VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D202/2004**

APPLICANT:	Noreen Cosgriff
FIRST RESPONDENT:	Housing Guarantee Fund Ltd (as Administrator of the Domestic Building (HIH) Indemnity Fund)
SECOND RESPONDENT:	Omega Construction Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Appications for amendment of order and for costs
DATE OF HEARING:	2 March 2006
DATE OF WRITTEN REASONS:	3 April 2006

[2006] VCAT 463

REASONS FOR DECISION

When the decision in regard to this application was made on 2 March 2006, oral reasons were given. In response to the request of the First Respondent the following written reasons are now provided.

APPEARANCES:

For the Applicant:	Mr A. Dickenson of Counsel
For the First Respondent:	Mr S. Stuckey of Counsel
For the Second Respondent:	Mr J. Lewis of Counsel

REASONS FOR DECISION

The application to amend the order

1 Once an order determining a proceeding has been made it is final save for appeal or what used to be called "the slip rule". The relevant provision in the Victorian Civil and adminiostaretive Tribunal Act 1998 is section 119 which provides as follows:

> **"Section 119**
>
> *"(1) The Tribunal may correct an order made by it if the order contains-*
>
> *(a) a clerical mistake; or*
>
> *(b) an error arising from an accidental slip or omission; or*
>
> *(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or*
>
> (17) *a defect of form."*

2 A similar provision is to be found in the **Rules of Civil Procedure, Chapter 1** 36.07, which provides:-

> *"The court may at any time correct a clerical mistake in a judgment or order or an error arising in a judgment or order from an accidental slip or omission."*

3 The extent of the jurisdiction conferred by this rule is extensively discussed in "**Williams Civil Procedure Victoria"** *I. 36.07.55*. In ***Riga v. Peninsular Home Improvements*** [2000] VCAT 56 I discussed the relevant authorities, including the following passage from the case ***R. –v.- Cripps ex parte Muldoon*** [1984] QB 686 at p. 695 where Donaldson MR said (citations omitted):-

> *"It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely, to allow the court to amend the formal order which by accident or error does not reflect the actual decision of the Judge. But it also authorises the court to make an order which it failed to make as a result of the accidental omission of Counsel to ask for it. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended."*

4 In ***Riga*** I concluded that the test as to whether a mistake or omission is accidental was: *"If the matter had been drawn to the court's attention, would the correction at once have been made?"* That is still my view.

5 It is also clear that the rule extends well beyond a mere clerical slip (see ***University of Ballarat –v.- Deborah Bridges and the Equal Opportunity Board*** (No. 7134 of 1993 – Court of Appeal 23 February 1996 - unreported).

6 The section cannot be used as a substitute for an appeal. It is there to fix a mistakes that has been made and it must be a mistake such that, had it occurred to me at the time I would not have made it. I would have picked it up and fixed it at once.

7 During the hearing the focus of whether or not the Second Respondent ("the Builder") had been given an opportunity to rectify the defects and whether or not he was willing to do so. The hearing focussed on the merits and although Mr Stuckey gave me a very learned dissertation at the beginning of his case as to the way the mechanics of the section of the ***House Contracts Guarantee Act 1987*** ("the Act") worked, when I came to make the order I did not turn my mind to the simple undeniable fact that the Applicant ("the Owner") was not seeking indemnity from an ordinary insurer that had received a premium in exchange for granting indemnity in accordance with the terms of written policy but rather, she was obtaining a statutory indemnity conferred by Parliament in legislation setting out, in specific terms, what indemnity is given and upon what terms. Now in determining the dispute that existed between the First respondent ("the Fund") as administrator of the scheme and the Owner I have to act on the basis that, if the Fund has gone wrong, that ought to be set right and it ought to be directed to who what it ought to have done in accordance with the provisions of the scheme.

8 The scheme is set up by the Act which provides how it is to operate. The forms and procedures to be used are to be approved by the Minister (s.41). I should not have made an order that the Fund do something other than what the Act provided. The order that I made is inconsistent with the scheme set out in the Act in two respects. First, it is clear from the wording of the Act that the assets of the Fund are not liable for payment of a claim, costs or expenses (s.39(5)) in regard to any amounts to be paid to one of the beneficiaries of the scheme. The Fund is administering the scheme, it is not the underwriter. The indemnity is conferred by the State of Victoria (s.37). To make an order as I did against the Fund to pay the Owner the sum of $39,231.50 was in error and I should not have done it. Secondly, the statutory scheme provides that the Owner is to

receive indemnity in accordance with and to the extent of the policy (s.38), but the policy provides for the payment of an excess. The order ought to have been that the Fund grant indemnity to the Applicant with respect to a loss established at $37,231.50 in accordance with the Act and then the machinery set out in or under the Act will take over.

9 Now the Act prohibits the Fund from paying out without an assignment of the claimant's rights to recover from HIH and the Builder. This is done in the form of a release and it is not proper for me to direct the Fund to pay out with receiving the release. The loss if fixed and established at $39,231.50 and the Fund ought to grant indemnity towards that loss but it must do so in accordance with the Act.

10 For those reasons I will amend the order in those terms. I will hear from Counsel as to the precise wording but that is what I feel I ought to do.

The applications for costs - against the Fund

11 The application for costs against the Fund was put on two bases by Mr Dickenson. The first was that, under the terms of the policy once the claim has been accepted the obligation arises for the insurer to pay the insured her reasonable costs and expenses associated with the successful enforcement of the claim. On that basis he seeks that I make an order for costs in those terms and reserve liberty to apply in the event of any difficulty the parties might have in quantifying the sum to be paid. In the alternative he seeks an order for costs in accordance with s.109 of the VCAT Act on the basis that, in all the circumstances, an order for costs ought to be made.

12 Mr Stuckey valiantly resisted both applications. In regard to the application for an order that his client pay the Owner's reasonable legal costs and expenses associated with the successful enforcement of the claim he pointed out that there had been no claim with respect to costs and that until there was there could be no decision on that claim that I could review. The review of such a decision is not the subject of this proceeding and if the Owner wishes to make a claim in accordance with that provision of the policy she will need to do so.

13 In response to that submission Mr Dickenson pointed to the precise wording of the policy which said that the obligation to pay reasonable costs arose when the claim was accepted. That has some superficial appeal but ultimately there must be a mechanism for the seeking, assessment and determination of a claim with respect to those costs and I think that it is implicit that there ought to be a claim if one is seeking to enforce a right under a policy. One needs to claim indemnity because a cause of action by an insured against an insurer is in damages for breach of contract, the breach of contract being the refusal or failure to indemnify. The insurer is not liable to indemnify until such time as indemnity is sought and the form in which it is sought is a claim. So I think that it is implicit that a claim ought to be made.

14 After that, if there is a dispute or the insured is dissatisfied with the manner in which the claim is dealt with then this Tribunal ultimately has jurisdiction to deal with that. Mr Dickenson laments that this is a very costly way of claiming costs but it seems to be that rather than approach it in this way the parties have simply to apply for an order for costs under s.109. The two of course are not co-extensive. The "reasonable costs" of enforcing a claim is a description that seems to go well beyond the mere costs that could be awarded under s.109. Indeed, the latter might be only a part and in some cases a minor part of the costs and expenses of enforcing the claim.

15 I can make an order for costs under s.109 but until such time as a claim is made I cannot make an order for indemnity under the policy with respect to those costs. To make an order in the terms sought would also simply be repeating what the policy says and what the policy requires. The Fund does not suggest that it is not liable to pay these expenses. It is simply saying that it needs to have a claim made for the amount sought which it needs to consider. I think that is what the Act contemplates should occur.

16 The alternative claim is for costs under s.109 Mr Stuckey made a very forceful submission in regard to that and pointed to the comments of Ormiston J. in the Court of Appeal in ***Pacific Indemnity Underwriting v. Maclaw*** [2005] VSCA 165 where he pointed out that there is no presumption in this Tribunal that there is any entitlement to costs. Costs are very commonly ordered in this list but the fact that they are commonly ordered does not mean to say that there is any presumption that they should be. As Mr

Stuckey pointed out one must look at the facts of each case to see if it is appropriate to make such an order.

17 Mr Stuckey submitted that there was a fair factual contest in this case as to whether the Builder was prepared to do the work the Fund directed it to do. That is so but it went well beyond that and a considerable number of experts were called. There was by no means agreement between the experts, in fact there was considerable conflict between them. I found the case extremely difficult. The method of rectification required considering and balancing of a lot of expert views and a visit to the site with the parties and their counsel. Mr Stuckey says that ultimately it was the Fund's approach to rectification that was adopted by the Tribunal which I think is largely true, but the fund did not offer to pay for that beforehand. The Fund's position was that it had given indemnity because it had ordered the Builder to return to the site. It took the view that the Owner had denied the Builder access. Its ultimate decision, if it can be classified as such, was to close its file.

18 So the case was not one where the Fund had rejected the claim. It had accepted the claim but then simply refused to provide any form of indemnification apart from the direction it had given to the Builder to go back to the site, and then saying that, if the Owner was not prepared to accept that she could not complain that she had not been offered indemnity. That was the point taken and I found it was not justified.

19 Mr Stuckey said that the question of quantum was not really an issue but ultimately I think it was because I found that the indemnity offered was in fact not an indemnity at all and I had to ascertain what the indemnity would be. I do not think I could have determined the case properly by simply saying *"No, you have not given indemnity, now you must give indemnity in terms of assessing it and what it would reasonably cost and pay a monetary amount to the Owner"*. I suppose I could have done that but that was not the way the case was argued. It would have been foolish for the parties to have proceeded in that way. The case was run on a much more sensible course which was to get the whole thing over and done with. The costs of running it in that way have been incurred by everybody.

20 I am going to make an order for costs because I think this is a complex case that was not cheap to bring or conduct. Without wanting to belittle the quantity of money involved, it was relatively modest compared to many building cases. To refuse an order for costs would probably have the effect of depriving the Owner of the fruits of conducting, the fruits of litigation where she has been successful. I think they are appropriate matters to take into account in awarding costs.

21 As to the scale I think they should be on Scale "C" in view of the amount involved. I do not propose to divide the costs into two. I shall make an order for the costs against the Fund in regard to the proceeding between the Owner and the Fund and the First Respondent.

Costs against the Builder

22 That leaves the claim for costs against the Builder. Again I think that the case was complex. I understand Mr Lewis's point that the ground upon which the Owner was ultimately successful was not specifically pleaded but the facts were raised during the hearing and the complaint upon which that ground rested was clearly made out. The Builder had not obtained foundation data as the ***Domestic Building Contracts Act 1985*** required him to do. The section was sufficiently raised by the Owner and this is not a court of pleading

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23 The same considerations referred to above apply equally in regard to the claim against the Builder.

SENIOR MEMBER R. WALKER