

VCAT Decision on the Application to have Costs Awarded against UCSK

Peter Holland (2009, revised 2011)

Introduction: The Costs Application:

The application by the developer to have costs awarded against unChain St Kilda at VCAT was not just important for UCSK. It was important for the future of planning throughout the state. This was an important precedent. Would VCAT allow the threat of costs against resident groups and councils to deter citizens from participating in decisions about their future? UCSK was not just fighting for the Triangle, we were fighting for fundamental democratic rights of all Victorians.

Public Interest groups have long argued that the heavy costs involved in judicial review applications, and the risk of paying the other side's costs if one loses, are a significant deterrent to public interest litigation.

In *Oshlack v Richmond River Council* (1998) a majority of the High Court held that the usual rule as to costs could be displaced in public interest litigation. In the second Blue Wedges case North J said:

'In Oshlack v Richmond River Council (1998) a majority of the High Court held that the usual rule as to costs could be displaced in public interest litigation if special circumstances were shown. Such special circumstances could include where the prime motivation of the applicant was in upholding the public interest and the rule of law, where the applicant had nothing personal to gain from the litigation, and where a significant number of members of the public shared the stance of the applicant'.

The *Oshlack* principles have been applied in some important cases such as the first Blue Wedges Inc challenge to the Bay dredging. However recently costs have been awarded against unsuccessful public interest litigants. In particular, costs have been awarded against Blue Wedges Inc on its second application, against Your Water Your Say Inc over its challenge to the desalination project, and against Lawyers for Forests Inc over approval of the Gunns pulp mill. A key difference was that these actions were brought in the Federal Court, where costs are normally awarded against the loser and the public interest groups were unable to successfully rely on the *Oshlack* principles.

Would the developers in the *St Kilda Triangle* action turn VCAT into a forum where public interest applicants ran a significant risk of having costs awarded against them?

The normal rule in VCAT is that each party has to pay their own costs (i.e. a 'no costs' order). This is found in the VCAT Act at s 109. However s 109(3) empowers VCAT to make a costs order against a party which has behaved improperly by being vexatious or unreasonably prolonging proceedings, or making a claim that has no tenable basis. The VCAT also has a wide discretion to consider the nature and complexity of the proceeding or any other matter the Tribunal considers relevant in deciding to make an order for the payment of costs.

The VCAT said in *Sinclair v Greater Geelong CC* (2004) VCAT 588: 'The Tribunal, as the planning tribunal in Victoria, is intended to be accessible to the citizens of the

State, and they should not be frightened off from making use of the Tribunal by fear that orders might be made against them for costs, at any rate where they have behaved in a reasonable and bona fide fashion’.

The unChain St Kilda Inc case determined whether the protection of the citizens’ rights described in *Sinclair’s* case still applied in Victoria. UCSK mounted a vigorous defence of those rights. The Tribunal decided in favour of UCSK and dismissed the developer’s application. The Tribunal said:

The success of the Planning List at VCAT relies on its accessibility, and the ability of ordinary citizens to bring high level planning disputes before the Tribunal without undue fear of a costs award against them if they lose.

The full judgment of VCAT is reproduced below.

**unChain St Kilda Inc. v Port Phillip CC & Ano [2009]
VCAT 2509 (25 November 2009)**

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2621/2008

APPLICANT

unChain St Kilda Inc.

FIRST RESPONDENT/

Port Phillip City Council

RESPONSIBLE AUTHORITY

SECOND RESPONDENT

BBC Triangle Investments Pty Ltd

OTHER PARTY

Melbourne Water Corporation

SUBJECT LAND

St Kilda Triangle

ST KILDA VIC 3182

WHERE HELD

Melbourne

BEFORE

Mark Dwyer, Deputy President

HEARING TYPE

No Hearing

DATE OF ORDER

25 November 2009

CITATION

unChain St Kilda Inc. v Port Phillip CC & Ano [2009]

ORDER

The application for costs by the second respondent (BBC Triangle Investments Pty Ltd) against the applicant (unChain St Kilda Inc.) is refused, and the application is dismissed. Each party must bear its own costs.

REASONS

The second respondent, BBC Triangle Investments Pty Ltd (BBC), has made application for costs against the unsuccessful applicant, unChain St Kilda Inc. (unChain StKilda). This follows my decision on 18 May 2009, dismissing an application by unChain St Kilda seeking declarations challenging the validity of the St Kilda Triangle Development Plan for which BBC is the project proponent.

Costs are not sought by or against the first respondent, Port Phillip City Council (Council), and the Council has not been involved in the costs application.

Both BBC and unChain St Kilda have filed detailed written submissions on the costs issue, with BBC also providing a reply. Both parties have consented to the costs application being determined 'on the papers' without a formal costs hearing.

I do not consider this a case where it is necessary to detail at length the principles generally applying to costs in the Planning List at VCAT. Relevant principles and cases are canvassed at length in the parties' submissions, and the parties are both represented by experienced planning counsel. It is sufficient to note that:

The general rule at VCAT, stemming from [s 109\(1\)](#) of the *Victorian Civil and Administrative Tribunal Act 1998*, is that each party bears its own costs in a proceeding. Amongst other things, this rule is intended to promote access to justice, and allow ordinary citizens to seek to protect their rights without undue fear of costs.

Pursuant to [s 109\(2\)](#) and (3) of the *Victorian Civil and Administrative Tribunal Act 1998*, the Tribunal may award costs, but only if it is satisfied that it is fair to do so having regard to specified criteria. The power is clearly discretionary, and each case is different and must be decided on its own merits.

Whilst the Tribunal has been more willing to depart from the general costs rule in planning matters in the *original* jurisdiction of the Tribunal (declarations, enforcement, amendment/cancellation of permits etc), rather than in its *review* jurisdiction, this is by no means automatic. It cannot be assumed that costs will follow the outcome in such proceedings, and an award of costs must still be justified having regard to [s 109](#).

An application for costs before the Tribunal therefore faces a relatively high hurdle if it is to succeed.

BBC has couched its application primarily by reference to the matters in [s 109\(3\)\(b\),\(c\),\(d\) & \(e\)](#) of the *Victorian Civil and Administrative Tribunal Act 1998*. I agree that the matters in [s 109\(3\)\(a\)](#) would not justify an award of costs in this proceeding. There has been no conduct by unChain St Kilda in the proceeding (such as a failure to comply with orders or the Act) that has materially or unnecessarily disadvantaged BBC.

For the purposes of [s 109\(3\)\(b\)](#), I do not consider that unChain St Kilda unreasonably prolonged the time taken to complete the hearing. The hearing date was fixed, in part, to accommodate the joinder of BBC as a party and its request for further particulars, and was not delayed by unChain St Kilda. The hearing itself occupied only 2½ days. Within the hearing, as applicant and first to present, unChain St Kilda took the Tribunal through extensive background material and documents necessary to understand the context of its application. This background would have been required whether the applicant then pursued one or several grounds. Following this background, the actual hearing of argument on the five grounds for declaration was relatively concise. Whilst some grounds were manifestly weaker than others, I doubt that the hearing would have been completed much more quickly or efficiently if the weaker grounds were not pursued.

For the purposes of [s 109\(3\)\(c\)](#), I agree with BBC that the application for declarations was comprehensively dismissed. However, as has been indicated in other decisions on costs, the fact that the Tribunal is (after hearing and analysis) able to reach a firm or comprehensive conclusion does not mean, of itself, that the unsuccessful party's case had no tenable basis in fact or law such that costs should be awarded against it. 'Untenable' means more than 'weak', and an award of costs should not ordinarily be made against an unsuccessful party just because it lost a relatively weak case. I am not convinced that, prior to the hearing and without the benefit of hindsight, unChain St Kilda and its advisers would have considered its application for declarations to be a hopeless cause. Nor do I consider that unChain St Kilda engaged in bringing the application frivolously or vexatiously on such a basis.

As I noted in my decision, the St Kilda Triangle project had attracted a high level of publicity and controversy, particularly in relation to the commercial component of the project intended to cross-subsidise planning outcomes for the site, and whether this was properly contemplated and authorised by the Port Phillip Planning Scheme. The planning scheme contained provisions relevant to the project and development plan approval that comprise 'weasel words' uncertain of specific outcome, open to different interpretations, or capable of being weighted or balanced in different ways. Under the planning scheme, the St Kilda Triangle Development Plan approval process represented the last opportunity for significant community input, with subsequent permit applications being largely exempt from third party notice and appeal rights. Alleged irregularities with the Council approval process had been aired publicly. Within this context, the applicant comprised an incorporated group of ordinary citizens seeking to protect their rights, and seeking to ensure that the development plan approval process had been validly undertaken in circumstances where there were at least some grounds for believing otherwise. The grounds for seeking the declarations were carefully crafted and argued by counsel within

established administrative law principles. I do not consider it fair in these circumstances to award costs primarily by reference to the relative strengths of the claims made by each party. As indicated, ordinary citizens should ordinarily be able to come before the Tribunal without undue fear of a costs award if unsuccessful - unless it can be established that their case was a hopeless cause, or based on a manifestly untenable premise, that unfairly or unreasonably caused another party to incur costs. In this case, I consider that unChain St Kilda's application for declarations was weak, but not so weak as to be considered hopeless, untenable or unarguable.

For the purposes of [s 109\(3\)\(d\)](#), similar comments prevail to those above in relation to the nature of the proceeding. In terms of its complexity, I agree with unChain St Kilda that the issues required considerable analysis before being dismissed by the Tribunal. All three parties were represented, and the case was argued by reference to numerous administrative law authorities. (The complexity contended by BBC also perhaps reinforces the view that the proceeding was not wholly untenable). As I have stated on other occasions, the issue of complexity also potentially 'cuts both ways' in relation to costs. Complexity will not always be a factor in favour of a costs award - the novelty or public interest in the issues ventilated before the Tribunal may sometimes militate against an award of costs despite the relative complexity of the proceeding.

Here, I do not consider that the fact that this proceeding comprised a declaration proceeding requiring a hearing before a presidential member, raising complex issues, and that was conducted by senior counsel with a 'court-like' character, is sufficient to justify a costs award. In my view, these factors would still, by themselves, be rarely sufficient to depart from the general rule that each party bear its own costs at VCAT. I agree with BBC that the application by unChain St Kilda may not necessarily be characterised as 'public interest' litigation in the strict sense. However, it was still of a broadly public character and brought in good faith by an incorporated not-for-profit community organisation comprising a large number of ordinary citizens challenging a local planning decision of some public controversy. It was not commercially or privately motivated. I do not consider it fair in these circumstances to award costs against unChain St Kilda.

For the purposes of [s 109\(3\)\(e\)](#), I am entitled to have regard to any other matter I consider relevant. Under this ground, BBC's written submission only raised issues falling under [s 109\(3\)\(b\)](#). I have already dealt with these.

UnChain St Kilda had also raised an argument that costs should not be awarded in favour of BBC because the application for declarations had initially been made against the Council alone and was not directed against BBC. The Council had competently defended the application, and BBC had chosen at its own behest to be joined as a party and to participate in the proceeding. Whilst this is conceivably a factor that might militate in some cases against an award of costs, I have given it little weight in my decision on costs in this proceeding. I agree with BBC that, given the nature of the proceeding and the potential impact on its interests, it was reasonable for BBC to seek joinder and to participate as a party in the hearing. The fact that BBC's joinder and participation was at its own behest should not be a bar to a costs award in the circumstances of this case, if the award of costs is otherwise justified. It is for the other reasons set out above that I have decided not to award costs in favour of BBC.

I endorse the views of other Tribunal members in other cases (including those referred to in unChain St Kilda's written submission) where it has been stated that the success of the Planning List at VCAT relies on its accessibility, and the ability of ordinary citizens to bring high level planning disputes before the Tribunal without undue fear of a costs award against them if they lose. I do not consider that the matters raised by BBC under [s 109\(3\)\(b\),\(c\),\(d\) & \(e\)](#) of the [Victorian Civil and Administrative Tribunal Act 1998](#), when considered 'on balance' in the circumstances of this case, justify an award of costs. Nor do I consider it would be fair to award costs in these circumstances.

It follows that the costs application is refused, and each party should bear its own costs.

Mark Dwyer

Deputy President