

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCATREFERENCE NO. OC565/2020

CATCHWORDS

Application for costs, s109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*. Exercise of discretion to order costs only if satisfied it is fair to do so: *Vero Insurance Ltd v The Gombac Group Pty Ltd* applied.

APPLICANT

Owners Corporation PS442801X

RESPONDENT

Australasian Mining & Forestry Equipment Manufacturing Pty Ltd (ACN: 006 401 823)

WHERE HELD

Melbourne

BEFORE

Member MJF Sweeney

HEARING TYPE

Costs Application, In Chambers

**DATE OF ORAL
SUBMISSIONS AT
HEARING**

5 October 2020

DATE OF HEARING

5 October 2020

DATE OF COSTS ORDER

21 October 2020

CITATION

Owners Corporation PS442801X v Australasian Mining & Forestry Equipment Manufacturing Pty Ltd (Costs) (Owners Corporations) [2020] VCAT 1189

ORDER

1. The respondent must pay the applicant's costs fixed at \$3,388.32.

MJF Sweeney
Member

REASONS

BACKGROUND

- 1 The proceeding was heard on 5 October 2020. The Owners Corporation was represented by Mr Wilkinson, solicitor, and the respondent represented by, Mr Dzenko, director.
- 2 The Owners Corporation sought orders for compliance by the respondent with certain Model Rules, including obstruction of common property and storage of vehicles, equipment and materials on common property. At the conclusion of the hearing, an order was made in favour of the Owners Corporation that the respondent comply with the Model Rules and remove the above goods from the common property. Costs were reserved.
- 3 The Owners Corporation seeks an order for costs against the respondent. It relies on oral submissions made at the conclusion of the hearing, after the making of the substantive orders.
- 4 The respondent did not submit a reply. Given the respondent was self represented, I ordered that he be provided with the opportunity to make a submission if he later felt he wished to do so and that any reply submission be made by not later than 19 October 2020. No reply submission was made by the respondent.

APPLICANT'S COSTS SUBMISSION

- 5 As summary of the submission made orally at the end of the hearing after the substantive decision, included the following:
 - (a) The respondent director, without notice, failed to attend a Compulsory Conference listed for 16 July 2020. On enquiry by the Tribunal by telephone, the respondent said he was suffering ill health. The Owners Corporation submits that the respondent would have been better informed about the poor prospects of his defence if he had attended the Compulsory Conference;
 - (b) On 20 July 2020, the respondent sought an adjournment of a Directions Hearing listed for 23 July 2020, which was refused;
 - (c) The respondent nevertheless failed to attend the Directions Hearing on 23 July 2020;
 - (d) The Owners Corporation made an offer to settle pursuant to s112 and s114 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act). The offer was that the respondent should remove his goods from the common property and that no legal costs would be sought by the Owners Corporation. The respondent's refusal of the offer to settle was unreasonable;
 - (e) By attending the Compulsory Conference and by later making an offer to settle, without seeking legal costs, the Owners Corporation has

attempted to avoid the cost and expense of a hearing. It submits that the conduct of the respondent has forced the Owners Corporation to go to a full hearing;

- (f) Under s109(3)(c) of the VCAT Act, the Owners Corporation submits that the relative strengths and weaknesses of the parties' respective cases demonstrates that the respondent had no defence.

LEGAL PRINCIPLES

6 Section 109(1) of the VCAT Act provides that each party must bear its own costs of the proceeding, unless it exercises its discretion under s109(2) to order a party to pay all or a specified part of the costs of another party.

7 Section 109(3) provides as follows:

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.

- 8 In *Vero Insurance Ltd v The Gombac Group Pty Ltd*¹ Gillard J held that the Tribunal is required to approach the question on an application for costs 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 so². 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 s109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal must also take into account any other matter that it considers relevant to the question.

ANALYSIS

- 9 My orders made on 5 October 2020 include a summary of findings. They include that Mr Dzenko's submission, concerning the description of the common property based on his asserted plan of subdivision, was unfounded. I found that his vehicles and goods were located or stored on common property, not on his lot. I found that the purported plan of subdivision on which he relied was not the registered plan and formed no part of registered Plan 442801X, registered on 6 January 2006.
- 10 Mr Dzenko's mistaken impression arose from what appeared to be an earlier 'draft' of a plan of subdivision made around the time when he purchased his lot from the developer, prior to any registration of plan of subdivision 442801X.
- 11 From the evidence presented at the substantive hearing, I accepted that there was a basis for Mr Dzenko to have been confused by the purported plan in his possession and that, at least initially, his mistaken view of the correct plan was reasonably held. I am also satisfied that the Owners Corporation subsequently tried to apprise Mr Dzenko of the real position according to the registered plan.
- 12 S109(3)(a) is concerned with whether a party has conducted the proceeding in a way that unnecessarily disadvantaged the other party by conduct, including by failing to comply with an order or direction of the Tribunal without reasonable excuse or causing an adjournment.
- 13 The Owners Corporation submitted that Mr Dzenko's failure to attend the Compulsory Conference caused unnecessary disadvantage and led to an adjournment for a subsequent directions hearing.
- 14 The Owners Corporation also submitted that, had Mr Dzenko attended the Compulsory Conference or sent a different person to represent the

¹ [2007] VSC 117 at [20] per Gillard J.

² Underlining emphasis of Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd*, supra.

- respondent, the respondent would have become properly acquainted with the true position, with a reasonable likelihood that a hearing would not have been necessary. I accept these submissions of the Owners Corporation.
- 15 The conduct of Mr Dzenko in not attending the Compulsory Conference, or getting another representative to attend, constituted conduct that unnecessarily disadvantaged the Owners Corporation under s109(3)(a) by failing to attend the Compulsory Conference as ordered and by causing an adjournment to a later Directions Hearing.
 - 16 Further, under s109(3)(c), I am satisfied that, in not attending the Compulsory Conference, Mr Dzenko denied the respondent the very real opportunity of being better appraised of the facts and thereby understanding the material weaknesses of his case, including that it had no tenable basis. The Owners Corporation had tried to apprise Mr Dzenko of the real position by explaining the registered plan, the description of common property and the consequent extent of the respondent's lot ownership. This would have become even more apparent had the respondent complied with orders to attend the Compulsory Conference.
 - 17 For the above reasons, I am satisfied that it is fair in all the circumstances to exercise my discretion and make an order for costs to be paid by the respondent.
 - 18 The Owners Corporation submits for costs, from initial instructions to lodge an application to VCAT to the date of the hearing and orders, estimated by it in the sum of \$7,512.00. Alternatively, if the Tribunal is not disposed to exercise its discretion to order costs for that period, then from the date of the offer of settlement on 31 August 2020 to the date of the final hearing and orders on 5 October 2010, estimated by it in the sum of \$5,633.38.
 - 19 I am not disposed to award costs from the commencement of proceedings. I am empowered to make a costs order for a specified part of costs under s109(2) of the VCAT Act. The exercise of my discretion to reverse the presumption and to award costs as above, amongst other matters, is grounded on the self represented lot owner causing disadvantage by failing to attend the Compulsory Conference on 16 July 2020. It is that date and from the date of the offer of settlement that the unnecessary disadvantage was caused to the Owners Corporation under the considerations I have had regard to under s109(3) of the VCAT Act.
 - 20 The Owners Corporation submitted as to the hourly rate under the applicable County Court scale on a standard basis of \$333.60 per hour. It submitted that preparation for the hearing and attendance at the hearing comprised 4.5 hours. At the hourly rate above, this represents \$1,501.12. It submitted that the instructions for drawing the affidavit (by orders made 23 July 2020), engrossing and exhibits at \$1,220.00. It sought a loading as per scale which I do not find fair to allow in all the circumstances. Preparation for the Compulsory Conference and attendance by teleconference I allow at 2 hours, being \$667.20. Total costs allowed fixed at \$3,388.32.

CONCLUSION

21 The respondent must pay the Owners Corporation costs, as above, fixed at \$3,388.32.

MJF Sweeney
Member