VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP383/2015

CATCHWORDS

DOMESTIC BUILDING – Costs – whether s 75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* applies when a proceeding is struck out by consent of the parties – s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* - relevant factors to consider – whether costs should be awarded where the conduct of both parties has led to unnecessary costs being incurred.

FIRST APPLICANT	Mr Barry King
SECOND APPLICANT	Ms Donna King
RESPONDENT	Adra Developments & Construction Group Pty Ltd (ACN 149 987 888)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Costs Hearing
DATE OF HEARING	27 October 2015
DATE OF ORDER	6 November 2015
CITATION	King v Adra Developments & Construction Group Pty Ltd (Building and Property) [2015] VCAT 1773

ORDER

1. By consent, the proceeding is struck out.

2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants Mr T M Dowling of counsel.

For the Respondents	Ms G Faba, solicitor.

REASONS

1. This proceeding and the associated proceeding BP384/2015 concern two individual claims made by the owners of two residential properties against the Respondent, arising out of what the Applicants contend is defective domestic building work undertaken by the Respondent (**'the Works'**). In both proceedings, the Respondent contended that it is not the legal entity that undertook the Works. Therefore, it argued that no claim could be maintained against it under the statutory warranties set out under the *Domestic Building Contracts Act 1995* or under any duty owed at common law.

2. On 23 September 2015, I heard an application issued by the Respondent, in which it sought an order that the claims against it be dismissed pursuant to s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**). At the conclusion of that summary judgment application, I determined that there was no factual basis upon which to allege that the Respondent undertook the original Works. Nevertheless, I indicated that there still remained a question as to whether the Respondent subsequently undertook remedial work and whether that remedial work in some way caused or contributed to the loss and damage allegedly suffered by Applicants. Consequently, I refused to dismiss the proceedings but rather, ordered that the Applicants' *Points of Claim* be struck out with liberty to file amended Points of Claim.

3. The Applicants in both proceedings have elected not to re-plead their *Points of Claim* but rather, have decided that they do not wish to further prosecute their respective claims against the Respondent. Accordingly, they seek an order that the proceedings be struck out. The Respondent does not oppose an order being made that the proceedings be struck out, subject to being heard on the question of costs. Consequently, the application before me is limited to an application by the Respondent that the Applicants in both proceedings pay its costs of those proceedings.

HOW SHOULD COSTS BE DETERMINED?

4. There are two basis upon which the Respondent seeks an order that its costs of the proceedings be paid by the Applicants. First, the Respondent contends that it is entitled to an order for costs pursuant to s 75(2) of the VCAT Act. Alternatively, it submits that it is also entitled to payment of its costs pursuant to s109 of the VCAT Act.

5. Section 75 of the VCAT Act states:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion –

(a) is frivolous, vexatious, misconceived or lacking in substance; or

(b) is otherwise an abuse of process.

(2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.

6. It is immediately apparent from the language of s 75(2) of the VCAT Act that the Tribunal's power to order costs under that provision is discretionary and conditional. In that sense, the exercise of the Tribunal's discretion does not crystallise unless the Tribunal has first made an order under s 75(1) dismissing or striking out all or any part of a proceeding.

7. In my view, it is questionable whether any order was made on 23 September 2015 *striking out or dismissing all or any part of the proceeding*. In fact, the applications to dismiss or strike out the proceedings were refused, notwithstanding that orders were made that the Applicants' respective *Points of Claim* be struck out with liberty given to re-draw those documents - so that their claims related to the Respondent's remedial work, rather than the original Works. Nevertheless, the proceedings still remained on foot.

8. The mere fact that the Applicants now seek orders that the proceedings be struck out does not, of itself, enliven s 75(1) of the VCAT Act. The orders which are now being sought are, in effect, analogous to an application for leave to withdraw, pursuant to s 74 of the VCAT Act. In executing an order that the proceeding be struck out, I am not determining that the proceedings are *frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process* but rather, I am giving effect to what the parties have agreed should happen to the proceedings. Therefore, I am of the opinion that the Respondent's application for costs falls to be considered under s 109(2) of the VCAT Act.

9. Even if the power to order costs under s 75(2) of the VCAT Act has crystallised, there is no presumption that costs should follow the event. In *Taylor v Third Szable Holding Pty Ltd*,[1] Deputy President McKenzie observed:

> What then are the circumstances in which s.75(2) applies? In my view that sub-section confers an unfettered discretion to be exercised according to the circumstances of the particular case. If this is so, one should not apply any general rule that costs should follow the event, irrespective of the circumstances of the particular case. I must consider each case on its own merits.[2]

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[1] *Taylor v Third Szable Holding Pty Ltd* [2002] VCAT 402.

[2] Ibid at [20].

10. That said and for the reasons which follow, I would, in any event, refuse to exercise my discretion under s 75(2) of the VCAT Act to order costs under that provision.

COSTS UNDER SECTION 109 OF THE VCAT ACT

11. Sections 109(1), (2) and (3) of the VCAT Act provides as follows:

> **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.

12. It is apparent from the language of s 109(1) that the general rule is that costs do not follow the event and that each party is to bear their own costs in a proceeding. By s 109(2) of the VCAT Act, the Tribunal is empowered to depart from the general rule but it is not bound to do so and may only exercise that discretion if it is satisfied that it is fair to do so, having regard to the matters set out in s 109(3).

13. In *Vero Insurance Ltd v Gombac Group Pty Ltd*,[3] Gillard J set out the steps to be taken when considering an application for costs under s 109 of the VCAT Act:

> [20] In approaching the question of any application to costs pursuant to 109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows -
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

14. The critical issue before me on 23 September 2015 related to the identity of the builder who undertook the original Works. As I indicated in my oral reasons given at the conclusion of the hearing on 23 September 2015, the factual matrix underpinning the dispute was convoluted, which led to confusion over who undertook the original Works. This confusion arose partly because the Respondent and the entity which the Respondent claims did the Works had, at the relevant time, a common director and partly because the entity that actually did the Works could not be definitively identified through a search of documents available in the public domain. The affidavits filed in the proceedings illustrate this point. They disclose the following material facts:

(a) The Works, which comprised the installation of air conditioning equipment to both dwellings, the subject of the proceedings, was undertaken during the period April 2012 to March 2013.

(b) The Works were performed under a subcontract with *Landmark Builders*, who are said to be the head builder, responsible for constructing both dwellings, the subject of these proceedings.

(c) A quotation for the Works dated 5 April 2012 was submitted to *Landmark Builders*. The business entity named on that quotation was *Snowman,* with the stated ABN: 79 683 3270 72.

(d) A tax invoice for the Works dated 26 April 2012 was submitted to *Landmark Builders* by *Snowman*, again stating the same ABN: 79 683 3270 72.

[3] [2007] VSC 117.

(e) A search of the *ABN Lookup* reveals that the ABN: 79 683 3270 72 is held by *The trustee for the THE ADRA FAMILY TRUST*. However, the actual name of that legal entity is not disclosed in any document available in the public domain.

(f) According to the ASIC National Business Name Search:

(i) Adra Enterprises Pty Ltd (ACN 128 275 810) registered and held *Snowman Refrigeration* as a business name between 9 December 2008 until 9 December 2011.

(ii) From 1 March 2013 to date, the business name *Snowman Refrigeration* is held by the Respondent.

(iii) Therefore, during the period 9 December 2011 until 1 March 2013, the business names *Snowman Refrigeration* or *Snowman* was not registered to any legal entity.

(g) Rami Adra was a director of the Respondent during the period 22 March 2011 to 14 August 2013.

(h) In 2014, Rami Adra attended both of the Applicants' premises to undertake rectification work. This proved unsuccessful.

(i) A screenshot of Rami Adra's *Facebook* page taken on 17 September 2015 states that he is *CEO & founder at Snowman.*

(j) A screenshot of Rami Adra's *LinkIn* profile on 17 September 2015 states that he is currently the director/owner of *Snowman Refrigeration & Heating & Cooling.*

(k) On 27 March 2015, Adra Enterprises Pty Ltd was deregistered.

(l) The trust deed for the *Adra Family Trust* names Adra Enterprises Pty Ltd (ACN 128 275 810) as the trustee of that trust.

15. In my view, the identity of the entity which undertook the Works was unclear until discovery of the trust deed for the *Adra Family Trust*. At that point, it was possible to link the ABN on the original quotation and subsequent tax invoice with a legal entity; namely, Adra Enterprises Pty Ltd (ACN 128 275 810), being the named trustee of that trust. However, prior to that time there were no documents in the public domain which disclosed the name of the legal entity which held the ABN stated on the quotation and tax invoice for the Works, save and except that it was the trustee of the *Adra Family Trust*.

16. The situation was exacerbated by the fact that Rami Adra, who was a director of the Respondent at or around the time when the Works were undertaken, answered calls to undertake remedial work. This was purportedly undertaken on behalf of an air-conditioning and heating business which operated under the name *Snowman*, in one form or another.

17. Ms Faba, solicitor for the Respondent, submitted that it was abundantly clear in correspondence dated 6 August 2015 that the Applicants had issued proceedings against the wrong legal entity. That correspondence stated, in part:

> We act for Adra Developments Construction Group Pty Ltd.
>
> Our instructions are that our client never carried out any works at … Richmond ("the property"), nor was our client involved in any way in the matters alleged in your client's points of claim dated 2 July 2015 ("POC").
>
> We are advised by Mr Rami Adra of Adra Enterprises Pty Ltd ("AE"), the following:
>
> 1. Between May 2012 and March 2013, at the request of Landmark Builders ("Landmark"), AE installed air-conditioning to the property;
> 2. At the material times, AE was not a builder within the meaning of section 3(1) of the *Domestic Building Contracts Act 1995 (Vic)* ("DBCA"), but rather, Landmark was the builder;
> 3. AE installed the air-conditioning in accordance with Landmark's specifications; and
> 4. AE never entered into any agreement or arrangement with N & P Developments Pty Ltd
>
> Mr Rami Adra has provided us with copies of the relevant quotations and invoices relating to the works, which we attach. Without addressing the merits of your clients POC on its face, it would appear that your client has brought proceedings against the wrong entity.
>
> In light of the above, should you not confirm that your client will withdraw its claim against our client by 4 PM on Monday, 10 August 2015, our client will immediately apply for an order summarily dismissing your client's application pursuant to section 75 (1) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* ("the Act") on the basis that it is frivolous, vexatious, misconceived or lacking in substance. Our client will also seek costs pursuant to section 75 (2) of the Act. However, should your client confirm that their claim is withdrawn, our client will forbear its rights to apply for costs incurred to date.

18. I do not accept that it was abundantly clear from the content of the above letter that the Respondent was not the legal entity which undertook the original Works. As I have already indicated, the ABN stated on both the quotation and tax invoice does not disclose the holder of that ABN, save and except that it is the trustee of the *Adra Family Trust.* A copy of that trust deed was not attached to that correspondence. That trust deed only surfaced as an exhibit to the affidavit of Mr Moretti, the Respondent's accountant, sworn on 9 September 2015.

19. I accept that once the Applicants were provided with a copy of the trust deed for *Adra Family Trust*, it was possible to ascertain the name of the legal entity which held the ABN stated on both the quotation and tax invoice. However, that was only two weeks before the return date of the Respondent's summary judgment application. No explanation was provided as to why that trust deed had not been provided to the Applicants soon after both applications had been filed in early April 2015 or with the 6 August 2015 letter. The failure to disclose that document clearly led to considerable legal costs being expended by both parties up to the date of the summary judgment application hearing.

20. Although the Applicants can be criticised for failing to bring these proceedings to an end following receipt of the trust deed; equally, the Respondent can be criticised for not disclosing that document earlier.

21. For that reason, I do not consider that it would be fair to order that the Applicants pay the Respondent's costs of the proceedings. As I have already indicated, had the Respondent acted with more diligence in producing the trust deed earlier, then the cloak under which Adra Enterprises Pty Ltd had operated would also have been lifted earlier. In that sense, both parties are responsible for the costs of these proceedings.

22. Therefore, I dismiss the Respondent's application for costs and I will order that there be no costs ordered in these proceedings.

SENIOR MEMBER E. RIEGLER