IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEAL LIST

Not Restricted

S CI 2013 6385

BURBANK AUSTRALIA PTY LTD
(ACN 007 099 8720) Appellant

v

OWNERS CORPORATION PS 447493 Respondent

JUDGE:	McDONALD J
WHERE HELD:	Melbourne
DATE OF HEARING:	18 February 2015
DATE OF JUDGMENT:	18 May 2015
CASE MAY BE CITED AS:	Burbank Australia Pty Ltd v Owners Corporation (No 2)
MEDIUM NEUTRAL CITATION:	[2015] VSC 200

COSTS — Appropriateness of costs order where parties have each enjoyed some success and some failure — No order as to costs save for costs reserved in respect of successful adjournment application.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr R Andrew	Oldham Naidoo Lawyers
For the Respondent	Mr R J Manly QC with Mr J A Moss	MacPherson & Kelley Lawyers

HIS HONOUR:

1 On 29 April 2015, I published my Reasons for Judgment in respect of an appeal from a decision of the Victorian Civil and Administrative Tribunal ('VCAT') dismissing the appellant's application to strike out the respondent's claim alleging breaches of implied warranties under s 8 of the *Domestic Building Contract Act 1995* ('DBC Act'). My judgment addressed three questions:

(i) Does the DBC Act apply in respect of a multi-apartment development?

(ii) Does the DBC Act have any application to developers?

(iii) Was there a valid resolution by the respondent authorising the commencement of the proceedings in VCAT?

2 I answered questions (i) in the affirmative and question (iii) in the negative. Consequently, question (i) was answered adversely to the appellant but question (iii) was answered in its favour. I concluded that the answer to question (ii), which was related to question (i), depended upon the nature of the works which are the subject of a contract to which a developer is a party. Consequently, I rejected the appellant's contention that the DBC Act could have no application to a developer.

3 The upshot of my judgment is that both the appellant and respondent have enjoyed a measure of success. The appellant has successfully challenged VCAT's finding that the commencement of the VCAT proceedings by the respondent had been authorised by a valid resolution. As a consequence, I have concluded that the proceedings in VCAT should be stayed until such time as the respondent is authorised by a special resolution to bring the proceedings against the appellant.

4 The respondent has successfully resisted the appellant's contention that:

(i) the warranties prescribed by s 8 of the DBC Act have no application to a multi-apartment development; and

(ii) the DBC Act has no application to a developer.

5 Costs are in the discretion of the court. Where both parties enjoy a measure of success, the parties' relative successes and failures may best be reflected by the making of an order that each party bear their own costs.[1]

6 In the circumstances of the present appeal proceedings, where both the appellant and the respondent have enjoyed a significant measure of success, subject to the qualification below, I consider that the appropriate order is that there be no order as to costs. Consequently, each party will be required to bear their own costs of the appeal.

7 The qualification to my ruling as set out above relates to the costs of an adjournment application which was brought by the respondent. The respondent sought to adjourn the hearing of the appeal pending the judgment of the Court of Appeal in *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*.[2] At the time of the application for an adjournment, there was a real prospect that the judgment of the Court of Appeal in *Brirek* would bear directly upon one of the questions upon which the appellant had been granted leave to appeal, namely, whether s 134 of the *Building Act 1993* replaced s 8 of the *Limitation of Actions Act 1958* so as to effectively provide for a 10 year limitation period from the date of issue of an occupancy permit.

8 Daly AsJ granted the adjournment on 2 May 2014. Subsequently, *Brirek* did deal with the question of the interrelationship of s 134 of the *Building Act 1993* and the *Limitation of Actions Act 1958*. As a result of the Court of Appeal's judgment, one of the questions in respect of which the appellant was granted leave to appeal, did not arise for determination. The outcome of the appeal proceedings in *Brirek* vindicated the respondent's application for an adjournment. The respondent is entitled to its costs in respect of the application for the adjournment.

9 In written submissions filed by the appellant subsequent to judgment being handed down in this matter on 29 April 2015, the appellant contended that it is entitled to a costs order in its favour arising from the withdrawal by individual Lot Owners as parties to the appeal proceedings. One of the questions in respect of which the appellant was granted leave was whether an action for contractual damages by individual Lot Owners could be issued after a 10 year limitation period on the basis

that the claims are closely intertwined and arise from alleged defective works in both common and private property. The appellant contended that by withdrawing from the appeal proceedings the Lot Owners had conceded that this question was to be resolved in the appellant's favour.

10 On 23 April 2014, the Lot Owners filed an application for leave to withdraw from the underlying VCAT proceedings. This application was granted but VCAT ordered the Lot Owners to pay costs. Shortly thereafter, pursuant to an order of Daly AsJ, they ceased to be parties to the appeal proceedings in this court. Daly AsJ granted liberty to apply with respect to the costs consequent upon the withdrawal of the individual Lot Owner's claims.

11 As the Lot Owners were not parties to the appeal proceeding before me, they have not been given notice of any application for a costs order against them. Prior to the claim for costs in the appellant's submissions on costs dated 6 May 2015, there was no indication from the appellant that liability of the Individual Lot Owners to pay costs would be a live issue in the appeal. These circumstances weigh heavily against an order for costs against the individual Lot Owners. Further, the individual Lot Owners withdrew from the appeal proceedings some 10 months prior to the hearing on 18 February 2015. No time was spent in the appeal hearing before me arguing any points relating to the individual Lot Owners. No order for costs will be made in respect of the individual Lot Owners.

12 The orders of the court will be as follows. First, further proceedings in VCAT in *Owners Corporation PS 447493 v Burbank Australia Pty Ltd* proceeding number D1166/2012 be stayed until Owners Corporation passes a special resolution complying with s 18 of the *Owners Corporation Act 2006*. Second, the appellant pay the respondent's costs of the adjournment application heard and determined by Daly AsJ on 2 May 2014. There be otherwise no order as to costs.

---

[1] *Agar v McCabe & Anor (No 2)* [2014] VSC 333 [2]; *Apostolidis v Kalenik (No 2)* [2011] VSCA 329 [59]-[60]; *Matzke v Sali (No 2)* [2010] VSCA 304 [4]-[5].

[2] [2014] VSCA 165 (‘*Brirek*’).