VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1561/2015

CATCHWORDS

Domestic building, costs, s109 of the *Victorian Civil and Administrative Tribunal Act 1998*, interlocutory application to prevent solicitors from acting when they had previously acted for a different party, solicitors ceased acting the day before the interlocutory application was heard, solicitors ordered not to act, orders given for recovery of documents, respondents to application did not file submissions as ordered, Tribunal's jurisdiction to make orders binding solicitors argued for the first time by them at the cost hearing, standard costs and indemnity costs, s109(3)(e), application for costs against the solicitors under s109(4), whether costs can be awarded against a party and its representative concurrently under s109(4).

APPLICANT	Mr Boris Zaitsev
SECOND RESPONDENT	Mr Max Micelli (struck out 12/4/16)
THIRD RESPONDENT	Strucsand Consulting Pty Ltd (ACN: 114 353 301)
FIFTH RESPONDENT	Mr Alex Domenico Sorgiovanni
SIXTH RESPONDENT	Nicholson Wright Pty Ltd (ACN: 072 393 741)
SEVENTH RESPONDENT	Mr Jim Tsaganas
EIGHTH RESPONDENT	R. I. Brown Pty Ltd (ACN: 006 712 223)
NINTH RESPONDENT	Mr Russell Ian Brown
TENTH RESPONDENT	Mr Alan Temling
JOINED PARTY	Mrs Svetlana Zaitsev
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	18 April 2018
DATE OF ORDER	30 April 2018
CITATION	Zaitsev v Strucsand Consulting Pty Ltd (Building and Property) [2018] VCAT 659

ORDERS

1 The third and fifth respondents must pay the applicant's costs of and associated with the applicant's application heard on 15 March 2018 on a standard basis in accordance with the County Court Scale.

2 Failing agreement between the applicant and third and fifth respondents, costs are to be assessed by the Victorian Costs Court forthwith.

3 **I direct the Principal Registrar to send copies of these orders and reasons to the parties and to HWL Ebsworth by email.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr G Golvan, QC and with him Mr S Palmer
For the Third and Fifth Respondents	Mr N Lux, solicitor
For HWL Ebsworth	Mr D. Arribas, solicitor

No other party appeared.

REASONS

1 These orders and reasons concern the applicant's application for costs of and associated with an interlocutory application heard by me on 15 March 2018. The applicant seeks costs, jointly and severally, from the third and fifth respondents, and from their previous solicitors, HWL Ebsworth ("HWLE"). The applicant seeks indemnity costs, to be taxed forthwith, in default of agreement.

2 Both the third and fifth respondents and HWLE filed written submissions on 29 March 2018. Both submitted that there should be no order as to costs of and incidental to the application.

HISTORY

3 On 19 February 2018 I conducted a directions hearing. Order 2 was:

> 2. The Applicant has foreshadowed an application for solicitors for the third respondent to cease acting on the basis that they have previously acted for the applicant.
>
> a. The applicant must file and serve its application, together with any supporting material, by 28 February 2018.
>
> b. By 7 March 2018 the first [sic, third and fifth] respondent[s] must, and any other respondent may, file and serve any material in response.
>
> **c. The proceeding is set down for a further directions hearing before Senior Member Lothian on 14[1] March 2018 at 9.00am at 55 King Street Melbourne with an estimated hearing time of 1 hour.**
>
> The Tribunal notes that Mr Harding of the third and fifth respondents has sought that any material concerning the application be directed to Mr Juan Martinez of his firm.

4 The third and fifth respondents did not file any material. On the evening of 14 March 2018, the Tribunal was notified that HWLE was ceasing to act for the third and fifth respondents. Wotton + Kearney then commenced to act for them. Mr Lux of Wotton + Kearney said at the hearing on 15 March 2018 that he had not yet received the file from HWLE.

5 The applicant presented a copy of an email from HWLE to his current solicitor, Mr Boris Pogoriller, of 14 March 2018 at 4:12 PM. The substance of the email is:

> Dear Boris,
>
> We are instructed to cease acting as the solicitors on the record for the third and fifth respondents.
>
> Nick Lux from Wotton + Kearney will file a notice of change of practitioner later today.

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[1] It was heard on 15 March 2018

We will advise VCAT of this development, so that an appearance is not required tomorrow.

6 The applicant did not agree that the interlocutory hearing be cancelled and sought orders restraining HWLE from continuing to act for the third and fifth respondents or assisting them in the proceeding. In the alternative, an order was sought restraining the third and fifth respondents from engaging HWLE as their solicitors in the proceeding. The applicant also sought orders concerning return of documents and payment of costs.

7 At the interlocutory hearing on 15 March 2018, I made the following orders that have a bearing on the costs application, noting that these orders were made substantially in the form sought by the applicant:

> The Tribunal notes that the applicant's application set down for today was to restrain HWL Ebsworth from continuing to act as solicitors for the third and fifth respondents but HWL Ebsworth notified the Tribunal and the applicant yesterday that they were instructed to cease to act.
>
> …
>
> 2. HWL Ebsworth is restrained from acting for the third and fifth respondents against the applicant in this proceeding and from directly or indirectly assisting the third and fifth respondents in the proceeding, except to the degree that is necessary to transfer the file to Wotton + Kearney.
> 3. By no later than 26 March 2018 HWL Ebsworth is directed to return all documents (whether in hard copy or electronic form) that it still retains relating to the applicant's case, including all notes and memoranda of attendances upon any person in connection with the applicant's case. This does not apply to documents that have been obtained or created for the third and/or fifth respondents.
> 4. There is specific liberty to apply if there is an issue concerning any particular document or documents.
> 5. The date by which the applicant must serve his list of documents and notify the Principal Registrar that he has done so is extended to 16 April 2018.
>
> [Order 6 was that the compulsory conference scheduled for June was confirmed]
>
> 7. **The applicant's application for costs is adjourned to be heard by Senior Member Lothian on 18 April 2018 at 9 AM with an estimated hearing time of one hour:**
>
> a. noting that the applicant has handed up written submissions concerning, among other things, costs, HWL Ebsworth and the third and fifth respondents must file and serve written submissions by 29 March 2018;
>
> b. the applicant must file and serve written submissions in reply by 10 April 2018.

8 On 15 March 2018, Mr G Golvan QC and Mr S Palmer of Counsel appeared for the applicant, Mr N Lux appeared for the third and fifth respondents, Ms Mann appeared for the tenth respondent and Mr Harding appeared for HWLE.

9 By way of background, matters that were the subject of submissions on 15 March 2018 included:

(a) Whether an order restraining HWLE should be made;

(b) The Tribunal's jurisdiction to do so (albeit addressed briefly); and

(c) The necessity for, and extent of an order for the return of documents.

Order restraining HWLE

10 Mr Golvan sought the order restraining HWLE from providing advice or instructions to the third and fifth respondents' new solicitors and to prevent any possibility of a change of mind at a later date about whether it was appropriate for HWLE to act. I note Mr Harding's submission that it was not necessary to make the restraining order. Given the history between the parties, the restraining order was made to avoid any future confusion. Further, I was satisfied that the applicant could reasonably apprehend serious disadvantage to him if HWLE continued to act for another party.

11 The application for either HWLE or the third and fifth respondents to be restrained was supported by an affidavit of Mr Pogoriller of 28 February 2018.

12 In summary, Mr Pogoriller's evidence was that he acted for the applicant between 25 November 2015 and 19 April 2017 when HWLE commenced to act for the applicant. Mr Pogoriller continued to assist the applicant and to discuss matters concerning his case with a number of solicitors from HWLE.

13 The affidavit stated that HWLE had undertaken the work on a reduced fee basis. It continued that at a meeting on 15 November 2017 attended by two solicitors from HWLE, Mr Palmer of Counsel, Mr Pogoriller and the applicant and his wife, a partner of HWLE said that the firm had decided to cease acting for the applicant "because the work involved had become too great".

14 Both Mr Pogoriller and the applicant tried to convince HWLE to continue to act for the applicant, or to delay the date upon which they cease to act "at least until new directions orders are made and until Senior and Junior Counsel have met with the experts at the construction site." A number of matters were raised and the applicant offered to pay full fees to HWLE.

15 The third and fifth respondents had been represented by TressCox Lawyers, who merged with HWLE in mid-January 2018. A partner with conduct of the third and fifth respondents' file at TressCox Lawyers was not part of the merging firm.

16 Mr Pogoriller said that HWLE delivered 8 archive boxes containing the applicant's file to his office on 6 February 2018. He said that on 8 February 2018 HWLE wrote to all parties to say that they were committing to act for the third and fifth respondents. It is noted that the solicitors acting within HWLE were not the same as the solicitors who previously acted for the applicant. The letter included:

> In order to manage the conflict of the firm's duties owed to our former client and our current client we advise that pursuant to Rule 10.2.2 of the Legal Profession Uniform Law Australia Solicitor's Conduct Rules 2015, an effective information barrier has been established in respect of the file of our former client (both hardcopy and electronic) that was previously maintained by Mr Graham and the other employees of our firm who assisted him on the file, including all instructions, information and material provided by or on behalf of the applicant. Further, an information barrier has also been put in place in terms of access to the file of the current clients … restricting access by Mr Graham and the other employees who assisted him on behalf of the applicant.

17 No further details were provided regarding the mechanics of the "Chinese wall"; neither was it sought. I also note that while HWLE considered that the physical and electronic barrier they intended to install would be sufficient to prevent a conflict of interest concerning a previous client and a current client, they did not go so far as to suggest it would be sufficient to enable them to continue to act for both parties.

18 Mr Pogoriller said he contacted Mr Battye, the partner with conduct of the third and fifth respondents' defence after the merger, to say he believed that no information barrier could overcome the conflict of interest for HWLE.

19 Mr Pogoriller said that in response to his telephone calls and emails regarding the potential conflict, HWLE repeatedly declined to cease to act.

20 I note that there is no affidavit in response to this affidavit of Mr Pogoriller, and neither was he cross-examined on his affidavit.

Jurisdiction to make the restraining order

21 The issue of jurisdiction was not argued in detail before me on 15 March 2018. Mr Golvan briefly addressed me on the question of whether the Tribunal has the power to make a restraining order against a firm of solicitors. He mentioned three decisions[2] of the Tribunal where such an order had been made. He also mentioned a recent decision of Judge Macnamara of the County Court[3]. Judge Macnamara, considering a matter before the County Court, found that inherent jurisdiction to make such

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2 *Jansen v North Melbourne Institute of TAFE and ors* An unreported decision of Deputy President McKenzie of 15 March 2000; *Benzvi v Gunther Developments Pty Ltd and anor* [2011] VCAT 1161 and *Allan Pty Ltd v Teska & Carson Pty Ltd* [2017] VCAT 373

3 Understood to be *Scandi International Pty Ltd v Larkfield Industrial Estate Pty Ltd 7 Anor*, unreported ruling of 28 April 2017

orders is conferred on the Supreme Court alone. Mr Golvan submitted that the Tribunal has different powers to those of the County Court, and that this was been addressed by Judge Macnamara.

22 It was not surprising that Mr Lux was not in a position to address these issues on 15 March 2018 as he had only just received instructions and during the hearing the applicant was not advancing the argument to restrain the third and fifth respondents from engaging HWLE.

23 Had the issue of jurisdiction been argued in detail, I would have considered the applicant's alternative submission that the third and fifth respondents be restrained from continuing to engage HWLE.

24 I accepted that the Tribunal has jurisdiction under one or more of ss80, 97 and 98 of the VCAT Act.

25 The written submissions of HWLE of 29 March 2018 explore the jurisdiction of the Tribunal to make orders concerning solicitors and make further mention of HWLE's system for preventing any actual conflict of interest. These submissions were not before me on 15 February 2018, when I made the decision that the Tribunal had jurisdiction. I note that on 15 March 2018 Mr Harding foreshadowed that HWLE's written submissions would include material regarding jurisdiction but he gave no indication of what might be said about jurisdiction

Return of documents

26 Mr Pogoriller made a second affidavit dated 10 April 2018. He stated, among other things, that on 22 March 2018 in accordance with the orders made on 15 March 2018, HWLE delivered 10 archive boxes to his office. At paragraph 21 he stated:

> The 10 boxes delivered on 22 March 2018 and the additional folder comprise a new complete copy of the Applicant's files in this proceeding and in the proceeding BP250/2016 between the Applicant and a builder Buckingham Holdings Pty Ltd.

27 At paragraph 22 Mr Pogoriller continued:

> In order to comply with my obligations as the Applicant's solicitor and to ensure that the Applicant complies with the orders the Tribunal has made for discovery and inspection of documents I am required to order and review all these documents and am in the process of doing so. The failure of HWL Ebsworth to provide the documents until after they were ordered to do so has occasioned significant delay to the Applicant in the preparation and conduct of his case.

28 At paragraph 26 Mr Pogoriller repeated that he had received a large volume of material on 6 February 2018 and a covering letter which included:

> … in the interests of efficiency we have not retained a [sic] copies of these documents.

29 However at paragraph 27 of his affidavit, Mr Pogoriller stated:

> The 10 boxes of documents delivered under cover of letter dated 22 March 2018 and signed by Mr Harding and Mr Battye contain copies of many of the documents sent under cover of the letter dated 6 February 2018, notwithstanding that I had been advised by HWL Ebsworth that they had not retained copies of these documents.

30 It seems that the applicant's concerns about the conduct of the third and fifth respondents, or HWLE, were not unjustified.

COSTS APPLICATION

31 Both the third and fifth respondents and HWLE filed submissions as to costs dated 29 March 2018. The applicant filed a second affidavit by Mr Pogoriller dated 10 April 2018 and submissions in reply of the same date.

32 The applicant was again represented by Mr Golvan and Mr Palmer. The third and fifth respondents were again represented by Mr Lux. Mr Arribas, solicitor, appeared for HWLE. He said that Mr Harding was unable to attend as he had suffered an injury.

Section 109(3) and (4)

33 Sections 109(3) and (4) of the *Victorian Civil and Administrative Tribunal Act 1998* provide as follows:

> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
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> (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;
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> (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) If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in subsection (3)(a) or (b), the

> Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily.

Costs sought from the third and fifth respondents

"Fair to do so"

34 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.

35 At paragraph 14 of their written submissions of 29 March 2018, the third and fifth respondents say:

> … the applicant was not unnecessarily disadvantaged in the proceeding, nor was the proceeding unreasonably delayed, given there was a genuine and proper issue to be agitated with respect to the merits of the application (being the question of jurisdiction).

36 I accept that there could have been a genuine and proper issue to be agitated, but the third and fifth respondents chose not to do so. I am satisfied that the applicant has incurred unnecessary costs because of the action of the third and fifth respondents, either personally or through their then solicitors, HWLE.

37 As to unnecessary disadvantage to the applicant, it was obvious to me, from the first mention of HWLE acting for the third and fifth respondents, that the applicant needed more than non-specific assurances that there would be no conflict, and if that could not be provided then the third and fifth respondents' representation needed to change. The applicant needed to act urgently to protect himself and it was inevitable that he would incur costs in doing so. I find that by failing to promptly withdraw instructions from HWLE, the third and fifth respondents have caused unnecessary costs to be incurred by the applicant, therefore it is fair that costs should be awarded to the applicant under section 109(3)(e).

Costs sought from HWLE under s109(4)

"representative of a party rather than a party is responsible"

38 In order to make a costs order against HWLE I must be satisfied that it was HWLE rather than the third and fifth respondents who were responsible for insisting that HWLE continue to act. I note the applicant's written submissions of 10 April 2018 – there was nothing that has been drawn to my attention that obliged HWLE to act for the third and fifth respondents.

39 While it is to be expected that a firm of solicitors would be more familiar with the risks of ceasing to act for one client and commencing to act for another in the same proceeding, this falls short of demonstrating to me that responsibility for the choice was HWLE's rather than the third and fifth respondents'.

40 I note that at paragraph 30 of his affidavit of 28 February 2018, Mr Pogoriller said:

> I asked Mr Battye [on 8 February 2018 by telephone] how it is that they commenced to act for the Third and Fourth (correctly, Fifth) Respondent against the Applicant. Mr Battye said that they were asked to act by the professional indemnity insurer of the Third and Fifth Respondent.

41 Assuming the accuracy of this reported telephone conversation, effective instructions to HWLE were by a sophisticated client. I cannot be satisfied that the course of action was by HWLE rather than the third and fifth respondents. Neither HWLE nor the third and fifth respondents have sought to attribute responsibility to the other, although I note HWLE's statement in its submissions that they "properly advised the Third and Fifth Respondents in relation to the merits of the application." This statement was unsupported by any sworn evidence.

42 Should there be a dispute between HWLE and the third and fifth respondents concerning this matter, it is properly the subject of a dispute between solicitor and client, and need not be an adjunct to this proceeding.

43 Similarly, I find HWLE's delay in delivering all documents to Mr Pogoriller's firm can more properly be considered a dispute between a solicitor and its previous client, although it was convenient to ensure that such documents be delivered without delay, for the benefit of this proceeding. The same consideration applies to HWLE's alleged failure to file a list of documents on behalf of the applicant, given that the applicant was obliged to file its list of documents by 1 December 2017, at which time HWLE was on the record as his solicitors.

44 In order to make an order for costs against a representative rather than the party represented by that person, the Tribunal must be satisfied that the representative is responsible. Holding a suspicion that the representative might be responsible falls short of this test. I am not satisfied that HWLE

was responsible for the conduct rather than its clients and make no order under s109(4).

Other matters

45 As I am not satisfied that the applicant is entitled to recover costs under s109(4), it is not necessary for me to further consider it, but I record the following matters:

Only regarding costs under 109(3)(a) or (b)

46 As discussed during the costs hearing, the Tribunal only has power to make an order under s109(4) if costs are being awarded for conduct described in subsection (3)(a) or (b).

"Representative of a party"

47 On 15 March 2018 I raised the issue of whether s109(4) applies to a representative who had ceased to act.

48 Mr Golvan submitted on 18 April 2018, that the representative of a party cannot escape an order for costs by ceasing to act for the party if the conduct occurred while it was so acting. His submission was not opposed.

Jurisdiction

- Power to make an order binding HWLE

49 In their written submissions of 29 March 2018 at paragraph 11 the third and fifth respondents said:

> It was submitted that the VCAT did not have the jurisdiction to make the orders sought by the Application, being an order to restrain HWLE from continuing to act on behalf of the Third and Fifth Respondents.

50 Similar submissions were made in HWLE's written submissions of 29 March 2018. I remarked during the costs hearing on 18 April 2015 that I had no intention of purporting to hear an appeal from my own decision and that the appropriate forum was the Supreme Court. To the degree that these were submissions that order 2 of 15 March 2018 should not have been made, and therefore no order as to costs should follow, I do not accept it.

51 As mentioned above, this issue was not argued in detail before me on 15 March 2018. Further, if either HWLE or the third and fifth respondents considered that the orders made were beyond jurisdiction, they had the opportunity to seek leave to appeal the decision which led to those orders, and they have not done so.

- Order for documents and its effect on the applicant's discovery

52 I note that the applicant alleges he has been delayed in completing discovery by the failure of HWLE, his then solicitors, to complete the task of discovery and to return the entire file to him. I find that this dispute is

more properly a dispute between solicitor and former client rather than an adjunct to this proceeding.

Costs sought jointly and severally against HWLE and the third and fifth respondents

53 As I am not satisfied that the applicant is entitled to recover costs against HWLE in this proceeding, it is not necessary for me to further consider whether costs should be ordered jointly and severally against HWLE and the third and fifth respondents. Nevertheless, I remark that s109(4) allows for awarding costs against the representative "rather than the party".

54 My attention was drawn to the decision of Member Aird (as she then was) in *Chan v Housing Guarantee Fund Ltd and Anor* [2004] VCAT 247 where she ordered a representative to pay part of the costs otherwise payable by his clients. The costs ordered were for a particular period of time and are distinguishable from an order for joint and several liability.

55 Mr Golvan raised the possibility that there could be concurrent costs, arising under separate obligations. It is not necessary for me to consider this point.

Indemnity or standard costs?

56 Where there is an order for costs in this list it is commonly for Standard Costs on the County Court Scale. The applicant has sought indemnity costs.

57 While the behaviour of the third and fifth respondents, or of HWLE on their behalf, was at least surprising, in the words of the learned authors Pizer and Nekvapil[4]:

> - the presumption against making costs awards at all would appear to indicate that orders for indemnity costs in the VCAT "would be made even more sparingly in the tribunal than they would be made in court."

58 I also have regard to the decision of Deputy President Aird in *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd* [2011] VCAT 1406 where she said at paragraph 13:

> It will only be in the most exceptional circumstances that an order for indemnity costs will be made; for instance where a party has engaged in contumelious or high handed conduct.

59 Suspicion that behaviour might have been contumelious and high-handed falls short of proof that it was. I am not so satisfied and order costs on a standard basis.

ORDERS

60 The orders I will make are as follows:

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4 *Pizer's Annotated VCAT Act 6th edition*, VCAT 111.80 at page 655

1. The third and fifth respondents must pay the applicant's costs of and associated with the applicant's application heard on 15 March 2018 on a standard basis in accordance with the County Court Scale.
2. Failing agreement between the applicant and third and fifth respondents, costs are to be assessed by the Victorian Costs Court forthwith.

SENIOR MEMBER M. LOTHIAN