VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D566/2009

CATCHWORDS

Application for costs of adjourned hearing – subsequent recusal by presiding member - impossible to determine what, if any, costs thrown away until matter heard – application for leave by first respondent to file a counterclaim – relevant considerations – desirability of avoidance of multiplicity of proceedings – ss97 and 98 *Victorian Civil and Administrative Tribunal Act* 1998 - discovery – workable tribunal book.

APPLICANTS	Anthony Donald Morphett Janice Elizabeth Morphett
FIRST RESPONDENT	Skabaw Pty Ltd (ACN 006 056 524) t/as Detailed Homes
SECOND RESPONDENT	KCE Consulting Engineers Pty Ltd (ACN 103 920 341)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	30 May 2011
DATE OF ORDER	7 June 2011
CITATION	Morphett v Skabaw Pty Ltd trading as Detailed Homes and Anor (Domestic Building) [2011] VCAT 1091

ORDER

1. By 30 June 2011 the first respondent may file and serve a counterclaim in the form of Points of Counterclaim (with the fee payable) which shall include fully itemized particulars of the counterclaim, loss and damage claimed, and the relief or remedy sought.
2. By 24 June 2011 the first respondent may file and serve on the applicants a Request for Particulars (to be specified in detail). A notice requesting "the usual particulars" or "the usual details" of some matter or thing shall not be served.
3. By 14 July the applicants must provide answers to any Request for the Particulars.

4. Upon application, if proper, the Tribunal may order that a party, wholly or partly, need not comply with a Request for Particulars and may order costs.

5. By 20 July 2011 the first respondent must file and serve any further expert reports on which it relies which must comply with VCAT PN2.

6. By 22 July 2011 the applicants must file and serve Points of Defence to Counterclaim specifying the material facts relied upon.

7. By 8 August 2011 the applicants and the first respondent must make discovery in accordance with the Rules of Civil Procedure.

8. By 22 August 2011 the first respondent must file and serve any further witness statements.

9. By 31 August the applicants and the second respondent must file and serve their witness statements in reply (if any).

10. By 6 September 2011 the applicants and the second respondent must file and serve any expert report in reply which must comply with VCAT PN2.

11. **The hearing date of 10 October 2011 commencing at 10:00am before Senior Member Walker for 15 days is confirmed.**

12. By 26 September 2011 the parties must advise which witnesses they require to attend the hearing for the purposes of cross-examination.

13. By 26 September 2011 the applicants must file two copies and serve an amended index to the Tribunal Book together with any substitute pages. All references to documents in witness statements included in the Tribunal Book must be to the page numbers of documents included in the Tribunal Book.

14. The costs of the hearing on 2, 3 and 6 May 2011, other than those costs to be paid by the first respondent pursuant to order 2 of the orders dated 6 May 2011, are reserved to be determined following the hearing and determination of this proceeding by the tribunal as constituted for the final hearing, unless otherwise ordered by the tribunal.

15. Subject to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998, the costs of the directions hearing of 20 May 2011 are costs in the cause.

16. The costs of the directions hearing on 30 May 2011 are reserved.

17. Liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants	Mr R A Fink of Counsel
For First Respondent	Mr R Andrew of Counsel
For Second Respondent	Ms R Balfoort, solicitor

REASONS

1 The applicants are the owners of a property in Arthurs Seat and in April 2007 entered into a contract with the first respondent builder for the construction of a two storey home to lock-up. The contract price was $1,498,000. On 4 August 2009 the owners commenced these proceedings claiming that the works had not reached lock-up stage and seeking damages of $705,067 for completion and rectification costs, liquidated damages and a further $14,924.99 for repayment of amounts they claimed they had overpaid. The second respondent engineer was subsequently joined as a party to the proceeding upon application by the builder.

2 This proceeding was set down for a 10 day hearing commencing on 14 March 2011, which was adjourned to 2 May 2011. The builder had been represented by lawyers, who are very experienced in this jurisdiction, from July 2009 until February 2011. Mr Barbargallo, the sole director of the builder, represented the builder until he instructed the builder's current lawyers on or about the second day of the hearing.

3 On 31 March 2011 Mr Barbagallo wrote to the tribunal seeking an adjournment of the hearing listed for 2 May 2011. He was advised by registry staff that it was necessary to obtain the consent of the other parties before the adjournment request could be considered. On 12 April 2011 Mr Barbagallo again wrote to the tribunal requesting an adjournment of the hearing and once again was advised to seek the consent of the other parties. On 18 April 2011 Mr Barbagallo filed an application on behalf of the builder dated 16 April 2010 seeking orders under ss75, 78 and 136 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act'). On 19 April 2011 Mr Barbagallo advised he had faxed a copy of his adjournment requests to the solicitors for the owners and the engineer. He faxed the tribunal again on 21 April 2011 (the day before the Easter break) seeking an adjournment of the hearing and was advised the application would be heard by the tribunal prior to the commencement of the hearing on 2 May 2011

4 The hearing proceeded for the first two days before Senior Member Lothian, following which there was an unsuccessful compulsory conference on 5 May 2011. I understand the builder's current solicitor attended the compulsory conference. On 6 May 2011 the builder's solicitor attended the hearing and applied for an adjournment. The adjournment was granted and Senior Member Lothian adjourned it to a directions hearing before her on 20 May 2011. The builder was ordered to pay the costs thrown away of the applicants and the second respondent of the appearance at the hearing on 6 May 2011, and two days preparation respectively $6,600 and $4,400. Liberty was reserved to the owners and the engineer to seek any further costs thrown away arising out of the adjournment.

5 At the directions hearing on 20 May 2011 Senior Member Lothian recused herself from further hearing the matter and directed the proceeding be listed for a directions hearing on 30 May 2011 before either Senior Member Walker or me to *make directions for the further conduct of the proceeding, to consider the First Respondent's foreshadowed further application to counterclaim and to hear further applications concerning costs as referred to in order 4 of 6 May 2011 and costs of today*. She provided short reasons for her recusal which I set out below, as they are important in the context of the applications which have been made.

> Mr Andrew of Counsel for the First Respondent submitted that I should recuse myself on the basis that certain aspects of my conduct of the proceeding so far could raise a reasonable apprehension of bias against his client. He did not allege actual bias, and was careful to point out the distinction.
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> 1. I accepted Mr Andrew's submissions and in the course of the hearing gave the following examples of instances where there could be a prima facie case for reasonable apprehension of bias:
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>   i. It could be found that I had insufficient regard to the submission of Mr Barbagallo (director of the First Respondent, who appeared for it before me on 2 and 3 May 2011) that he had good reasons for being unable to obtain further reports from the First Respondent's expert, Dr Eilenberg.
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>   ii. It could be found that the Applicants should have been ordered to provide further discovery as sought by the First Respondent on 19 April 2011.
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> 2. Because the question of reasonable apprehension of bias appeared to me to be arguable, I found that the interests of all parties are best served if their time and resources are spent on the substantial proceeding, rather than a potential appeal arising out of the question of whether there is a reasonable apprehension of bias.

6 Mr Fink of counsel continues to appear for the owners. Mr Andrew of counsel appeared on behalf of the builder at the directions hearing on 20 May 2011 and again at the directions hearing before me on 30 May 2011.

7 A number of applications were made during the directions hearing without notice even though there is a well established practice in this list for the making of interlocutory applications. In this regard I refer the parties to paragraph 10 of PNDB1 (2007).

The owners' costs applications

8 At the directions hearing on 30 May 2011 Mr Fink noted the $6,600 the builder was ordered to pay to the owners on 6 May 2011 were for the costs of counsel's appearance on that day and two days preparation for counsel and confirmed the owners were seeking their costs thrown away of the hearing as follows:

- 3 days for instructing solicitor $2,000
- 2 days for counsel $4,400
- 3 days for transcript $1,350

9 The owners also seek their costs of the directions hearing on 20 May 2011.

10 Despite hearing lengthy oral submissions from counsel for the owners, it seems the basis for their claim for costs thrown away occasioned by the adjournment of the hearing is simply that they have been unfairly disadvantaged by the adjournment. Although Mr Fink did not address me about s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') until I expressly invited him to do, that must be the starting point in considering whether I should depart from s109(1) that each party pay its own costs and exercise the tribunal's discretion under s109(2) and make an order for costs. The tribunal's discretion may only be exercised after it has had regard to the matters set out in s109(3) which provides:

> 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;
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> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
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> (v) attempting to deceive another party or the Tribunal;
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> (vi) vexatiously conducting the proceeding;
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> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
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> (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;
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> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

11 The approach to be taken by the tribunal in considering whether to exercise its discretion under s109(2) was considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where he said at [20]:

> The Tribunal should approach the question [of costs] 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. (emphasis added)

12 Although the tribunal may make an order for costs during a proceeding, in my view, other than in the clearest of instances, the discretion under s109(2) should be exercised with caution when considering any application for costs before determination of the substantive issues.

13 Further, as discussed with the parties during the directions hearing it seems to me that any additional costs thrown away were occasioned by Senior Member Lothian's recusal of herself, not by the adjournment of the hearing.

14 If the hearing had proceeded part-heard before Senior Member Lothian it is difficult to conceive of the costs of the first three days of the hearing being costs thrown away. Although Mr Fink submitted that prudent lawyers would advise the builder that the hearing should start afresh, this is no more than mere speculation. Mr Andrew indicated it was not the builder's intention or advice that the hearing should start anew, and he drew my attention to s108(6) of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') which provides:

> if the Tribunal is reconstituted for the purposes of the proceeding, the reconstituted Tribunal may have regard to any record of the proceeding in the Tribunal as previously constituted, including a record of any evidence taken in the proceeding.

Further, I note that s98(1)(c) provides that the tribunal *may inform itself on any matter as it sees fit.*

15 In this instance, transcript has previously been ordered, and I understand has been obtained by the owners at their cost. The tribunal has a copy and presumably, the builder's legal advisors can negotiate with the owners' lawyers to obtain a copy, or can make arrangements to obtain their own copy of the transcript.

16 Until the hearing proceeds it will be impossible to determine what, if any costs have been thrown away. The builder's conduct in requesting an adjournment of the hearing on 31 March 2011 and again on 21 April 2011 are irrelevant to a consideration of these costs applications.

17 It was submitted by Mr Fink that I should exercise the tribunal's discretion because the owners have been disadvantaged by the builder causing an adjournment of the hearing when it obtained legal advice during the hearing[1] and by the builder unreasonably prolonging the proceeding[2]. The owners have been compensated for any disadvantage caused by the

[1] s109(3)(a) (iv)
[2] s109(3)(a)(v)

adjournment by the costs order of 6 May 2011, which I note is subject to an application for leave to appeal to the Supreme Court by the builder. If the tribunal is ultimately satisfied that there are no costs thrown away occasioned by the adjournment, then the owners will not have suffered any disadvantage to which the matters set out in s109(3) would apply.

18 In my view the appropriate order is that the costs of the adjourned hearing be reserved, to be determined at the conclusion of the hearing when the member conducting the hearing will be in a better position to determine if there were any costs thrown away.

Costs of the directions hearing of 20 May 2011

19 The owners apply for an order that the builder pay their costs of the directions hearing on 20 May 2011. As noted above this directions hearing was scheduled on 6 May 2011 to consider the further conduct of the proceeding. However, at the directions hearing on 20 May an application was made on behalf of the builder for Senior Member Lothian to recuse herself, which application she acceded to for the reasons set out above.

20 Mr Fink submitted that the owners were unfairly disadvantaged by the late application for Senior Member Lothian to recuse herself. He drew my attention to a comment made by Mr Barbagallo on the second day of the hearing when he said[3]:

> I'm very pleased with the way the proceedings are being run by yourself, not just – and I'm happy to see the proceedings through, but I really would like to weigh up the options.

21 However, those comments were made by Mr Barbagallo before he obtained legal advice and the application for recusal was apparently made on the advice of his current lawyers. This was an application the builder was entitled to make, and I do not accept this application could or should have been made earlier. This application was made by the builder once it had obtained legal advice, and was made on its behalf by experienced counsel at the first opportunity after its current lawyers were engaged. I am not persuaded this application could have been made on 6 May 2011 when the application for an adjournment of the hearing was granted with the builder being ordered to pay costs as set out above. At that time, the builder's current solicitors had only recently received instructions - within the previous 48 hours or so, and naturally required time to review the file and the transcript before making such a serious application.

22 Accordingly, I am not persuaded it is appropriate that I exercise the tribunal's discretion under s109(2) and make the costs order sought. The costs of the directions hearing on 20 May 2011 should be costs in the cause, subject to s109 of the VCAT Act.

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[3] T137 at lines 20-23

Should leave be granted to the builder to file a counterclaim?

23 The builder's application for leave to file a counterclaim is opposed by the owners. Mr Barbagallo swore an affidavit on 19 May 2011 in which he deposed to his concerns about the manner in which the builder's former solicitors had conducted the proceeding on its behalf. I note that Mr Barbagallo was not cross-examined on the contents of this affidavit at the directions hearing before me on 30 May 2011 and in the absence of contrary evidence, I accept his uncontested sworn evidence.

24 The builder's former solicitors attended the first directions hearing on 17 September 2009. Mr Barbagallo states that he received confirmation from them by letter dated 18 September 2009 that counsel had been briefed to prepare the defence and counterclaim[4]. In that letter they confirm that these are due by 16 October 2009. In his costs agreement counsel confirmed that he was briefed to prepare, amongst other things, the counterclaim.

25 Mr Barbagallo states that the counterclaim was not filed by the due date because when he attended the conference with counsel he was advised that additional documents were required for its preparation, so the defence was prepared with the counterclaim to follow. Mr Barbagallo states that he had further discussions with his former lawyers leading up to the compulsory conference which was scheduled for 24 November 2009 about the preparation of a counterclaim to be produced at the compulsory conference.

26 He continues that he had a further conference with counsel prior to the compulsory conference in which he discussed the Position Paper for the compulsory conference which set out details of the builder's counterclaim. At the end of the compulsory conference orders were made for the filing of amended Points of Claim by the owners by 29 January 2010 and any counterclaim by 26 February 2010. The timetable was subsequently amended and the owners' amended Points of Claim were filed on or about 22 February 2010, with the date by which the builders' defence and counterclaim was to be filed was extended to 6 April 2010[5]. Mr Barbagallo states that he understood a counterclaim had been filed in accordance with the tribunal's orders and that it was not until a telephone conversation with his former lawyer on 3 February 2011 that he discovered that a counterclaim had not been filed. He immediately terminated his former lawyer's services who filed a Notice of Solicitor Ceasing to Act with the tribunal on 4 February 2011.

27 Mr Barbagallo attended the directions hearing on 22 February 2011 when the builder was refused leave to file a counterclaim. Order 1 of those orders is relevant:

> The First Respondent's application to file a counterclaim is dismissed because orders for a counterclaim were made on 17 September 2009,

[4] Affidavit of Tony Barbagallo sworn 19 May 2011 at [11] and "TB-1" (comprised of a bundle of relevant documents and correspondence)
[5] Orders dated 12 February 2010 as amended under s119 of the VCAT Act

> 24 November 2009 and 12 February 2010 and should the First Respondent be given the opportunity to file a counterclaim at this late stage, the hearing date would be lost for the second time. This order does not prevent the First Respondent from taking action against the Applicants in future for matters which are not the subject of any set off.

The hearing scheduled to commence on 14 March 2011 was adjourned to commence on 2 May 2011. It is not clear whether the tribunal was aware of the facts and circumstances as set out in Mr Barbagallo's affidavit of 19 May 2011 when that order was made. In any event I am unable to revisit that order although I note it was made when the hearing date was imminent.

28 Mr Fink submitted on behalf of the owners that they would be disadvantaged if the builder was now granted leave to file a counterclaim because they would have to incur additional legal costs responding to and defending it. As raised with Mr Fink during the hearing, these costs will be incurred whether a counterclaim is lodged in this proceeding or a separate application is lodged. In my view it is desirable to avoid a multiplicity of proceedings wherever practical, and where there is no clear prejudice to a party if leave is granted for the filing of a counterclaim by a respondent. In reality a counterclaim is no more than a cross application with leave being granted to a respondent to file the claim in the same proceeding for administrative and procedural convenience. For instance, where there are separate proceedings parties are often required to file and serve what are effectively duplicate documents. This duplication can be avoided where a counterclaim is filed rather than a separate application.

29 I have noted Mr Fink's evidence from the bar table that the owners are suffering considerable hardship because of the delays and their mounting legal costs. However, these are not matters which I can properly take into account in determining these applications. The tribunal has an obligation under s97 of the VCAT Act *'...act fairly and according to the substantial merits of the case'* and under s98 to comply with the rules of natural justice: simply put, to give everyone who appears before it a 'fair go'. In my view, without there being any obvious prejudice to the owners, such as a further adjournment of the hearing, and particularly noting that the substance of the builder's counterclaim (although perhaps not its entirety) is claimed as a set-off in its defence, I consider it fair to allow the builder to file a counterclaim. Mr Andrews indicated a month would be sufficient.

Discovery

30 Mr Andrew raised some concerns about the adequacy of the owners' discovery and whether they had included all documents in their 'power custody or control' in their Lists of Documents. It seems from a perusal of the file and the previous orders that have been made, that discovery has been an ongoing issue. Whether the rectifying builder's diaries should have been discovered by the owners rather than copies being provided to the

respondents during hearing is not a matter I propose to rule on as I am not aware of the circumstances under which they were produced. However, having regard to the previous orders of the tribunal I consider it appropriate that the owners and the builder be required to make discovery in accordance with the Rules of Civil Procedure. This order does not extend to the engineer.

The tribunal book

31 The tribunal book comprises 7 volumes. Although it includes an index this is lacking in detail. There are numerous duplicate documents and it is difficult to conclude that it is not simply a copy of the discovered documents. The function of a tribunal book is to collate and make available to the parties and the tribunal the discovered documents on which the parties will rely during the hearing. The intention of a tribunal book is to streamline the hearing. Although Mr Andrew urged me to order 'new' tribunal book I am conscious of the time and cost involved in doing so. However, I consider it appropriate to order the preparation of a more detailed index clearly identifying the documents which have been included. Further, where there are references in witness statements to attachments these should be updated so that they are references to documents in the Tribunal Book. For instance, at Tribunal Book pages 387 to 389 there is an attachment to the Amended Witness Statement of Anthony Donald Morphett dated 28 March 2011 which purports to cross-reference documents referred to in his witness statement to attachments to the witness statement. Fortunately, these have not been included in the Tribunal Book. As they comprise five volumes these would have added to the duplication (at the very least) of documents. However, for the witness statement to make any sense it is imperative that documents referred to in it are cross-referenced to the relevant page numbers in the Tribunal Book.

32 Accordingly, I will order that a revised index and substitute pages, clearly identified as such, be filed and served by 26 September 2011. The cost of preparation of these, other than when they refer to additional documents which the builder seeks to have included in the tribunal book shall be borne by the owners.

33 I have amended the dates in the timetable from those suggested by the parties at the directions hearing to allow for discovery. There will also be liberty to apply.

DEPUTY PRESIDENT C AIRD