

**BURBANK AUSTRALIA PTY LTD V LUZINAT & ORS [2000] VSC 128**

Supreme Court of VIC – 30 March 2000

**FACTS**

Saris engaged Burbank to build a domestic dwelling. Burbank completed work on the house to the fixing stage and then served a notice of termination on Saric after he refused to pay for the progress claims submitted by Burbank. Burbank then issued proceedings to recover the outstanding debt in the Domestic Building List of the Victorian Civil & Administrative Tribunal (“VCAT”). Saris defended the claim and served a counterclaim on Burbank.

After some adjournments the dispute was mediated. The mediation was unsuccessful and VCAT listed the claim for a 13-day hearing. Saric then made an application to the Building Appeals Board (“the Board”) to determine whether the building works complied with the building regulations. Burbank objected to the Board hearing the dispute on the grounds that the dispute was already before VCAT. The Board refused to stay its hearing, so Burbank applied to the Court.

**ISSUES**

Should the Court stay the hearing and determination of Saric’s application to the Board until the VCAT proceeding had been heard and determined?

**FINDING**

Saric had allowed the VCAT proceeding to proceed until a hearing date had been fixed and only then elected to apply to the Board. Burbank had already spent a great deal of time and money preparing for the VCAT hearing and VCAT was prepared to determine the disputes between the parties.

The hearing before the Board was stayed.

**QUOTE**

Beach J said:

*“Where a party to a proceeding institutes a second proceeding in a different form in relation to the same subject matter as the first proceeding, prima facie the second proceeding is vexatious and will be stayed. ...*

*In such a situation the courts have for many years taken the view that a litigant already deeply involved in one piece of litigation would be unduly harassed if a second piece of litigation was to proceed at the same time as the first.*

*And such a principle applies to proceedings whether they be before a court, a board or a tribunal. All the more so where there is a significant risk, as there is in the present case, that VCAT’s findings and the Board’s findings may be in conflict one with the other.”*

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Jim Doyle  
1800 888 783

[jdoyle@doylesconstructionlawyers.com](mailto:jdoyle@doylesconstructionlawyers.com)  
[www.doylesconstructionlawyers.com](http://www.doylesconstructionlawyers.com)

## **IMPACT**

When an aggrieved party has the choice of more than one venue or method of resolving a dispute they should take care to select their preferred venue or method before commencing proceedings.

In this case the builder would have been forced to defend two proceedings at the same time after having already incurred legal costs in preparing for the one proceeding, and it would have been unfair to have expected the builder to have then incurred further costs preparing for a second proceeding.

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[jdoyle@doylesconstructionlawyers.com](mailto:jdoyle@doylesconstructionlawyers.com)  
[www.doylesconstructionlawyers.com](http://www.doylesconstructionlawyers.com)