VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D777/2004

CATCHWORDS

Domestic building, costs, low value dispute, Calderbank offer, offer not in compliance with Ss 112-115 of the *Victorian Civil and Administrative Tribunal Act* 1998, reasonable actions.

[2006] VCAT 598

APPLICANT	Joe Ciantar t/as Dalrymple Homes
RESPONDENT	Housing Guarantee Fund Limited
JOINED PARTIES	Cheryl Giampa, Lino Giampa
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 March 2006
DATE OF ORDER	12 April 2006

ORDER

1. The Victorian Managed Insurance Authority is substituted for the Housing Guarantee Fund Limited as Respondent and is treated as if it had been the Respondent from the commencement of the proceeding.

2. The Applicant must pay the Respondent's and Joined Parties' party/party costs from and including 29 September 2005. In default of agreement I refer the assessment of such costs to the principal registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act* 1998, who shall assess them on County Court Scale C.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr D Pumpa of Counsel
For the Respondent	Mr J Forrest of Counsel
For the Joined Parties	Mr D Galloway, Solicitor

REASONS

1. On 16 December 2005 I ordered that the decision of the First Respondent was affirmed, therefore dismissing the application of the Applicant builder, and I gave the parties leave to apply for costs. Both the Respondent - Insurer and the Joined Parties – home owners have sought their costs.

2. The Joined Parties and their solicitors attended on the first day of the hearing but not thereafter. Mr Galloway for the Joined Parties was excused at 10.45 a.m. on the first day but attended the Compulsory Conference ordered by the Tribunal. The Joined Parties took very little part in the hearing, which was actively conducted by the Applicant and the Respondent.

3. At paragraph 64 of the Reasons I said:

> "The parties have leave to apply for costs, although, given the disproportion between the apparent cost of rectification of the defect [indicated to be between $10,000.00 and $20,000.00] and the five day hearing, their attention is drawn to the recent decision in *Sandman v Extension Factory Custom Designers and Builders* [2005] VCAT 245.

4. At paragraph 3 of *Sandman*, Senior Member Cremean said:

> "The matter was heard by me for [5] days. … Each party was represented by Counsel. Considering the amounts involved on the claim and counterclaim, a 5 day hearing, in all, can hardly be justified. The parties, acting reasonably, should have settled".

5. As indicated below in connection with the Calderbank letter, I do not assume that all parties acted equally reasonably (or unreasonably).

6. Mr Galloway wrote to apply for costs on behalf of the Joined Parties. Omitting the formal parts, the letter stated:

> "We refer to the decision of the Tribunal in this matter. The parties were given leave to apply for costs. My client believes that it should not be required to bear the cost of the trial.
>
> 1. My clients were (properly) joined on the motion of the Tribunal.
>
> 2. They became embroiled in an argument between the insurer and the builder that they could not avoid but they lacked the legal and technical knowledge required to participate.
>
> 3. They were intimidated by the process and sought the advice of a solicitor. This was a prudent and appropriate course of action. It was encouraged by the insurer's solicitor. It would have been very difficult for my clients to participate in this process without the advice of a lawyer. It would have made the work of the other parties more difficult.
>
> 4. My clients undertook the minimum amount of work and assisted the insurer and the builder at every opportunity.
>
> 5. My clients would not have brought proceedings against the builder. Given the rectification cost, I believe they would have arranged to have the work done themselves. I would have encouraged them to do so. This course was not available to them because the insurer and the builder proceeded to trial.
>
> 6. I asked the other parties on several occasions why the matter was proceeding to trial. For $5,500 each, we could have settled and the cost to the parties would have been significantly reduced.
>
> 7. Given the estimated rectification cost of $11,000, it seems extraordinary that this matter proceeded through a 5 day trial to judgment but my clients understand that there are times when this can not be avoided.
>
> 8. There was a great deal of work involved despite my clients' attempts to keep the work to a minimum and to stimulate settlement discussions.
>
> 9. My client wishes to avoid further legal costs to the greatest extent possible.
>
> 10. It would be extremely unfair for my clients to bear the cost of this dispute.

a. They did not start it.
b. They were joined by the Tribunal.
c. They could not avoid it.
d. Their involvement throughout was to minimize their costs, assist the other parties and to try to find a resolution.
e. The building work was found to have been defective.
f. The builder should bear my client's costs and they should be indemnified for those costs by the insurer.

11. My clients seek an order that:
a. The builder pays $10,384 being the costs incurred to date (as set out in the attached invoice).
b. If these are not paid within 14 days that the insurer is obliged to make payment directly to my client within a further 14 days".

7. At the costs hearing, Mr Galloway again emphasised the unfairness to the Joined Parties of being joined to a dispute not of their making where approximately the whole value of the dispute was absorbed in fees. At the hearing I said that, while this outcome is most regrettable, it is not necessarily sufficient to entitle the Joined Parties to an order for costs.

8. It is noted with some degree of alarm that the Joined Parties have incurred substantial costs where they were represented only at one directions hearing, the compulsory conference and the hearing for three-quarters of an hour, and only a list of documents was filed on their behalf. It is also noted, however, that there were significant numbers of documents lodged for a matter of this magnitude and that the expert reports were extensive and highly complex. With the benefit of hindsight the Joined Parties would have been better off to leave the matter in the hands of the insurer. Unfortunately, like the rest of the population, they did not have the benefit of hindsight.

9. The Respondent seeks costs under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act") which provides in part:

"(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

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

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(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".

10. The Act establishes the assumption that each party will bear their own costs unless there is a reason to depart from that assumption.

Costs under s109

11. It was submitted for the Respondent that costs should be awarded because the application had no tenable basis in fact or law. The Applicant's case did not fall into this category. At paragraph 52 of the reasons I said "On the **balance of probabilities**[1] it is found the some fill beneath the south east corner of the garage wall … was placed by the [Applicant] or should have been immediately obvious to [him]".

12. The expert evidence in the proceeding was technically complex, which tends to support an application under s109(3)(d). However I am assisted by

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the decision in *The Gombac Group v Vero Insurance* [2006] VCAT 238. I agree with Deputy President Aird's decision that it does not automatically follow that costs will not be awarded where an application for review of an insurer's decision is unsuccessful. That proceeding, also, contained "a number of complex technical issues" and the hearing appeared, also, to be around five days. Deputy President Aird commented that: "There mere fact that the builder was unsuccessful is not sufficient reason for me to depart from the provisions of s109(1)". In the absence of the Respondent's Calderbank letter, there would have been no order for costs in this proceeding.

Calderbank letters and offers under Division 8 of the Act

13. On 27 October 2005 the Respondent's Solicitors sent a letter to the Applicant's Solicitors offering that the Respondent would bear its own costs, if the Applicant would withdraw his appeal against the Respondent's decision and attend to the works, or pay for this to be done. The letter referred to a quote from A-Tech Home Improvements to undertake the underpinning work for $7,200. The letter purported to make an offer under Division 8 of the Act, but was only open for seven days, so it did not comply. Section 114(1) and (2) provides:

> **Provisions concerning the acceptance of settlement offers**
>
> (1) An offer must be open for acceptance until immediately before the Tribunal makes its orders on the matters in dispute, or until the expiry of a specified period after the offer is made, whichever is the shorter period.
>
> (2) The minimum period that can be specified is 14 days.

14. However the offer was also expressed to be made in accordance with the principles in *Calderbank v Calderbank* and *Cutts v Head* as adopted by Justice Gillard in *M T Associates Pty Ltd v Aqua-Max Pty Ltd & Anor* (No 3) [2000] VSC 163.

15. Significantly, the author of the letter said,

> "It is abundantly clear that the costs of repair will pale into insignificance compared to the cost the parties will incur in continuing with this dispute. The costs incurred to date are already substantial."

16. The letter in general and the paragraph in particular encapsulated admirable good sense, and a willingness to deal with the commercial realities of this litigation. In the words of Gillard J *M T Associates* at paragraphs 65 to 67:

> "In my opinion if the offer could be made in accordance with the rules it should be. The rules [about offers of compromise] are there to be followed. In addition the rules set out in detail the procedure to be followed and the consequences which flow from the happening of a particular event.
>
> But if the offer is not made in accordance with the rules when it could have, it is still a relevant matter to take into account on the question of costs.
>
> Any offer made in litigation should be carefully considered and a party and his solicitor ignores or rejects the offer at his peril".

17. I accept the submission for the Respondent that despite the small value of the claim, the Respondent could not compromise its position by disregarding its obligations under the *House Contracts Guarantee Act*, and the rights of joined parties under that act and the HIH policy. Expediency was not open to it.

18. The Respondent's offer was rejected by letter from the Applicant's solicitors of 8 November 2005, which enclosed a document entitled "offer of compromise". The substance of the offer was that the Respondent reverse its decision and pay the Applicant's costs and disbursements on Magistrates' Court Scale D.

19. The result achieved by the Respondent by the decision of 16 December 2005 was more beneficial to it than the offer of the Applicant, and at least as beneficial to it as the offer it made to the Applicant. It has been submitted

for the Applicant that the Respondent's offer has not been equalled or bettered by the decision, because it produced a "quote and contract" from K.L.H. Constructions of 26 January 2006 where they offered to undertake the underpinning for "$4,920.00 plus council fees and charges where required". The quotation was not attached to an affidavit or otherwise proved in evidence, but handed up from the bar table. Further, the Respondent's offer was not purely a money offer, and, by necessary inference, gave the Applicant the choice of paying or doing the work. It said:

> "The quote [for $7,200.00] does not include the cost to rectify consequential damage. Given that your client is in the profession, he should have an idea about how much it would cost him to do that work".

20. The order was that the Respondent's decision was affirmed, and the decision was that the Applicant was directed to rectify the works.

21. I am satisfied that, from the date the Applicant received the Respondent's offer, it is reasonable that he should have behaved in a sensible commercial manner and accepted it. The Respondent is therefore entitled to costs from and including 29 September 2005; the third business day after the offer was made. Had the offer been made in accordance with Division 8 of the Act, the Respondent's entitlement to costs would have commenced on 27 September 2005.

22. No similar offer was made by the Joined Parties, but in this case if the Applicant had taken the reasonable course after the receipt of the Respondent's offer, their involvement in the proceeding would have ceased as well. I find in the circumstances that the Joined Parties are also entitled to have their costs paid by the Applicant from and including 29 September 2005.

Claim by Joined Parties Against the Respondent

23. The Joined Parties sought their costs from the Applicant, but failing payment within 14 days, to be indemnified by the Respondent. No basis for indemnity was included in the Joined parties' solicitor's letter of 19 December 2005 and none was argued at the costs hearing. It is noted that this is not a claim which falls under s15 of the *House Contracts Guarantee Act* 1987. In the absence of argument and the relevant policy, no order regarding indemnity is made.

Scale of Costs

24. Where there has been an offer under Division 8 of the Act it is not unusual for costs to be awarded on an indemnity or solicitor-client basis as in *Greenhill Homes Pty Ltd v Allianz Australia Insurance Ltd and Ors* [2006] VCAT 184, but in this case the offer's relevance is that it should have drawn the Applicant's attention to the wisdom of settling, and but for the offer, no costs would have been awarded. I find that party-party costs are appropriate.

25. The sum in dispute would fall under the Magistrates' Court jurisdiction, but the complexity has justified engaging experienced Counsel. The submission on behalf of the Respondent that County Court Scale C is appropriate is accepted.

SENIOR MEMBER M. LOTHIAN