

VICTORIAN CIVIL AND
ADMINISTRATIVE TRIBUNAL



FILED

- 1 AUG 2008

CIVIL CLAIMS LIST

Our Ref: C4993/2008

Your Ref:

Marshalls & Dent
DX 213
MELBOURNE VIC

Dear Sir/Madam

**Norman Edward Pauline -v- Body Corporate Services (Vic) Pty Limited ABN 35 079
654 103 trading as Body Corporate Services, Inscor Services Pty Ltd trading as Body
Corporate Services, Owners Corporation No. 407083**

I refer to the above application and enclose a copy of the Tribunal's Reasons in this matter.

Yours faithfully

J W D NELMS
SENIOR REGISTRAR
29 July 2008

Encl:

(16Order V.5/1/99)

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
CIVIL CLAIMS LIST**

VCAT REFERENCE: C4993/2008

CATCHWORDS

Costs Victorian Civil and Administrative Tribunal Act 1998 s74(2)(b) and s109.

APPLICANT: Norman Edward Pauline

1st RESPONDENT: Body Corporate Services (Vic) Pty Limited ABN 35
079 654 103 trading as Body Corporate Services

2nd RESPONDENT: Inscor Services Pty Ltd trading as Body Corporate
Services

3rd RESPONDENT: Owners Corporation No. 407083

WHERE HELD: Melbourne

BEFORE: Member P. Eggleston

HEARING TYPE: Hearing

DATE OF HEARING: 21 July 2008

DATE OF ORDER: 21 July 2008

FINDINGS

1. The Respondent in this proceeding following the Applicant's withdrawal of his proceeding has sought costs. The basis upon which costs are being sought is twofold namely:
 - (a) Pursuant to s74 of the VCAT Act.
 - (b) Pursuant to s109 of the VCAT Act.

Section 74

- 2.1 It has been argued by Mr Little for the Respondents that s75 is akin to the provisions of s75 of the VCAT Act in that both deal with situations where proceedings are brought to early conclusion. S75 is different to S74 in that it is through Tribunal decision that proceedings are brought to an end in essence based upon the Applicant's own case inadequacies.
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- 2.2 S74 could apply to situations when for whatever reason the applicant has a case which the Applicant does not consider would be ultimately successful based upon evidence and argument but it could also apply to cases where due to unforeseen circumstance parties no longer had a meritorious case e.g. the death of a key witness.
- 2.3 S74(2)(b) does give the Tribunal power for the Tribunal to make costs orders as against the Applicant in respect to the other parties. Significantly it does not give the Tribunal power to address any other cost situations. That in my view suggests that S74(2)(b) gives to VCAT a power separate to S109 to award costs. The rationale expressed by the then Deputy President Professor Cremean in the case of Kiahida (2002) VCAT 8 in respect to S75 of the VCAT lends support to this. This power is independent of S109.

S109

3. Mr Little submitted that the principles enunciated by His Honour Mr Justice Gillard in the decision of Vero Insurance Ltd v The Gombac Group Pty Ltd (2007) VSC 117 unreported 2 May 2007 ought to be followed. I accept Mr Little's submission and agree that His Honour step by step process is proper namely in S109 cost cases.
- (a) The prima facie rule is that each party should bear its own costs.
- (b) That the Tribunal should only make costs orders where it is satisfied that it is fair to do so and
- (c) In determining whether it is fair to do so the Tribunal must have regard to the matters stated in S109(3). Additionally the Tribunal must have regard to the specified matters in determining the question and by reason of paragraph (e) of S109(3) the Tribunal may also take into account any other matter that it considers relevant to the question.

Relevant Matters

- 4.1 I accept that on the face of it there is history to this matter.
- 4.2 That the Applicant has from the outset involved legal practitioners where it has suited him.
- 4.3 That the correspondence from the legal practitioners made their client's position very plain and definite should there be no compliance with their demands i.e. that their client would proceed to VCAT to seek an injunction.
- 4.4 That it would appear that the Applicant on his own volition opted to proceed with the issuing of the application. I do not accept that the Applicant having consulted solicitors would not be aware of the total consequences of his actions in issuing the application.

- 4.5 Given the history of the matter and the material in support of the Applicant's application together with the nature of the remedy being sought; it was absolutely necessary for the Respondents to take proper steps to defend their position. I accept that this involved a significant amount of preparation, collation of material and discussion with the committee members. The allegations initially made by the Applicant against the Respondents were well beyond the application per se.
- 4.6 It was proper and prudent that at all stages in this matter that the Respondents were legally represented.
- 4.7 Significantly the Applicant had other alternative dispute mechanism processes to endeavour to address this matter but at his own option proceeded with the issuing of an application seeking an injunction.
- 4.8 The Applicant had by virtue of my order dated 15 July 2008 the opportunity to properly particularise all aspects of his allegations through points of claim. This has not occurred. Whilst there are always other considerations to be factored in with litigation matters, the lack of claim points tends to detract from the bona fides of the Applicant's claim.
- 4.9 The threats of action against the committee personally make it legitimate for those people to instruct legal representatives to defend their position at all times.

ORDERS

- 5.1 Parties are properly and legitimately without cost and fear entitled to bring matters before VCAT, to have VCAT hear and determine their grievances. A balance however has to be struck between legitimate and arguable claim and other proceedings.
- 5.2 In this instance I have the power to address the Respondents' costs application pursuant to S74(2)(b) this power is independent of S109.
- 5.3 It is fair and proper that the Applicant pay the Respondents' costs in respect to this application.
- 5.4 The costs paid by the Applicant should be as follows:
- (a) To costs relating to the preparation and collating of the Respondents case in respect to the application by the Respondents. This would include a reasonable allowance for time spent at a barrister's conference and preparation time of the barrister of up to six hours.
 - (b) The Respondents costs (including committee people) of their attendances at the hearings of 10 July and 15 July 2008.

- (c) The Barrister's fee of 21 July 2008 and an allowance of one committee member to attend the Tribunal on 21 July 2008.
- (d) That the costs shall be on scale C of the County Court scale and be assessed by the principal registrar of VCAT in default of agreement being made within 28 days of this order.



P. Eggleston
Member

29 July 2008

