VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO.BP184/2014

CATCHWORDS

Domestic Building; applicant's entitlement to costs following successful defence of a respondent's application to strike out under s 75 of the *Victorian Civil and Administrative Tribunal Act* 1998.

APPLICANT:	Ms Christina Tsobanis
FIRST RESPONDENT:	Mr Chris Katsouranis t/as CT Properties
SECOND RESPONDENT:	BCG (AUST) PTY LTD (ACN 114 332 017)
THIRD RESPONDENT:	Mr John Richardson
FOURTH RESPONDENT:	D&L Bosnar Plumbing Pty Ltd (ACN 122 666 246)
FIFTH RESPONDENT:	Mr Peter Bozinovki
WHERE HELD:	Melbourne
BEFORE:	Member C Edquist
HEARING TYPE:	Summons for Directions
DATE OF HEARING:	12 June 2015
DATE OF ORDER:	25 August 2015
CITATION	Tsobanis v Katsouranis trading as CT Properties (costs) (Building and Property) [2015] VCAT 1311

ORDERS

1. The first respondent must pay the applicant's costs of defending the first respondent's application to strike out her claim, made under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*. Those costs, if not agreed, are to be assessed by the Costs Court on the standard basis pursuant to the County Court Scale.
2. The third respondent must pay the applicant's costs of defending the third respondent's application to strike out her claim, made under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998*. Those costs, if not

agreed, are to be assessed by the Costs Court on the standard basis pursuant to the County Court Scale.

MEMBER C EDQUIST

APPEARANCES:

FOR THE APPLICANT	Mr J Gray, Solicitor
FOR THE FIRST NAMED RESPONDENT:	Mr T Mitchell of Counsel
FOR THE SECOND NAMED RESPONDENT AND THE FORMERLY NAMED RESPONDENT MR B ROMANOVSKI:	Mr S Watters of Counsel
FOR THE THIRD NAMED RESPONDENT AND THE FORMERLY NAMED RESPONDENT NORTHERN BUILDING SURVEYING SERVICES PTY LTD:	Mr S Bird of Counsel
FOR THE FOURTH NAMED RESPONDENT:	Mr D Bosnar in person
FOR THE FIFTH NAMED RESPONDENT:	No appearance

REASONS

Introduction

1 On 7 August 2014, the applicant Christine Tsobanis commenced proceedings in the Tribunal against a number of parties including the first respondent, Mr Chris Katsouranis trading as C T Properties, and the third respondent, Mr John Richardson.

2 On 6 March 2015, I heard applications by Mr Katsouranis and Mr Richardson for orders under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that the respective proceedings against them be summarily dismissed or struck out.

3 On 26 May 2015, the two applications were dismissed.

4 This proceeding was listed for a directions hearing at 2.15pm on 12 June 2015. On that day a number of applications for costs were made. Some of these were dismissed on the day, but the Tribunal reserved its decision on:

(a) Ms Tsobanis' application that Mr Katsouranis should pay her costs of the successful defence of his s 75 application; and

(b) Ms Tsobanis' application that Mr Richardson should pay her costs of the successful defence of his s 75 application.

5 I now give my decision in respect to those two applications.

Tribunal's power to award costs

6 This is not a case where a respondent has successfully applied to have the applicant's case summarily dismissed, thereby enlivening the discretion of the Tribunal under s 75(2) to award compensation to the successful respondent. If this was such a case, the Tribunal could have awarded the successful respondent its costs by way of compensation. See *Graham v McNab* (Building and Property) [2015] VCAT 980.

7 Here, Ms Tsobanis has successfully defended a respondent's s 75 application. Section 75(2) is not available to her as an avenue to claim her costs, and she must seek costs under s 109 of the VCAT Act.

Section 109 of the VCAT Act

8 Section 109(1) of the VCAT Act creates a default position, which is that each party in a proceeding in the Tribunal is to be their own costs. However, the Tribunal can order that a party pay all or a specified part of the costs of another party pursuant to s 109(3), if the Tribunal is satisfied that it is fair to do so, having regard to a number of specified factors. The relevant provisions in s 109 are:

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 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.

9 In *Vero Insurance Ltd v Gombac Group Pty Ltd* (2007) 26 VAR 354; [2007] VSC 117 Gillard J set out the approach to be followed in such a case:

> In approaching the question of any application for costs pursuant to s 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.

Ms Tsobanis' application for costs against Mr Katsouranis

10 Ms Tsobanis relied on two criteria set out in s 109(3), namely:

(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.

11 Ms Tsobanis referred to a third criterion, which appears in s 109(3)(c), namely, 'any other matter the Tribunal considers relevant'. However, she did not identify any other matter which might be relevant, so no further consideration need be given to that particular matter.

12 In respect of s 109(3)(c), Ms Tsobanis says that:

(a) There are many decisions of the Tribunal which demonstrate that the threshold for a successful strike out application is set at a high level. It is a serious matter for the Tribunal, at the interlocutory stage, to deprive a party of the chance to have their claim heard. Reference was made to some of those decisions including *Norman v The Australian Red Cross Society* [1998] 14 VAR 243.

(b) Each of the bases upon which Mr Katsouranis argued that the Applicant's claim against him should be struck out summarily turned on factual matters.

(c) As the decision of the Tribunal was that the factual issues would have to be determined on evidence at the hearing, an application based on factual matters had no prospect of success, or a 'high risk' of failure.

13 In respect of s 109(3)(d), Mr Gray submitted that as the application was complex, this factor should be taken into account.

The submissions made on behalf of Mr Katsouranis

14 Mr Katsouranis argued that the usual rule in the Tribunal, which is that each party should bear their own costs, should prevail. This submission, of course, begs the question as to whether s 109(3) applies.

15 Mr Katsouranis also says that his s 75 application, although unsuccessful, was not completely unmeritorious. Each argument relied on remains to be considered at a hearing.

16 I do not accept this submission. The relevant point is that his s 75 application was unsuccessful. What might happen at a hearing is immaterial.

17 Thirdly, Mr Katsouranis says that if the matter was being heard in the Supreme Court he would be arguing that the appropriate order would be that each party should bear their own costs, or costs should be in the cause, because he has been partly successful. By this, he means he has been successful on the pleadings summons which was raised at the same time as his unsuccessful strike out application.

18 Ms Tsobanis responded to this argument by asserting that a pleading summons should be distinguished from a s 75 application, as they are very different matters. Furthermore, the time taken to prepare for a pleading summons, which might be two hours, is very different to the significant time required to prepare for the defence of a s 75 application.

19 I accept Ms Tsobanis' contention that an application regarding a pleading is not to be equated with a s 75 strike application. I note also that the attack on Ms Tsobanis' pleading in March 2015 was made as a secondary application in the event the primary (s 75) application failed.[1]

20 Finally, Mr Katsouranis referred to an old Supreme Court decision, *Dawson v Watson* (1929) VLR 263, which he said was authority for the proposition that on a summons for final judgment there was no general rule that a party who fails should always pay their own costs.

21 In my view, *Dawson v Watson* is of little relevance. While the case clearly rejects the proposition that there is a general rule that a plaintiff who fails on a summons for final judgment should always bear the costs of the summons, it does not create a rule to the opposite effect. Rather, Macfarlan J emphasised that 'Each case must depend on its own facts'. Secondly, given that costs in the Tribunal in the present proceeding are governed by s 109 of the VCAT Act, a case decided under the Rules of the Supreme Court of Victoria applicable in 1929, is of limited assistance.

Discussion of the two criteria in s 109(3) relied on by Ms Tsobanis

22 As discussed, the first criterion raised for the Tribunal's consideration was that found in s 109(3)(c), namely, the issue of:

> 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.

23 To assess the applicability of this criterion, it is necessary to consider each of the contentions relied on by Mr Katsouranis in making his s 75 application.

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[1] Mr Katsouranis' submissions dated 11 February 2015, paragraph 25.

24 One submission made by Mr Katsouranis was that he has been released by Ms Tsobanis. Reliance was placed by him on a release dated 12 March 2014. I addressed this argument at length in my reasons for decision dated 26 May 2015 ('Reasons'). In summary, I said that a number of questions were raised. I concluded:

> They are matters for Mr Katsouranis to raise in his defence. They should be the subject of evidence and argument in a hearing. The fact that they are issues to be considered makes it clear that a strike out order should not be made in Mr Katsouranis' favour at this point.[2]

25 Mr Katsouranis had a further argument, based on the application of the rule in *Weldon v Neal* (1887) 19 QBD 394, which precludes the making of an amendment to a pleading which would have the effect of introducing a cause of action in respect of which the relevant limitation period has expired.

26 Mr Katsouranis' submissions referred to the full Court of the Supreme Court of Victoria in *Ruzeu v Massey Ferguson (Aust) Ltd* [1983] VR 733 at 738, which held that to plead a cause of action not contained in an endorsement of claim amounts to making a new claim that attracts the operation of the rule in *Weldon v Neal*.

27 The submission concluded with the contention that new claims based on reports by Russell Brown and Tom Brown have been made by Ms Tsobanis in the Points of Claim, and they cannot now be brought because they were time barred.[3]

28 Mr Katsouranis placed some emphasis on the remark I made in my reasons that:

> '[i]nsofar as Mr Katsouranis' argument is based on the proposition that a VCAT application form is akin to an endorsement of the claim in a Supreme Court Writ, I comment that there may be something in the point'.[4]

29 I consider that that Mr Katsouranis took false comfort from this remark, because I then observed that:

> the question of whether the Points of Claim contain claims which are outside the original set of claims referred to in the application is a question of fact to be determined at a hearing.[5]

30 I went on to say:

> Prior to a hearing, Mr Katsouranis will need to file a defence which sets out the claims which he says are 'new' in the sense that they are outside the set of claims referred to in the application. Ms Tsobanis

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2 Reasons, paragraph 92.
3 Reasons, paragraph 94(g).
4 Reasons, paragraph 100.
5 Reasons, paragraph 101.

> can then reply to the defence. Evidence can then be introduced by the parties at the hearing to support their respective positions.[6]

31 Having reviewed my reasons for dismissing Mr Katsouranis' application under s 75, I accept Ms Tsobanis' submission about the relevant strengths of the parties' positions. I think the s 75 application always had a high risk of failure. I find that s 109(3)(c) applies.

32 Turning to s 109(3)(d), I agree that the s 75 application was complex. The complexity is reflected in the analysis of Mr Katsouranis' submissions set out in my Reasons. I find this complexity to be a factor which weighs in favour of an award of costs because it was necessary for Ms Tsobanis' lawyer to prepare thoroughly in order to successfully defend the strike out application.

Finding in respect of Ms Tsobanis' application against Mr Katsouranis

33 Having regard to my conclusions regarding the applicability of the factors set out in s 109(3)(c) and (d) of the VCAT Act, I find that it is fair to order that Mr Katsouranis should pay Ms Tsobanis' costs of defending Mr Katsouranis' s 75 strike out application.

Assessment of Costs

34 Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules* 2008, which came into effect on 30 January 2015, provides:

> Unless the Tribunal otherwise orders, if the Tribunal makes an order as to costs, the applicable scale of costs is the ***County Court costs scale*** as defined in Rule 1.13 of Chapter I of the Rules of the County Court.
>
> **Note**
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> Chapter I of the Rules of the County Court defines ***County Court costs scale*** to mean a fee, charge or amount that is 80 per cent of the applicable rate set out in Appendix A to Chapter I of the Rules of the Supreme Court.

35 If the parties cannot agree on the quantum of costs to be paid by Mr Katsouranis, there will have to be an assessment in the Costs Court on the County Court costs scale.

Indemnity or Standard Costs?

36 Ms Tsobanis argued that she should receive an indemnity for two thirds of her total costs of resisting the s 75 applications made by Mr Katsouranis, Mr Richardson and BCG, given that she had successfully defended two of the three applications. However, she provided no justification for this apportionment, and I do not think such an apportionment is warranted.

37 I find that as Mr Katsouranis' application had no real prospect of success, an award of costs on an indemnity basis is warranted. However, Mr Gray will have to review his file and isolate the relevant costs.

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[6] Reasons, paragraph 102.

Application for costs against Mr Richardson

38 Ms Tsobanis, in respect of her claim for costs against Mr Richardson, relied on the same criteria as she had relied on against Mr Katsouranis, namely s 109(3)(c) and (d).

Mr Richardson's arguments

39 Mr Richardson relies on the usual rule as to costs arising under s 109(1). He also says that he has been partially successful in the sense that a number of the arguments he relied on remain to be dealt with at the hearing.

40 A further point made was that in my Reasons I noted that although Mr Richardson could understand the pleading against him, I agreed that the claim could be better particularised, and so there had been a win 'of sorts' on the pleading application. Overall, it was said that sufficient complexity existed for Mr Richardson to say that s 109(3) should not be engaged.

Consideration of Mr Richardson's arguments

41 If s 109(3) applies, then the usual rule as to costs arising under s 109(1) will be displaced.

42 As to the contention that the underlying arguments put forward by Mr Richardson were respectable in the sense that they still will have to be addressed at the hearing, the key issue is that the s 75 application failed. What happens at the hearing will be irrelevant to today's issue which is who is to pay the costs of the s 75 application.

43 As to the pleading application, all that needs to be said is that Mr Richardson's attack on the pleading, made as part of the s 75 application, failed.

Discussion of the two criteria in s 109(3) relied on by Ms Tsobanis

44 Under s 109(3)(c), the issue to be considered is: 'the relative strengths of the claims made by each of the parties'.

45 Mr Richardson's first argument was that the report he prepared is a report prepared in respect of s 137B of the Building Act, and that the preparation of this report is not 'building work' for the purposes of a building action under s 134 of the *Building Act 1993*. I rejected this contention.

46 Mr Richardson also sought a strike out on the basis that the allegations against him are vague and embarrassing. I considered that this proposition was not made out as I considered that Mr Richardson could understand the claim being made against him, even though there was clearly scope for particularisation of each of the allegations.[7]

47 A further contention put forward by Mr Richardson was that the claim by Ms Tsobanis against him was hopeless because she did not rely on his report as she subsequently received a report from BSS Design Group, and it

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[7] Reasons, paragraph 117.

was on the basis of that report she purchased the property. Also, it is said that on the basis of a second report from BSS, she then settled with Mr Katsouranis for $25,000.00.

48 I acknowledged that there may be something in these arguments but the relevant evidence needed to come out and there must be a hearing about the issues. This meant the argument did not justify a strike out order under s 75 of the VCAT Act.[8]

49 Finally, Mr Richardson said the claim against him is statute barred. This was merely asserted, but not argued properly, let alone demonstrated. I said the issue would have to be determined at a hearing.[9]

50 For all these reasons, Mr Richardson's application pursuant to s 75 of the VCAT Act for summary dismissal of the claim against him was itself dismissed.[10]

51 Some of the arguments made by Mr Richardson were in a different category to those run by Mr Katsouranis. The first and second arguments were legal in nature. They did not fail because they turned on facts which would have to be determined at a hearing. However, in my view, they were on their face unsustainable. The third argument was tenable on its face, but its success or failure will have to be established at a hearing, and so a s 75 application based on it alone was doomed to failure. The fourth argument, regarding the claim being time barred, was merely put as a proposition at the hearing on 6 March 2015 but was not articulated, which perhaps reflects its underlying weakness. In any event, it remains a matter for determination at a hearing.

52 Not one of the four contentions relied on by Mr Richardson was an appropriate basis to make a s 75 application. The position of Mr Richardson was not improved by bundling the submissions together, and I consider that the application was doomed to fail. I accordingly find that s 109(3)(c) is engaged because of the relative weakness of Mr Richardson's position.

53 Turning to s 109(3)(d), I agree that Mr Richardson's s 75 application was complex. It was based on four separate arguments, each of which required analysis. I find this complexity to be a factor which weighs in favour of an award of costs because it was necessary for Ms Tsobanis' lawyer to prepare thoroughly in order to successfully defend the strike out application.

Finding in respect of Ms Tsobanis' application against Mr Richardson

54 Having regard to my conclusions relating to the applicability of the factors set out in s 109(3)(c), and (d) of the VCAT Act, I find that it is fair to order that Mr Richardson should pay Ms Tsobanis' costs of defending Mr Richardson's s 75 strike out application.

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[8] Reasons, paragraph 119.
[9] Reasons, paragraph 120.
[10] Reasons, paragraph 121.

55 As I consider that Mr Richardson's s 75 application had no real prospect of success I think an award of costs on an indemnity basis is warranted. Those costs will have to be assessed by the Costs Court on the County Court costs scale, pursuant to Rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008*, if they cannot be agreed.

MEMBER C EDQUIST