VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D176/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, costs and withdrawal of proceedings, offers of compromise, offers under ss112-115 of the *Victorian Civil and Administrative Tribunal Act* 1998, unsolicited submission after hearing, relevant binding decision after hearing, scale of costs

[2006] VCAT 640

APPLICANT	Grant Wharington
FIRST RESPONDENT	Vero Insurance Limited previously known as Royal & Sun Alliance Insurance Australia Limited
SECOND RESPONDENT	Stanley James Best
THIRD RESPONDENT	Marcia Rosalyn Best
FOURTH RESPONDENT	Boral Window Systems Limited
FIFTH RESPONDENT	The Truss Works (Vic) Pty Ltd
SIXTH RESPONDENT	Peninsula Prefabs Co
SEVENTH RESPONDENT	Eliza Designs Pty Ltd (ACN 006 888 777)
EIGHTH RESPONDENT	Nepean Building Permits and Consultants (A Firm)
NINTH RESPONDENT	James Sheedy
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	8 March 2006
DATE OF ORDER	19 April 2006

ORDERS

1. The Fourth Respondent must pay the costs of the Seventh Respondent, including reserved costs, from and including 27 October 2005. In default of agreement, such costs are to be assessed by the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on County Court Scale D. In assessing the costs the Principal Registrar shall

take into account that some costs may be shared between this proceeding and one or more of proceedings D175/2005, D512/2003 and D597/2003.

2. The Fourth Respondent must pay the costs of the Eighth and Ninth Respondents, including reserved costs, from and including 27 October 2005. In default of agreement, such costs are to be assessed by the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on County Court Scale D. In assessing the costs the Principal Registrar shall take into account that some costs may be shared between this proceeding and one or more of proceedings D175/2005, D512/2003 and D597/2003.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	No Appearance
For the First Respondent	No Appearance
For the Second Respondent	No Appearance
For the Third Respondent	No Appearance
For the Fourth Respondent	Mr C Harrison of Counsel
For the Fifth Respondent	No Appearance
For the Sixth Respondent	No Appearance
For the Seventh Respondent	Mr D Klempfner of Counsel
For the Eighth Respondent	Mr M Whitten of Counsel
For the Ninth Respondent	Mr M Whitten of Counsel

REASONS

1. This is one of four proceedings, which in turn are part of a larger group, concerning leaking windows at Patterson Lakes, Victoria. The substantive matters have settled or been withdrawn. This hearing related to applications for costs by the Seventh Respondent ("Eliza Designs") and the Eighth and Ninth Respondents ("the Surveyors") against the Fourth Respondent ("Boral Windows"). My task is made difficult because the merits of the substantive application and cross applications have not been determined. The following discussion of some aspects of the involvement of the Seventh, Eighth and Ninth Respondents should not be taken as an indication of what would have occurred if the matter had gone to a hearing, but only as an indication of whether it is reasonable to make an order that the Fourth Respondent should pay costs and that the Seventh, Eighth and Ninth Respondents should receive them.

2. On 14 April 2005 the Tribunal ordered that any application by Boral Windows for joinder of any other party should be made by 2 May 2005.

3. On 26 May 2005 Deputy President Macnamara granted Boral Windows leave to join Eliza Designs and the Surveyors to the proceedings. It was alleged by the builder that Boral Windows was responsible for the water ingress into the Second and Third Respondents' home. Boral Windows in turn, pleaded that if the claims against it were proven, then Eliza Designs and/or the Surveyors were obliged to contribute to, or indemnify Boral Windows for, damages payable.

4. Boral Windows alleged that Eliza Designs specified a wind category that was too low for the geographic location and that the Surveyors failed to

discover this when certifying the design for construction, and failed to discover it again when issuing a certificate of occupancy for the home.

5. All parties concede that the wind category nominated by Eliza Designs, which formed part of the design approved by the Surveyors, was inadequate. The design carried a box with three wind categories printed in it, two of which were 33 metres/sec, (or 650 pascal) and 41 m/second (or 1,000 Pa). The other two figures were crossed out, leaving 33 metres/sec. Boral Windows' expert, Mr Ric Bonaldi, provided the opinion that the correct classification was 1,000 Pa.

6. Nevertheless, it is said on behalf of Eliza Designs and the Surveyors, that Boral Windows did not have a claim against them because the windows actually ordered and supplied were not the lower 650 Pa windows, but 1,000 Pa windows. It follows that although the windows, if supplied as designed, might have led to liability, they were not so supplied, therefore the chain of causation was broken between alleged breach of duty of care and the loss or damage. Mr Harrison for Boral Windows asserted that the windows, as designed, were supplied, but if this assertion is correct, it does not appear to have been the basis of Boral Windows' conduct of the case. It also appears inconsistent with the Bonaldi report discussed below.

Settlement and withdrawal

7. The proceeding was settled between most parties as a result of a compulsory conference conducted in November 2005 and on 15 December 2005 Boral Windows was granted leave "to discontinue" against Eliza Designs and the Surveyors. Costs were reserved.

8. The Seventh, Eighth and Ninth Respondents assert that the report of 13 September 2005 of Mr Bonaldi, the expert for Boral Windows, was of

critical importance in finalising the proceedings against them. At page 3 he said:

> *"My opinion is that the requirements for 1000 Pa windloading designs is the correct one and the approval, by the Building Surveyor, of windows at 650 Pa is not correct as stated by the building designers on their drawings. Under AS2047.1 and .2 the windows were to pass a test of 1000 Pa and a water penetration test pressure of 150 Pa.*
>
> *I have been provided with details of the windows provided to the Builder* ***which indicates that they passed tests to 1000 Pa for wind loading and water penetration to 150 Pa****."*[*]

And at Page 7 he said:

> *Summary of opinion*
> *(a)* ***The windows as fabricated and delivered to the site for erection and installation by the builder are not the cause of the current water entries into the building****. The main cause of the water entry is that the exterior walls containing the openings for the very large window frames have excessive lintel deflections which now bear on the windows and have ripped the outer cement sheeting in places.*
> *(b) The structural adequacy of the windows/doors … is not compliant with the BCA. The vertical mullion sections chosen by the fabricator were not the one that are needed to achieve the 1000Pa windloading."*

9. It is remarked in passing that Mr Bonaldi's candid and clear report is admirable.

10. Mr Horan of the solicitors for Eliza Designs, made an affidavit on 10 February 2006. He stated, among other things, that he received a copy of the Bonaldi report from solicitors for Boral Windows on 16 September 2005, that on 26 October 2005 his firm sent a letter to the solicitors for Boral Windows and that "neither Boral nor its solicitors responded to that letter …".

11. The letter of 26 October 2005 contained an offer to settle and also said: "According to your client's expert, R J Bonaldi, our client did not cause the

[*] Emphasis added

defects in the windows." It is also noted that Boral Windows took no step to amend its pleading against the Seventh, Eighth and Ninth Respondents to articulate any other basis upon which they could have been liable.

12. It would seem, on the material before me, that Boral Windows, in reliance upon the Bonaldi report, settled with other parties and chose to obtain leave to withdraw and take its chances on costs with the Seventh, Eighth and Ninth Respondents.

Basis of Applications for Costs

- **S112-115 of the Victorian Civil and Administrative Tribunal Act 1998**

13. The Solicitors for both Eliza Designs and the Surveyors took the prudent step of conveying offers to Boral Windows which were expressed to be in accordance with sections 112 to 115 of the *Victorian Civil and Administrative Tribunal Act 1998* ("the Act"). Section 112 provides:

> *112. Presumption of order for costs if settlement offer is rejected*
>
> *(1) This section applies if-*
>
> *(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and*
>
> *(b) the other party does not accept the offer within the time the offer is open; and*
>
> *(c) the offer complies with sections 113 and 114; and*
>
> *(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.*
>
> *(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by then offering party after the offer was made.*
>
> *(3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal-*

(a) must take into account any costs it would have ordered on the date the offer was made; and

(b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

14. The offer made on behalf of Eliza Designs on 26 October 2006 was to consent to withdrawal of the proceedings on the payment to Eliza Designs of costs of $7,500.00. At that time Eliza Designs' cost consultant estimated the costs incurred by it, on a party-party basis on County Court Scale D, at a little over $11,000.00.

15. The offer made on behalf of the Surveyors was sent on 8 December 2005. They offered to settle all four proceedings on the basis that Boral Windows would pay the Surveyors jointly $19,000.00 and would bear its own costs. There would be mutual releases. The offer was expressed as being open until 4.00 pm on 23 December 2005, and went on to say:

> *"If above proposal is allowed to lapse or is rejected by Boral Windows and ultimately the proceeding is concluded on terms more favourable to our client then we reserve the right to raise this letter on a question of costs and at that time seek an order that Boral Windows pay our clients' costs from the date of this letter on an indemnity basis."*

16. Although the step is prudent because it is always possible that the proceeding will be heard and determined, it is impossible to say whether, in this case, the "orders made by the Tribunal … are not more favourable to [Boral Windows] than the offer." This is because there is no automatic right to costs under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998, or even under s 74 where matters are withdrawn. Costs were reserved on that day, pending argument. It follows that the pre-conditions for section 112 to apply have not been met.

17. Further, Mr Harrison for Boral Windows asserted that the offers were not open for 14 days because the "days" should not include the day of service or

the day of expiry, unless the offer expires at midnight. Mr Klempfner asserted that with respect to Eliza Designs, a little over 14 periods of 24 hours had expired as the offer was served by facsimile just after 3.00 p.m. on the first day and did not expire until 4.00 p.m. on the last. Because I have determined that the offers are not comparable with the order, it has been unnecessary for me to determine this matter.

- **Costs under Section 74 – Withdrawal of Proceedings, or generally under Section 109**

18. Section 74 provides in part:

> "*Withdrawal of proceedings*
> *(1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.*
> *(2) If an applicant withdraws an application or referral –*
> *(a) the applicant must notify all other parties in writing of the withdrawal; and*
> *(b) the Tribunal may make an order that the applicant pay all, or any part of the costs of the other parties to the proceeding;"*

19. Mr Harrison for Boral Windows conceded that the expression "applicant" contemplates a respondent who has joined another respondent, as occurred here. I am also satisfied that the leave to discontinue granted by Senior Member Young is the same as leave to withdraw.

20 I was referred to *Philtom Developments v Vero* [2005] VCAT 751 which has similar, but not identical, facts to this proceeding. The Applicant-builder settled its proceedings with the Owner then obtained leave to withdraw against the Respondent – insurer. The insurer sought to have the matter dismissed with costs under s74(2). This application was unsuccessful. In the words of Deputy President Aird:

> "*The simple fact that the owner and the builder reached a resolution in this matter is not indicative that the builders' appeal was totally without merit or that an order for costs should be made under s.109(2) or s74(2)".*

21 In both cases there was no resolution between the party(s) seeking costs and any other party. However it is noted that in *Philtom* and also in *Brown v*

Alliance Australia Insurance Ltd [2004] VCAT 1748, the proceedings were appeals against decisions of insurers. At paragraph 9 of *Philtom,* Deputy President Aird said:

> *"The attitude of the insurer in this case is surprising and, in my view, unreasonable, especially given [the insurer's lawyers] confirmation that the usual approach of the insurer where a builder or an owner, as the case may be, appeals a decision of the insurer, is to encourage the owner and the builder to reach a resolution between themselves."*

22. Furthermore, in *Philtom*, Deputy President Aird added:

> *"…it would not, in my view, be in the spirit of the Domestic Building Contracts Act1995 and the Victorian Civil and Administrative Tribunal Act 1998 to make an order for costs in circumstances where the owner and the builder reach a resolution* ***at an early stage."***[*]

Resolution in the proceeding before me was not reached at an early stage.

23. I was referred to *K & C James Constructions Pty Ltd v Imway Pty Ltd* which was decided on 29 October 1999 by the then Deputy President Cremean. He decided not to award costs under s74 (but did award them under s109) because leave to withdraw had not been granted. In passing, he said he considered the power to order costs under s74(2)(b) as a separate power from that under s109, and that only s109 expressly limits the Tribunal's discretion to circumstances "where it is satisfied that it is fair to do so".

24. Another significant difference between s74 and s109 is that the former does not commence with the equivalent of s109(1). S109(1), (2) and (3) provide:

> *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-*

[*] Empasis added

(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.

25. In considering the power to award costs under s74 I was referred to the decision of Deputy President McKenzie in *Asghari v SBS Radio [2001] VCAT* 1755. In paragraph 4 of her decision she said:

> *"Section 74(2)(b) is a separate power to order costs on the withdrawal of a proceeding. There is no rule here that costs lie where they fall, unless the Tribunal considers it fair to order otherwise. Here the Tribunal has an unfettered and broad discretion as to costs…*

26. She went on to discuss matters such as conducting a proceeding vexatiously, or unreasonably, or in circumstances where the applicant made or persisted in the claim when they had no belief in its merits, or where the claim was totally lacking in merit. While the discussion is useful, it is in the context of a claim under equal opportunity legislation, and in the words of Deputy President Mckenzie:

> *"It is also relevant to take into the account the nature of the proceeding. This is a complaint under the Equal Opportunity Act. That legislation has a social rather than a commercial objective."*

27. My view is that the practical difference between s74 and s109 is not very great. Although s109 sets out the preconditions for an award of costs in greater detail, the power to award costs under section 74 is discretionary; the Tribunal "…**may** make an order…". It is hard to imagine how the Tribunal can logically exercise the discretion other than in accordance with considerations of fairness. The distinction is that under s109 there is an assumption that costs will not be ordered, whereas under s74 there is no assumption either way.

28. Mr Whitten for the Surveyors urged me to accept that the claim against the Surveyors (and hence against Eliza Designs as well) never had a reasonable foundation in fact or law because even before application was made to join them to the proceedings, Boral Windows' lawyers had the means of discovering that the windows described in the drawings were not the ones installed. It is noted that the then proposed joined parties were represented at the directions hearing of 26 May 2005 when the order for joinder was made. If anyone had knowledge of the discrepancy between the wind loading specified and the product delivered, it could and should have been raised then. There were no reasons accompanying the directions, and if this argument was raised, it was clearly insufficient to convince the Tribunal not to join the Seventh, Eighth and Ninth Respondents. Further, there was no mention of such an argument during the costs hearing.

29. Mr Whitten pointed out a number of requests by Mr Bonaldi for further information from his client which would have revealed the discrepancy earlier. While his argument is not without merit, it is noted that these substantial cases take time to unfold.

30. It is found that Boral Windows acted reasonably in seeking to join the Seventh, Eighth and Ninth Respondents, particularly given the Tribunal's order of 14 April 2005 referred to in paragraph 2 above. It is therefore fair that parties to this application for costs should each bear their own costs of the joinder and, in my view, for some time thereafter.

31. The significance of the Bonaldi report is that Boral Windows should have realised that its claim against the Seventh, Eighth and Ninth Respondents, as articulated, lacked merit shortly after receiving it and it is reasonable that it should have withdrawn its claim then. It therefore follows that it is fair that Boral Windows pay the Seventh, Eighth and Ninth Respondents' costs from that time under s74 of the Act in circumstances where it has since withdrawn its proceedings against them.

- ***Patsios v Glavinic***

32. On 22 March 2006, solicitors for Boral Windows wrote to the Tribunal, enclosing a copy of *Patsios & Anor v Glavinic & Anor* [2006] VSC 92. The decision was also published on Austlii on 20 March 2006, that is, after the costs hearing of 8 March 2006 and before these reasons were finalised. Solicitors for the Seventh, Eighth and Ninth Respondents objected to submission of unsolicited material after the costs hearing.

33. On 3 April 2006 the Tribunal wrote to solicitors for the Seventh, Eighth and Ninth Respondents, offering to accept any further submissions regarding *Patsios* until 14April 2006.

34. Submissions were received on behalf of the Building Surveyors on 4 April 2006 and on behalf of Eliza Designs on 11 April 2006.

35. Both submissions on behalf of the Seventh, Eighth and Ninth Respondents renewed their objection to receipt by the Tribunal of further submissions, and both referred to *Stockdale v Alesios & Ors* (1999) 3VL 169 and *M Hill and G P Williams v Rural City of Wangaratta & Ors* [2000] VCAT 2593. In the latter, the Tribunal quoted *Stockdale* and made reference to "exceptional circumstances". It was submitted on behalf of the Building Surveyors that there were no exceptional circumstances, and on behalf of Eliza Designs that there was no "unexpected change in the position of the parties". I find that, while it would be improper to have regard to a fresh, unsolicited submission, the exceptional circumstance in this proceeding is that a relevant, binding decision was handed down between the hearing and the determination, and whether it was referred to me by a party or I had discovered it in my own reading, I would be bound to have regard to it.

36. My views regarding *Patsios* are supported by the submissions for the Seventh, Eighth and Ninth Respondents. In *Patsios* Gillard J declined to award costs in circumstances where the plaintiffs withdrew, but there was an important factual difference. At paragraph 53 he said the plaintiffs "faced up to the realities and behaved in a more than reasonable fashion in trying to resolve the matter by agreeing to let the first defendant have adverse possession of the disputed land when, on the evidence revealed in these proceedings they had real prospects of succeeding." In contrast the first defendant "acted unreasonably in making … application" for title by adverse possession. As in *Patsios* at paragraph 8 "it is relevant to consider the reasonableness of the conduct of the parties before commencing the proceedings, in commencing the proceedings, in conducting the proceedings and in the termination of the proceedings." Boral Windows' behaviour was reasonable at the time of joinder, but the delay in seeking leave to withdraw was unreasonable. In the words of Mr Whitten in his further submission for the Building Surveyors, Boral Windows "effectively 'surrendered' in respect of its claims …".

37. In the alternative, under s109(3)(b), Boral Windows' inaction unnecessarily prolonged the completion of the proceedings as far as the Seventh, Eighth and Ninth Respondents were concerned. Mr Bonaldi's report was the wake-up call to which Boral Windows failed to respond. It neither acted in a timely manner to discontinue, nor did it seek to amend its Points of Claim to articulate some other claim that did have merit. By its inaction, it caused the Seventh, Eighth and Ninth Respondents to continue to incur costs when it was unnecessary for them to do so. It is considered that, upon receipt of the report, Boral Windows should have taken action in a timely manner.

38. At latest it is reasonable that Boral Windows should have considered the report and made a decision regarding the Seventh, Eighth and Ninth Respondents on receipt of the letter from solicitors for Eliza Designs of 26 October 2005, which, it is noted, was transmitted by facsimile. In these circumstances I am satisfied that it is fair that Boral Windows pay the costs of the Seventh, Eighth and Ninth Respondents from and including the next business day, which was 27 October 2005.

Scale of costs

39. Those seeking costs assert that the appropriate scale is County Court Scale D. Boral Windows asserts that costs should not be ordered, but if they are, the correct scale is a Magistrates Court Scale. Given the complexity of the proceedings, I find the appropriate scale is County Court Scale D, although costs that have been incurred in relation to more than one proceeding must also be taken into account.

SENIOR MEMBER M. LOTHIAN