no basis whatsoever on which the Applicant might have expected that the Tribunal would probably make or that there would even be a possibility that it would make an order for costs in her favour. Accordingly, I consider it is also fair that the Respondent should not be required to pay its own costs of the 'costs proceeding' and that these should also be paid on a solicitor/client basis by the Applicant.

22. In the result, having regard to all the above and further to the view expressed at 11.4, in respect of the costs incurred pertaining to the hearing days of 10 February 2005, 24 March 2005, 26 April 2005, and the half day of 5 August 2005 together with the 'costs hearing' days of 14 February 2006 and the half day on 14 March 2006 I find on the merits of the case that it is fair that I order pursuant to section 109 as follows:

(i) The Respondent to pay the Applicant's costs of and in relation to the 'reinstatement hearing' days of 10 February 2005 and 24 March 2005 on a party/party basis. In default of agreement, such costs are to be taxed by the principal registrar pursuant to Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on Scale A of the County Court Scale of Costs.

(ii) The Applicant to pay the Respondent's costs of and in relation to the 'reinstatement hearing' days of 26 April 2005, the half day on 5 August 2005, and the 'costs hearing' days of 14 February 2006 and the half day on 14 March 2006 on a solicitor/client basis having particular regard to Section 109(3)(b) and (c) of the *Victorian Civil and Administrative Tribunal Act* 1998. In default of agreement, such costs are to be taxed by the principal registrar pursuant to

Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on Scale A of the County Court Scale of Costs.

(iii) An issue of the Respondent in relation to costs (refer paragraphs 8.1 and 8.4) reserved.

23. It is a sad fact that I believe the level of costs in early 2005 pertaining to the issue of the application seeking reinstatement was in the vicinity of $577.70.

MEMBER M. WALSH