VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D424/2003

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – s109 of the *Victorian Civil and Administrative Tribunal Act* 1998- relevant considerations for exercise of discretion – conduct of parties

APPLICANTS	Barry Carroll, Heather Carroll
FIRST RESPONDENT	Housing Guarantee Fund Ltd
SECOND RESPONDENT	Anthony Gerard Tuddenham
THIRD RESPONDENT	Tudcorp Constructions Pty Ltd (ACN 079 626 985)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	10 April 2006
DATE OF ORDER	6 July 2006
CITATION	Carroll v Housing Guarantee Fund Ltd (Domestic Building) [2006] VCAT 1299

ORDER

1. 'Victorian Managed Insurance Authority' (VMIA) is substituted for 'Housing Guarantee Fund' as the First Respondent.

2. The First and Third Respondents shall pay the Applicants' costs of the proceeding including reserved costs. In default of agreement such costs are to be assessed by the Principal Registrar on County Court Scale 'D'.

3. I certify for Counsel's fees at $2,000.00 per day and $250.00 per hour.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants	Mr K Oliver of Counsel
For the First Respondent	Mr C Johnson of Counsel
For the Second and Third Respondents	Mr M Settle of Counsel

REASONS

1 On 8 September 2003 the First Respondent issued a direction to the Third Respondent to rectify approximately half of the 214 items contained in the Applicants' claim dated 4 June 2003. The Applicants sought a review of that decision, and on 22 December 2005 I ordered that the Third Respondent pay to the Applicants the sum of $58,095.45 and that the First Respondent indemnify the Applicants and pay them the sum of $57,979.95 out of the Domestic Building (HIH) Indemnity Fund. Costs were reserved with liberty to apply.

2 The Applicants seek orders that the First and Third Respondents pay their costs of the proceeding. They seek their costs as against the First Respondent on an indemnity basis, or alternatively on a party/party basis on County Court Scale 'D'. They also seek orders that Counsel's fees be certified at $2,000.00 per day and $250.00 per hour. The Applicants seek their costs as against the Third Respondent on a party/party basis on County Court Scale 'D'.

3 The Second and Third Respondents seek their costs of the proceeding and orders that the by reason of its conduct the First Respondent not be entitled to seek indemnification from the Third Respondent.

THE APPLICANTS' APPLICATION FOR COSTS

4 The Applicants seek orders that both the First and Third Respondents pay their costs. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 (*'the VCAT Act'*) provides that each party must bear their own costs of any proceeding unless the Tribunal is minded to exercise its discretion to make an order costs under s109(2) having regard to the matters set out in s109(3).

The claim for costs against the First Respondent

5 In support of their application for costs against the First Respondent, the Applicants rely on s109(3)(b), (c), (d) and (e) which provide:

> 3. The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to –
>
> ….
>
> (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.

6 It was submitted on behalf of the Applicants that the failure of the First Respondent to properly assess the Applicants' claim for loss and damage had prolonged the time taken to complete the proceeding. By way of example I was referred to my observations at paragraphs 11 and 12 of my Reasons for Decision ('the earlier Decision') in relation to the claim for scratched glass.

7 As is clear from my earlier Reasons the First Respondent adopted a position which I found to be untenable and generally lacking in merit, particularly in relation to those defects in respect of which it denied liability because they would have been apparent at the time of settlement and final payment under the building contract.

8 All parties were represented by experienced practitioners, and there were a large number of items to be considered. The failure of the First Respondent to understand and acknowledge its obligations under the Policy of Warranty Insurance, and then to take any steps to defend its decision, added a complexity to this proceeding which might otherwise have been absent or minimized. Whilst the factual matrix of this dispute was fairly straightforward there were a number of complex legal and technical issues to be considered.

9 The attitude of the First Respondent that it was not required to defend its decision did little to persuade me that it was correct. This matter came before the Tribunal as an application for review of the decision of the First Respondent under s61 of the *Domestic Building Contracts Act ('the DBCA Act')* 1995. It was for the First Respondent to explain and defend its position – it was not sufficient for it merely to rely on Mr Kilgour's inspection report in circumstances where there was conflicting expert evidence, and where the experts for the Applicants and the Third Respondent were generally able to agree on a method of rectification for most of the alleged defects.

10 Mr Johnson submitted on behalf of the First Respondent that this was essentially a 'quantum' dispute. He noted that although the loss and damage claimed by the Applicants at the commencement of the hearing was $133,468.00, this had been reduced to $99,775.00 or $97,350.00 during closing submissions, of which I found the sum of $58,095.45 was the reasonable cost of rectification works.

11 Although I accept the award of damages was significantly less than the amount sought by the Applicants, it is, in my view, to misconstrue the true nature of the Applicants' claim against the First Respondent to describe it as essentially a 'quantum' dispute. Although the Applicants also sought an order for payment out of the Domestic Building (HIH) Indemnity Fund their application was first and foremost an application for review of the First Respondent's decision on liability. The Applicants were successful in

having that decision varied. Had the First Respondent complied with its obligations under the Policy of Warranty Insurance, and accepted the items which it sought to exclude because they would have been reasonably obvious at the time of final payment, the Applicants may not have sought a review of the decision on liability.

12 Further, the hearing was divided into two distinct parts – the first in relation to liability and the second part of the hearing was concerned with quantum – in fact only one day of the seven day hearing was dedicated to quantum.

13 Mr Johnson also submitted that this is an expert tribunal and all that was required was for the First Respondent to put its evidence in the form of Mr Kilgour's inspection report before the Tribunal for consideration. As noted in my earlier Reasons I am of the view that the First Respondent having denied liability in relation to a number of items, which the Third Respondent later included in its open offer, had an obligation to the parties and to the Tribunal to justify its decision. It is not for the Tribunal, even if I accept that this is an expert tribunal, to form its own opinion without the benefit of proper argument, and cross examination of all witnesses. The First Respondent simply sat back and let the hearing proceed with little or no input other than Mr Linton's involvement in the 'hot tub' process on quantum. Mr Kilgour did not take an active part in the hearing, nor, as far as I am aware, in any of the discussions between Mr Moore and Mr Martin – the technical experts.

14 As noted in my earlier Reasons the refusal of the First Respondent to indemnify the Applicants in relation to any rectification works to be carried out by the Third Respondent was simply incomprehensible. Mr Johnson suggested that had the First Respondent agreed to indemnify the Applicants and had settlement been reached, the Third Respondent may not have carried out the rectification works satisfactorily and this would led to the matter coming back to the Tribunal. However, this is purely hypothetical. If the First Respondent had agreed to indemnify the Applicants in respect of the Third Respondent's open offer, and had settlement been reached, any renewal before the tribunal would presumably have been for an assessment of quantum in relation to the works to be completed – an exercise which, of itself, would not have been particularly time consuming. An appropriate mechanism for identification of any works not satisfactorily rectified could have been agreed between the parties as a term of any settlement. I refer to my comments at paragraph 39 of my earlier Reasons which may well have been different had the First Respondent been more involved in the process. The extent of the First Respondent's exposure may even have been significantly reduced!

15 I am therefore satisfied that this is an appropriate case for the exercise of the Tribunal's discretion under s109(2) in relation to the application for costs against the First Respondent.

On what basis should the order for costs against the First Respondent be made?

16 The Applicants seek their costs as against the First Respondent on an indemnity basis. Although I am persuaded that this is an appropriate case for exercise of the Tribunal's discretion under s109(2) I am not persuaded that those costs should be on any other basis than party/party costs. I refer to Ormiston JA's comments in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 where he said at paragraph 34:

> '…there should be no presumption, as seems to have been assumed in both the Tribunal and the Trial Division, that costs ought to be paid in favour of claimants in domestic building disputes brought in VCAT…'

and to the comments of Nettle JA in the same case where he made it clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. When considering the meaning of 'reasonable legal costs' he said:

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

17 In my view there is nothing exceptional about this case. It was an appeal against a decision of the First Respondent which I have determined was untenable. For the Reasons set out above I am satisfied the First Respondent should pay the Applicants' costs because I accept the 'tests' set out in s109(3)(b)(c)(d) and (e) have been satisfied – nothing more. I will therefore order that the First Respondent pay the Applicants' party/party costs of this proceeding. I accept that the appropriate scale is County Court Scale 'D'. I also consider it appropriate to certify for Counsel's fees in the sums sought.

The claim for costs against the Third Respondent

18 The Third Respondent submits that the Applicants should bear their own costs of the proceeding because of the manner in which the Applicants' conducted the proceeding. The Applicants' claim against the Third Respondent was for damages for the cost of rectification works and consequential damage. The claim was generally successful. I reject the submissions on behalf of the Third Respondent that the Applicants' failure or inability to properly particularise their claim disadvantaged the Third Respondent in its preparation of its defence and that a considerable amount of hearing time was wasted. The Third Respondent engaged its own expert to prepare an estimate and there is no evidence he was impeded in this task

by the failure of the Applicants to fully particularise their loss and damage until late in the proceeding.

19 As has been noted above, only one day of the hearing was concerned with quantum. Similarly, there is no evidence to support the submission that the Applicants' failure to properly particularise their claim impeded settlement discussions. In any event, I note that although the Third Respondent made an open offer to carry out certain rectification works, it apparently did not take any steps to protect its position in relation to quantum by serving an Offer of Compromise.

20 It was suggested on behalf of the Third Respondent that because the Applicants' claim was initially for an amount in excess of $130,000.00 they would have had an inflated or unrealistic expectation of how much their claim was worth. However, it seems they were prepared to adopt a reasonable approach as demonstrated by their Offer of Compromise dated 26 August 2005 whereby they offered to accept, from the Respondents and the Joined Parties, the sum of $62,500.00 in respect to their claim for damages, and the sum of $50,000.00 in settlement of their claim for costs and interest.

21 Further, the Applicants' claim for costs must be considered in light of the Third Respondent's conduct. It is apparent that the open offer tabled on the first day of the hearing was a significant departure from the earlier qualified offer to carry out certain rectification works as set out in the letter of 20 October 2003 to the First Respondent (see paragraphs 20 – 24 of the earlier Reasons).

22 Although Mr Tuddenham gave evidence, on behalf of the builder, that he estimated the cost to carry out the rectification works to be approximately $15,000.00 he did not provide any evidence or calculations to support this estimate. Whilst I accept that of the $58,095.45 which I found to be the reasonable cost of the rectification works, only $4,333.60 related to items which were not included in the open offer. However, the open offer was to carry out rectification works. It was not to pay the Applicants the cost of those works.

23 It was submitted on behalf of the Third Respondent that in determining whether to exercise the Tribunal's discretion under s109(2) I should take into account my assessment of the Applicants' loss and damage. In my view it is immaterial that the value of the works allowed over and above the quantum applicable to the open offer was $4,333.60 – the Third Respondent's open offer was to carry out rectification works not to pay money. The suggestion on behalf of the Third Respondent that it cost in excess of $84,000.00 (the Third Respondent's estimate of the 'hearing costs' incurred by the parties) for a return of $4,333.60 is clearly misconceived.

24 The inability of the Third Respondent to satisfy the judgement against it, even to the extent of $115.50 over and above the amount for which the First

Respondent was ordered to indemnify the Applicants, validates the Applicants' reservations about accepting the open offer in the absence of an indemnity from the First Respondent, and their opposition to the making of any order for rectification.

25 Having regard to the conduct of the builder, and the matters set out in s109(3), I am persuaded that it is appropriate for me to exercise the Tribunal's discretion under s109(2) and order the Third Respondent to pay the Applicants' party/party costs, I accept that the appropriate scale is County Court Scale 'D'.

26 It was submitted by Mr Johnson that any orders for costs should be apportioned between the First and Third Respondents insofar as they related to the Applicants' claims against each of them. However, in my view, it is not appropriate or realistic to apportion these costs by some artificial percentage as suggested by Mr Johnson. The claims against each of the First and Third Respondents are inextricably linked. The Applicants would not have made a claim against under the Policy of Warranty Insurance had the Third Respondent fulfilled its contractual and statutory obligations in relation to the carrying out of the building works. Although the First Respondent erred in its interpretation of its obligations under the Policy, the builder continually failed to take responsibility for its works. It may not have sought a review of the decision but it did not make its unqualified open offer until the first day of the hearing and then the offer was only to carry out the rectification works. I am therefore satisfied that there should be no apportionment of the Applicants' costs as between the First and Third Respondents.

The Second Respondent's application for costs

27 I am not persuaded that I should make any order for costs in favour of the Second Respondent. Any costs which may have been incurred by the Second Respondent are essentially of his own, or the Third's Respondent's making.

28 Although I ultimately determined that the Third Respondent was, in fact, the builder, it was not until shortly before the hearing that there was any suggestion by the Second Respondent that he had been incorrectly named, in the alternative, as the builder. Any confusion as to the identity of the builder was caused by the manner in which the building contract was completed and in this regard I refer to paragraphs 14 and 15 of my earlier Reasons.

29 I note and accept the submission on behalf of the Applicants that common documents were generally filed on behalf of both the Second and Third Respondents. This is of course with the exception of the material filed in support of the application for leave to withdraw the admission that the Second Respondent was the builder, which application was unsuccessful.

THE THIRD RESPONDENT'S APPLICATION FOR COSTS AND AN ORDER THAT THE FIRST RESPONDENT NOT BE ENTITLED TO SEEK INDEMNIFICATION FROM IT.

30 The Third Respondent has apparently incurred costs and disbursements amounting to $120,000.00 which have allegedly been paid although there is no supporting evidence before me in relation to the amount of the costs or their payment. The Third Respondent seeks an order that the First Respondent pay its costs and a further order that the First Respondent not be entitled to seek indemnification from the Third Respondent. It relies on the conduct of the First Respondent in refusing to provide indemnity in respect of its open offer on day one of the hearing which it submits disadvantaged it and the Applicants, and led to a hearing which might otherwise have been avoided.

31 It was appropriate that the Third Respondent be a party to this proceeding insofar as it relates to an application for review of the First Respondent's decision, as its interests were clearly affected. In any event the Applicants had a claim for damages against the Third Respondent.

32 The Third Respondent alleges that the failure of the First Respondent to agreed to indemnify the Applicants in relation to the open offer to rectify the items specified prevented settlement being reached thereby disadvantaging the Third Respondent, and that accordingly, I should order that the First Respondent not be entitled to seek indemnification from it. This submission must be considered in the context of the Third Respondent's conduct at the proceeding. The open offer was to carry out rectification works. It did not take any steps to protect itself on quantum by making an offer of compromise.

33 It cannot now look to the First Respondent to 'bail it out'. The Third Respondent persistently failed to take responsibility as evidenced by its attitude prior to the claim being lodged with the First Respondent and its subsequent conduct commencing with the qualified offer set out in the letter of 20 October 2003 letter. I am not persuaded that the First Respondent's conduct of this case was such that it should be ordered to pay the Third Respondent's costs.

34 It is for the First Respondent to determine whether it wishes to pursue any recovery claim and it is premature to determine whether any such claim should succeed. Further, in my view, it would be inappropriate to deny the First Respondent an opportunity to pursue any claim for recovery it may have.

SECTION 97 OF THE *VCAT ACT* AND COSTS

35 I reject the submissions on behalf of the Applicant and the Third Respondent that the provisions of s97 are relevant in considering their respective claims for costs. Section 109 stands alone and as I have already noted provides that each party bears its own costs unless the Tribunal is

satisfied it is fair to exercise its discretion having regard to the matters set out in s109(3)(a) to (e).

36 I will therefore order that the First and Third Respondents pay the Applicants costs of this proceeding including reserved costs. In default of agreement such costs to be assessed by the Principal Registrar. I will also certify for Counsel's fees in the amounts sought being satisfied it was appropriate for the Applicants to engage experienced Counsel.

DEPUTY PRESIDENT C. AIRD