VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D916/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – s109 *Victorian Civil and Administrative Tribunal Act* 1998 – whether fair to exercise discretion under s109(2)

APPLICANT/FIRST RESPONDENT TO COUNTERCLAIM	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT/ APPLICANT BY COUNTERCLAIM	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs hearing
DATE OF HEARING	6 November 2008
DATE OF ORDER	7 April 2009
CITATION	Seachange Management Pty Lt v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2009] VCAT 618

ORDER

1. The applicant and the first respondent/applicant by counterclaim must bear their own costs of the directions hearings on 10 April 2007.

2. The costs of the applicant and the first respondent/applicant by counterclaim of the directions hearing on 30 April 2007 are costs in the cause.
3. The costs of the applicant and the first respondent/applicant by counterclaim of one half day of the directions hearing on 6 July 2007 are costs in the cause.
4. The costs of the first respondent/applicant by counterclaim and the second respondent to counterclaim of the directions hearings on 4 March 2008 and 13 May 2008 are costs in the cause.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr E Riegler of Counsel
For the First Respondent/Applicant by Counterclaim	Mr B Reid of Counsel
For the Second Respondent to Counterclaim	Mr G De Simone, in person
Other parties excused from attending	

REASONS

1 It is now more than two years since this proceeding was commenced during which time there have been numerous interlocutory applications and no less than ten written decisions have been published. It is therefore unnecessary to restate the history behind the proceeding, suffice to note that these Reasons concern applications for costs by the respondent/applicant by counterclaim, Bevnol, against the applicant, Seachange, and the second respondent to counterclaim, Mr De Simone.

2 Bevnol seeks orders that Seachange pay its costs of the following directions hearings:

a 10 April 2007 - half day

b 30 April 2007

c 6 July 2007 - half day

and that Mr De Simone pay its costs of the following directions hearings:

d 4 March 2008

e 13 May 2008

It seeks such costs on an indemnity basis, and in default of agreement to be assessed on the Supreme Court Scale.

3 It is of course difficult for a member, other than the member who presided at the hearings in respect of which costs orders are sought, to determine whether to exercise the discretion under s109(2) of the *Victorian Civil and Administrative Tribunal Act* 1998. Section 109 clearly provides that each party will bear its own costs unless the tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out in s109(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

4 There can never be any expectation that there will be an order for costs in favour of a successful party. It is incumbent upon an applicant for costs to address the tribunal as to how each of the factors relied on in s109(3) apply to the circumstances of its particular application. In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the tribunal when considering an application for costs:

> 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 having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

Applications for costs orders against Seachange

5 Although invited to do so, counsel for Bevnol did not address me about each of the matters set out in s109(3), simply referring me to his written submissions of 19 December 2007 and 6 June 2008 which I note are succinct.

6 Bevnol was the only respondent to the application filed by Seachange on 21 December 2006. In its Points of Claim filed on 1 March 2007 Seachange included as parties Bevnol's directors, the now second and third respondents. On 16 March 2007 Bevnol filed an Application for Orders/Directions which included an application that the paragraphs of the Points of Claim relating to its directors be struck out. This application was set down for hearing on 10 April 2007. Subsequently, on 4 April 2007 Seachange applied to join Bevnol's directors as parties and this was also set down for hearing on 10 April 2007.

7 Bevnol seeks its costs of and incidental to the directions hearings on 10 and 30 April 2007. It contends that as Seachange subsequently amended its pleadings as against the now second and third respondents, and did not rely on the affidavit material filed in support of the original pleadings, it has incurred costs akin to costs 'thrown away'.

8 Although Bevnol seeks orders that Seachange pay the costs it has incurred, it seems to me that many of the costs were actually incurred by the now second and third respondents in preparing material in opposition to the application for joinder. They are not separately represented, being

represented by Bevnol's solicitors and counsel. By way of example I refer to the affidavit of Bruce Jamieson, one of the directors of Bevnol, sworn 10 April 2007 where relevantly at paragraphs 2 and 3 he states:

> 2. I make this Affidavit on my own behalf and on behalf of Mr Lou Allain whom the Applicant is seeking to have joined as the Second Respondent in these proceedings.
>
> 3. I and Mr Alain each object to being joined as Respondents in these proceedings for the reasons set out in this my Affidavit.

9 Whilst the basis of Seachange's application for joinder changed, and it amended its draft pleadings as against each of the proposed parties (now the second and third respondents), I am unable to speculate as to whether the member who presided at each of the relevant directions hearings would have granted or dismissed the application, had it been heard. In considering an application for costs, particularly in circumstances where I did not preside at any of the relevant directions hearings, it would be inappropriate to speculate about whether Seachange's application for joinder, as then framed, would have been successful.

10 I will consider Bevnol's application in relation to each of the directions hearings in turn.

10 April 2007

11 The directions hearing on 10 April 2007 was convened to hear Bevnol's strike out application set out in its Application for Directions dated 15 March, and filed on 16 March 2007. Seachange subsequently made application to join the now second and third respondent. On the Application for Orders/Directions the party applying is required to estimate the time required to hear the application. Bevnol had estimated the required hearing time for its application as one hour, and Seachange had estimated the required hearing time for its application as half an hour. This was clearly insufficient time and the directions hearing was adjourned to 30 April 2007 with costs reserved.

12 In circumstances where the estimated hearing time for each application was grossly inadequate, I am not persuaded it would be fair to exercise the tribunal's discretion under s109(2) and make any order for costs. Seachange submits that the costs of this directions hearing should be costs in the cause. As application for costs has now been made and I have found that each party contributed to the necessity for an adjournment, it seems to me that the appropriate order is that each party bear their own costs of the directions hearing on 10 April 2007.

30 April 2007

13 At the directions hearing on 30 April 2007 counsel for Seachange indicated it was proposing to amend its pleadings. Counsel for Seachange and Bevnol agreed that it would be expedient for the hearing of Seachange's

joinder application to be adjourned pending the amendments to its Points of Claim. Bevnol sought its costs of the day submitting that it could be implied from Seachange's intention to amend that it knew and accepted that its application for joinder was unlikely to succeed on the current pleading. I note the following comments by the tribunal:

> Whatever their [Seachange's] concern it's a matter for me to determine what order I perhaps would make in proceeding ---[1]

and later:

> … should I join these two people …I couldn't say definitely not and I couldn't say I definitely would …[2]

Similarly, I cannot second guess the order that would have been made had Seachange's application for joinder been heard on that day.

14 The tribunal then made orders and directions for the filing of Amended Points of Claim by 28 May, Points of Defence, and by separate document, Bevnol's counterclaim by 8 June, and Points of Defence to Counterclaim by 29 June and adjourned the hearing of the applicant's application for joinder, and the respondent's application for further particulars to 6 July, allowing one day for the hearing. Any application for joinder by Bevnol was to be made by 22 June, and any further material in support of its application for joinder was to be filed by Bevnol by 29 June. The following orders, reflecting the tribunal's comments set out above, are relevant to this application:

> 7. Since I have heard no argument in regard to either of the current applications I am unable to decide now whether I would have made an order for joinder as sought by the Applicant or made an order for further particulars as sought by the Respondent. Consequently, the costs of both applications are reserved for determination on 6 July 2007 as aforesaid.
>
> 9. The costs of today's hearing are reserved.

15 As I understand the orders made by the tribunal and the comments made by the senior member during the directions hearing, it was his intention to reserve the costs of the directions hearing, and adjourn the costs of the joinder applications to 6 July 2007. After confirming that the costs of the joinder applications will be reserved for determination on 6 July 2007 he specifically confirmed:

> The costs of today will be reserved. This is essentially the directions hearing…[3]

16 Although it was suggested by Mr Reid, counsel for Bevnol, that the primary reason for the adjournment of the directions hearing was the foreshadowed amendment to Seachange's pleadings as against the proposed parties, I note

[1] T44: 24-25
[2] T63:16-17
[3] T65:11-12

that at the hearing on 6 July 2007 he confirmed that the joinder applications had been adjourned off to 6 July 2007 because of an understanding between him and Mr Riegler, counsel for Seachange[4]

17 As the hearing of both applications was adjourned I am not persuaded it would be fair to exercise the tribunal's discretion under s109(2) and order Seachange to pay Bevnol's costs. However, noting that directions were made for the further conduct of the proceeding I consider the fair order is that the parties' costs of the directions hearing on 30 April 2007 be costs in the cause.

6 July 2007

18 Bevnol applies for its costs of half a day of the directions hearing on 6 July 2007. It contends that half a day was taken up with an application for an adjournment by Seachange. However, the hearing of Bevnol's application for production of certain documents by Seachange apparently commenced at 12.30 p.m. and went through until 1.20 p.m. when it was adjourned until 2.15 p.m.[5], The directions hearing did not finish until after 5 p.m. At page 203 of the 223 page transcript Mr Lustig, solicitor for Seachange observed that it was *'almost five o'clock and I'm still here'*[6]. Further there was a short break in the morning session. Also, Order 1 records:

> The parties consent to the joinder applications, being applied for by both parties, being the Applicant and the First Respondent, being adjourned to the directions hearing of 28 August 2007.

19 The only reference to any application for an adjournment in the orders made on that day is in order 2 refusing an application for an adjournment by the proposed party, Mr De Simone. The tribunal also ordered:

> 11. The Applicant will pay the First Respondent's costs of one half a day of this directions hearing fixed in the sum of $2,200.00, such costs to be paid on or before 6 August 2007; the costs of the adjourned applications for joinder incurred this day are reserved until the reconvened directions hearing of 28 August 2007 and the time for the hearing of the matters set out in Order 7 of the orders of 30 April 2007 are reserved to the same hearing.

20 I have read the relevant extracts from the 223 page transcript of this directions hearing. Mr De Simone's application for an adjournment, which was ultimately refused, was caught up in a general consideration of whether the joinder applications could and should be heard on that day, or whether they should be adjourned. When it was decided that Seachange's application for joinder should be adjourned to August, it was considered expedient that Bevnol's application for joinder also be adjourned.

[4] T7:15-19
[5] T174:22-25
[6] T203:4-5

21 On that day directions were otherwise made for the further conduct of the proceeding including, upon application by Bevnol, orders for the production of various documents by Seachange and third party discovery under s81 of the *VCAT Act*. Bevnol's application for joinder was finally heard on 28 August 2007 when the second third and fourth respondents to counterclaim were joined. Seachange's application for joinder was not finally determined until 13 May 2008 when the directors of Bevnol were joined as the second and third respondents.

22 I am not persuaded it would be fair to exercise the tribunal's discretion under s109(2) and decline to do so, but consider it appropriate that the Bevnol's and Seachange's costs of one half a day on 6 July 2007, otherwise be costs in the cause.

Application for costs to be paid by Mr De Simone

4 March and 13 May 2008

23 Bevnol seeks orders that Mr De Simone pay its costs of 4 March and 13 May 2008. It relies on the matters set out in s109(3)(a), (b) and (c). The directions hearing on 4 March 2008 was convened by the tribunal to hear any further submissions in relation to Seachange's application for joinder. The parties were required to attend. Whilst the directions hearing was adjourned and then reconvened on 13 May 2008 so that the tribunal could hear and consider Mr De Simone's explanation for having left the directions hearing on 4 March 2008, that directions hearing was not concerned only with this discrete issue. Mr De Simone's application that the senior member disqualify himself was heard and dismissed, the directors of Bevnol were joined as the second and third respondents, and directions were made which included orders for the filing and service of Amended Points of Counterclaim by Bevnol. Even if the 4 March directions hearing had not been adjourned, in all probability there would have been a further directions hearing, following the joinder of the second and third respondents, so that directions could be made for the further conduct of the proceeding. In particular it would have been necessary for Bevnol to obtain leave to file and serve Amended Points of Counterclaim.

24 In circumstances where Judge Ross, then Acting President, ordered the tribunal be reconstituted by order dated 18 July 2008, having been satisfied that Mr De Simone had been denied procedural fairness on 4 March and 13 May 2008, I am not persuaded that it would be fair to exercise the tribunal's discretion under s109(2), even if I were satisfied that I should otherwise do so having regard to the matters set out in s109(3), which I am not.

25 Once again, I consider the fair order is that Bevnol's and Mr De Simone's costs of these two directions hearings be costs in the cause.

DEPUTY PRESIDENT C. AIRD