VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D193/2003

CATCHWORDS

Domestic building, costs, indemnity costs

APPLICANT	Ann Myilly Milankovic
FIRST RESPONDENT	Binyun Pty Ltd
SECOND RESPONDENT	David Plotnik
THIRD RESPONDENT	Vero Insurance Limited (formerly Royal & Sun Alliance Insurance Australia Ltd)
FOURTH RESPONDENT	Gevah Constructions Pty Ltd
FIFTH RESPONDENT	Boroondara City Council (released from proceedings 22/3/2004)
SIXTH RESPONDENT	Michael Herbertson (released from proceedings 22/3/2004)
FIRST JOINED PARTY	CIR Consulting Engineers Pty Ltd (ABN 21 068 197 464)
SECOND JOINED PARTY	Adrian Hensgen
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	4 December 2009
DATE OF ORDER	5 May 2010
CITATION	Milankovic v Binyun Pty Ltd & Ors (Domestic Building) [2010] VCAT 538

ORDER

The First, Second and Fourth Respondents must pay the Applicant's costs of and incidental to the application dated 10 July 2009 and all subsequent costs to be

agreed, but failing agreement to be assessed by the Victorian Costs Court on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr D. Pumpa of Counsel
For First Respondent	Mr A. Downie of Counsel
For Second Respondent	Mr A. Downie of Counsel
For Third Respondent	No appearance
For Fourth Respondent	Mr A. Downie of Counsel
For Fifth Respondent	No appearance
For Sixth Respondent	No appearance
For First Joined Party	No appearance
For Second Joined Party	No appearance

REASONS

1 This proceeding has been determined and costs orders made. The Applicant now applies for her costs of the costs hearing and subsequent events.

THE APPLICATION

2 On 27 October 2009 the Applicant's solicitors made application as follows:

> 1. The First, Second and Fourth Respondents shall pay the Applicant's costs of and incidental to the Applicant's application made by application dated 10 July 2009.
>
> 2. The First, Second and Fourth Respondents shall pay the Applicant's costs of and incidental to this application.

3 Because of an offer made, the First, Second and Fourth Respondents ("Respondents") have sought their costs "relating to the 27 October application."

BACKGROUND

4 The history of this proceeding is given in greater detail in the reasons for my decision of 9 October 2009. Suffice to say that the proceeding has been settled twice, the second time for a monetary sum which was subsequently paid. It has also been reinstated twice – the second time on 27 August 2009 when the Respondents objected to the Applicant's claim for costs of the whole proceeding, necessitating a further hearing on 9 October 2009. On 27 August 2009 I ordered that the Respondents pay the Applicant's costs of that day on County Court Scale D.

5 On 9 October 2009 the Applicant claimed costs under the terms of settlement from the commencement of the proceeding in 2003. The Respondents disagreed with the Applicant's interpretation of the terms of settlement and said that the costs agreed to be paid under them should be from the first reinstatement on 17 July 2008.

6 I found in favour of the Applicant and ordered the Respondents to pay her costs from the commencement of the proceeding in 2003 on County Court scale C as agreed by the parties in the second terms of settlement. The costs I allowed were assessed by Registrar Jacobs on 17 December 2009 at $70,000.

7 I reserved the costs of the application of 10 July 2009 with liberty to apply. At paragraph 14 of the reasons of 9 October 2009 I said:

> The Applicant applied for costs of this application on 10 July 2009 but I was not addressed on this point. It is likely that under s109(3)(c) of the *Victorian Civil and Administrative Tribunal Act* 1998 that [sic] an order for costs should be made in favour of the Applicant in similar terms to order 1 [party-party on County Court Scale C] however as I have not heard submissions I reserve costs of and incidental to this application with liberty to apply.

8 I expressed myself in this way because my preliminary view was that although the Respondent's opposition to the orders sought was at least ill-advised, I was not satisfied that there was clear evidence of the kind of high-handed and contumelious behaviour which frequently attracts an order for indemnity costs. I reserved costs because I thought there might have been an offer to which s112 of the VCAT Act responds, that is, an offer in the nature of an offer of compromise. I have since discovered that there was not.

9 As mentioned above, the Applicant filed her application for costs on 27 October 2009 and it was listed for hearing on 27 November 2009.

10 Seventeen days later, on 13 November 2009, solicitors for the Respondents wrote to solicitors for the Applicant as follows, and copied the letter to the Tribunal:

> On behalf of the first, second and fourth respondents we consent to order number one which was sought by the applicant dated 27 October 2009.

The reference is to the orders quoted in paragraph 2 above. The necessary inference is that the Respondents did not consent to the second order sought, for costs of and associated with the application.

11 On 25 November 2009 the Respondents' solicitors wrote to the Tribunal to ask whether the directions hearing listed for 27 November 2009 would still proceed. The next day the Applicant's solicitors wrote to the Tribunal stating that she sought her costs on an indemnity basis, therefore it was necessary for the directions hearing to proceed.

12 The hearing regarding costs commenced on 27 November 2009 and was adjourned to 4 December 2009 at 9.00 am in part because Mr Downie of Counsel, who appeared for the Respondents said his instructor had not been given grounds of the basis upon which the Applicant sought indemnity costs. Mr Downie was also poorly briefed and had to be provided with copies of earlier affidavits. It was possible that the hearing could have continued later in the day, after Mr Downie had read the material. However Mr Pumpa was due to appear in a compulsory conference in another proceeding commencing that morning and although it was scheduled to start at 10:30 rather than 10:00, there would have been barely sufficient time to deal with the application even if Mr Downie had been properly briefed.

13 I also reserved the costs of 27 November 2009.

BASIS FOR AN ORDER FOR COSTS

14 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 says in part:

s.109:

(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 subsection (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.

15 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should 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 (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

SUBMISSIONS OF 4 DECEMBER 2009

16 Mr Pumpa and Mr Downie appeared again on 4 December 2009. As Mr Pumpa submitted, the general position under s109(1) of the VCAT Act is that each party bears their own costs.

17 I find that it is reasonable that the Applicant receive her costs of and incidental to the hearing of 9 October 2009. The Respondents, by their submissions of 27 August 2009 caused a delay in conclusion of the proceeding and their submissions of 9 October 2009 had very little, if any, merit. The requirements of s109(3)(b) and (c) are fulfilled. The proceeding should have ended on 27 August 2009 and the fact that it did not end then is entirely due to the submissions of the Respondents.

18 The question is whether the costs should be on a party-party basis or on an indemnity basis.

INDEMNITY COSTS

19 Mr Pumpa acknowledged that indemnity costs will only be ordered where there are exceptional circumstances. He said the exceptional circumstances are "the Respondents' actions opposing orders to give effect to terms of settlement freely entered into between the parties" the adjournment of the proceeding on 27 August 2009 and the inaccurate reference in an affidavit by Mr Plotnik, the second respondent, to having paid "all costs in the original proceeding" when, as described in the reasons of 9 October 2009, those costs were for only two hearings.

20 Mr Pumpa also said that the first order applied for by the Applicant on 27 October 2009 could not be agreed to by the Respondents, because it did not specify a scale of costs.

21 As I said at paragraph 9 of the reasons of 9 October 2009, the reason why I did not simply order costs on the day the proceeding was reinstated was because the Respondents submitted that there had already been an order for costs concerning events before the second reinstatement. It was submitted on behalf of the Respondents and then appeared in an affidavit by the Second Respondent which I found "… inadvertently or otherwise … could have misled the Tribunal."

22 Mr Pumpa submitted that I should have regard to the Tribunal's decision in *Theiss v The Metropolis Corporate Centre* [2004] VCAT 1088 at [16] where Deputy President Cremean said:

> A factor of critical importance, as I see it, is, in the words of Woodward J in *Fountain Selected Meats (Sale) Pty Ltd v International Produce Merchant Pty Ltd*[1] whether I can be satisfied that the Applicant's proceeding has been commenced or continued "in circumstances where the Applicant, properly advised, should have known that he had no chance of success". For if so, Woodward J says

[1] (1988) 81 ALR 397 at 400 - 1

> it "must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law". [Emphasis added]

23 Mr Pumpa also referred to *Avonwood Homes v Milodanovic*[2] a proceeding where the respondents were ordered to pay costs having been found to have attempted to deceive the Tribunal, *Baranov v Bronson No 2*[3] where the respondent was also ordered to pay indemnity costs for actions which were "highhanded and meritless". He also referred me to the costs decision of Senior Member Young in *Pratley v Racine*[4] where party-party costs were ordered until an offer to compromise under s112[5] of the VCAT Act was made, and indemnity costs were ordered thereafter.

24 As mentioned above, no-one has told me of any offer to which s112 of the VCAT Act would apply, and the difference between the *Theiss* and *Avonwood* cases and this one is that I am not satisfied that there was a deliberate attempt to mislead, although the possibility remains.

25 In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651Pty Ltd and Anor*[6] Nettle J said that where an order for costs is made in a proceeding before the Domestic Building List they will ordinarily be party-party. He added:

> Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in the Domestic Building List on an indemnity basis. But those occasions will be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the *Supreme Court (General Civil Procedure) Rules* 1996.

26 I have been assisted by Mr Downie's summary of the basis upon which the Supreme Court will consider making an order for indemnity costs, drawn from the decision of Balmford J in *Scholl Nicholson Pty Ltd v Chapman (No 2)*[7]. To further summarise, they are:

i Whether a party has been forced to take legal proceedings entirely through the wrongful or inappropriate conduct of the other party;

ii Whether an action has been commenced or continued in circumstances where the applicant, properly advised, should have known he had no chance of success;

iii Where a party persists in what should, on proper consideration, be seen to be a hopeless case;

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2 [2005]VCAT2205
3 [2004]VCAT1134
4 [2005]VCAT547
5 Given the recent decision of the Victorian Court of Appeal in *Verlado & Anor v Andonov* [2010] VSCA 38, particularly at [47] there is now less support for the view that a party who makes a successful offer to which s112 of the VCAT Act applies is entitled to an order for indemnity costs.
6 [2005]VSCA 165
7 [2001] VSC 462

iv Whether the party against whom indemnity costs are sought has made a false allegation of fraud;

v Particular misconduct that causes a loss of time to the Court and the parties;

vi Commencing or continuing proceedings for an ulterior motive or in wilful disregard of known facts or clearly established law;

vii Making allegations which ought never to have been made or undue prolongation of a case by groundless contentions, and

viii An imprudent refusal of an offer of compromise.

27 The ground I have numbered vii above is close to being satisfied. Had the Respondents and their lawyers considered the history of the proceeding with greater care, they would not have caused the adjournment of the hearing of 27 August 2009.

First mention of indemnity costs

28 As Mr Downie submitted, the first mention of indemnity costs of which I am aware was a letter from the Applicant's solicitors to the Respondents' solicitors on 25 November 2009; two days before the hearing fixed for 27 November. Mr Downie submitted that the Respondents should not have to pay costs at all, because the Applicant failed to state the level of costs sought; the matter could have been dealt with informally between the parties; the Respondents' lawyers consented to order 1; order 2 was unlikely to succeed and the Applicant first communicated her demand for indemnity costs of 25 November at which time her lawyers made no attempt to negotiate.

Statement of level of costs sought

29 If the Applicant had stated in the application of 27 October 2009 that indemnity costs were sought, it would probably have avoided the adjournment of 27 November 2009, because there would have been no reasonable grounds to grant it. Nevertheless, parties coming before the Domestic Building List frequently seek "costs" without stating the type or scale of costs sought and I do not consider that this objection is fatal to the Applicant's application for costs.

Failure to deal informally

30 The failure of the Applicant's solicitors to write to or telephone the Respondents' solicitors seems wasteful, but again, is not fatal to an application for costs. I note that there is a long history between the parties and I make no assumption about whether a letter or telephone call would have been effective. If the Applicant's solicitors considered it would not, it would only have had the effect of adding an unnecessary step to the inevitable application.

Consent to order 1, and order 2 unlikely to be made

31 The Respondents acted properly in consenting to order 1, although the order could not be made in precisely the form sought by the Applicant.

32 When a party obtains an order for costs of an application, it is common that they also get costs incidental to the application. It was always more likely than not that order 2 would be made.

33 In an ideal world, the Respondents would have consented to both orders and the solicitors would have had a brief conversation to work out the precise orders to be made. The world is not ideal. As the Respondents' purported acceptance did not include order 2, it would not have brought an end to this last point of contention between the parties.

Indemnity costs not mentioned until 25 November 2009

34 This late notification of the full extent of the application, whether by oversight or otherwise, was not helpful and contributed to the need to adjourn the costs hearing of 27 November 2009, but is not sufficient to deprive the Applicant of an order for costs.

"FAIR TO DO SO"

35 Returning to the Gillard J's words in *Gombac*, what is fair between the parties? The Respondents made submissions which were very weak and relied on an affidavit which was potentially misleading. On the other hand, there are grounds for criticising the Applicant's conduct with respect to the application of 27 October 2009 and everything that followed. I am therefore not persuaded that an order for indemnity costs is warranted although I am persuaded that costs beyond those contemplated in my reasons of 9 October 2009 are warranted.

36 I consider that it is fair that the Respondents pay the Applicant's costs of and incidental to the application dated 10 July 2009 and all subsequent costs on a party-party basis on County Court Scale D.

SENIOR MEMBER M. LOTHIAN