VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D668/2003 and D580/2004**

CATCHWORDS

Costs – relevant considerations

APPLICANT:	Donaldson Homes Pty Ltd
RESPONDENT:	Vero Insurance Limited
JOINED PARTY:	Martin Fisher (claim withdrawn 3/9/2004)
JOINED PARTY 2:	Arlette Fisher (claim withdrawn 3/9/2004)
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Costs Hearing
DATE OF HEARING:	13 December 2005
DATE OF ORDER:	15 February 2006

[2006] VCAT 179

ORDERS

The Respondent shall pay the costs of the Applicant, including all reserved costs, save and except for any costs incurred by the Applicant in proceeding D668/2003 up to and including 30 November 2004, and in relation to the Respondent's application for Directions/Orders dated 9 September 2005 heard and determined on 27 October 2005. In default of agreement, such costs to be taxed by the Principal Registrar in accordance with County Court Scale 'D'.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr T Graham, Solicitor
For the Respondent:	Mr J Nixon of Counsel
For the Other Parties:	claim withdrawn 3/9/2004

REASONS

1. The Applicant ("the builder") seeks orders that the Respondent ("the insurer") pays its costs of and incidental to this proceeding and D668/2003 on a solicitor/client basis. The builder was represented at the costs hearing by Mr Graham, solicitor and the insurer by Mr Nixon of Counsel. These Reasons apply to the orders made in both proceedings.

2. At the commencement of the costs hearing the builder sought an adjournment because Counsel briefed in the matter was unavailable. This adjournment application had been foreshadowed by a letter from the builder's solicitors dated 8 December 2005 accompanied by affidavit material in support. Apparently Counsel advised the builder's solicitor as early as 7 November 2005 that he would be unavailable. However, this was not communicated to the insurer's solicitors until 24 November 2005– nearly three weeks later. Although the insurer's solicitor was slow in responding and did not do so until the builder threatened to make application to the Tribunal for an adjournment, I was satisfied this was not fatal to the insurer's objection to the hearing being adjourned.

3. It is surprising that the builder's solicitor, having been advised by Counsel that he would be unavailable as early as 7 November 2005, nevertheless briefed him to prepare the written submissions in support of the application for costs yet made no attempt to contact the insurer's solicitors at that time. There are a number of members of Counsel who would, no doubt, have been available to prepare the submission and appear at the costs hearing. It is not unusual for alternative arrangements to be made during the course of a proceeding and I was not satisfied that the builder was unable to make such arrangements in relation to this application for costs.

4. Mr Graham, the builder's solicitor, advised he had rearranged his day so that he could appear on behalf of the builder in the event the adjournment was not granted. I was therefore not persuaded I should grant the adjournment and the costs hearing proceeded.

Background

5. The owners entered into a building contract with the builder for construction of a new home on 25 March 1998. On 10 December 1999 they made a claim under the policy of warranty insurance which was accepted, in part, by the insurer on 15 February 2000 ('the first decision'). The first decision was based on a report of Mr Bruce Higgins who inspected the property on 17 December 1999 in the absence of the builder. Mr Higgins estimated the cost of rectification of the accepted items at $9,338.00.

6. On 22 February 2000 the builder wrote to the insurer requesting a further inspection which was carried out on 19 May 2000, again by Mr Higgins. There is no explanation as to the insurer's delay in arranging this inspection in response to the builder's letter of 22 February 2000 which it received on 28 February 2000.

7. A revised scope of works was agreed at the inspection, and the builder commenced rectification works on 31 May 2000. There is some dispute as to whether the builder's painter was denied access to complete the works as has been alleged by the builder.

8. On 2 June 2000 the builder sent the following letter to the insurer which the insurer relies on as the builder indicating a clear intention not to return to the site to carry out any further rectification works:

As you have not returned my previous 3 phone calls, I now write to you to confirm the current status of this claim.

Corrective work at the property, as agreed upon at our meeting with Mr Bruce Higgins, commenced on Wednesday 31 May. Carpentry, plumbing, rendering and painting was carried out on this day. Painting was the only work which required more time. However, Mr Fisher has taken it upon himself to bar us from completing the painting. Mr Fisher informs me he has compiled a further list of alleged defects and is awaiting your reply. It is now beyond the timeframe for which he can appeal against the HOW decision.

I have been happy to accept the HOW decision and to perform the agreed list of works, but cannot tolerate further delays in completing the work schedule at the whim of Mr Fisher. I do not believe that you should allow Mr Fisher to make further claims beyond those which have previously been agreed upon by all parties.

This has already become a very long drawn out affair which has been caused by circumstances beyond my control. I now do not wish to have any further dealings with the matter and leave it to you to complete.

9. The builder has expressed frustration that the insurer did not respond to this letter (nor to various telephone calls). However, it is difficult to interpret it as requiring a response. Although the builder contends that if the insurer had responded the matter could have been resolved at that time, this is not the impression one gets from reading the letter. It is not surprising that the insurer relies on this letter as a clear indication that the builder did not intend to carry out any further works to the property and was content for the insurer to take whatever steps were necessary. I am particularly concerned by the builder's attitude as expressed in the second last paragraph of this letter. The owners have an entitlement to make a claim during the life of the policy for whatever items they consider to be defective. The insurer cannot deny them of what are their statutory and contractual rights and entitlements and the builder should not have requested or demanded that they do so.

10. There seems to have been little if any action by the insurer or the builder during 2001 as evidenced by the owners' letter to the insurer dated 20 December 2001 wherein Mr Fisher expresses his concern about having not heard from the insurer since August 2000. Following receipt of the owners' letter of 20 December 2001, the insurer arranged for Mr McNees to carry out a further inspection on 24 April 2002 which the builder complains it was not given the opportunity of attending. On 21 November 2002, some seven months later, the insurer made a second decision on liability based on Mr McNees report of 24 April 2002. The builder contends this decision apart from some additional items, is much the same as the first decision made on 15 February 2000. There is no explanation from the insurer for the delay between that report and the making of the second decision.

11. Mr Donaldson, director of the builder, says that he then had some discussions with a representative of the insurer following which he provided it with a report dated 12 December 2002 together with a request for an internal review of the decision of 21 November 2002. He then heard nothing further until 22 May 2003 when the insurer advised the builder that the owners had made a further claim. Following the insurer's further decision on liability made on 16 September 2003 the builder made application to this tribunal in proceeding D668/2003 seeking a review of that decision.

12. A mediation was held on 20 February 2004 following which the builder contends the parties' respective experts met together and agreed a scope of works on 27 April 2004. This is denied by the insurer although it agrees that it did obtain quotations in accordance with the scope of works discussed by the experts. The quotations are dated 22 August 2004 in the sum of $55,111.00 and 23 August 2004 in the sum of $41,790.00. Copies of those quotations were sent to the builder's solicitors under cover of a

letter from the insurer's solicitors dated 27 August 2004 advising

> '*Both quotations have been prepared on the basis of the Scope of Works detailed in the Schedule under the column headed further "Build Scope and Co Pty Ltd comments'*.

13. The insurer made a decision on quantum on 5 August 2004 in the sum of $69,408.25 based on a quotation from Master Menders dated 1 June 2004, having settled with the owners and paid them the sum of $38,000.00 on 17 June 2004 (after the experts had 'agreed' the scope of works, but before quotations in respect of the 'agreed' scope of works had been obtained). The builder made a further application to the Tribunal seeking a review of this decision on 1 September 2004 (D580/2004).

14. On 1 June 2005 Mr Ray Martin was appointed as a Special Referee under s95 of the *Victorian Civil and Administrative Tribunal Act* 1998 to:

> *… report to the Tribunal and provide his opinion for the reasonable quantum for the completion by Registered Domestic Builder of the rectification works required in accordance with the agreed Scope of Works attached hereto and marked "A" The Estimate of Quantum").*

15. Mr Martin's report is dated 12 July 2005 and his estimate of the cost of carrying out the agreed scope of works is $10,568.50 which includes a margin of 45%. Quotations had been obtained by the owners from RL Green Building Services in the sum of $41,790.00 and by the insurer from Master Menders in the sum of $55,111.40.

The builder's difficulties in obtaining warranty insurance

16. Mr Donaldson, director of the builder, has filed an affidavit dated 29 November 2004 in which he sets out in detail the difficulties the builder perceives it had in obtaining warranty insurance from HIA or IMAR because the 'Fisher claim' remained unresolved. He also contends that the insurer failed to process its application for insurance promptly.

17. However the application currently before me, as confirmed by Mr Graham during the hearing, is an application for costs of the two proceedings. It is not a claim for damages or compensation arising out of the failure of the insurer to process the application for insurance. A consideration of the correspondence, from the insurers to the builder, reveals that there has not been a refusal to provide insurance but rather each of the insurers to whom application for insurance was made repeatedly sought further information from the builder which it has seemingly failed to provide. I am not satisfied that any alleged difficulties in obtaining insurance are matters which should properly be taken into account in determining this application for costs.

Discussion

18. Although the builder expresses frustration that it was not given an opportunity to return to site to carry out the rectification works I am satisfied that it had indicated to the insurer that it was not interested in doing so in its letter of 2 June 2000. The builder's conduct following the further decisions on liability only serves to reinforce this impression. As noted above, following the further decision on 21 November 2002 the builder sought an internal review of that decision alleging that apart from the painting works in respect of which it alleged it had been denied access by the owners, it had rectified those items which it believed were included in the earlier decision. The last paragraph of the builder's letter of 12 December 2002 to the insurer is illustrative of its general attitude:

> *Please consider both your own situation and mine and realize that I have attended to the previous work schedules which have now been dredged up. Any further work is beyond our guarantee obligation and Mr Fisher should attend to those things himself.*

19. This attitude is further reinforced by the letter of 19 September 2003 (the date on which the builder received the insurer's decision dated 16

September 2003):

> *Your letter today asks me to contact Fisher within 14 days. I will be interstate from this weekend for 2 weeks so I won't be able to contact him.*
>
> *By my comment to you from your response is it seems my previous correspondence over the years and my situation has been totally ignored and that Royal and Sun have taken the easy option to put it all back on me. I am not going to sit and suffer because of HOW, Royal & Sun and Fishers incompetence and whims.*
>
> *I ask you to reconsider my last correspondence by October 6th as I will act upon the situation upon my return.*

20. On 13 October 2003 the application seeking a review of the decision on liability was lodged with the tribunal on the grounds *'that the decision is wrong in law'*. It was not until July 2004, some 20 months after the insurer's second decision on liability, that the builder offered to return to carry out any rectification works, and then only after its offer to pay the minimal sum of $2849.00 was rejected.

21. Points of Claim applicable to both proceedings were filed on 23 December 2004. Although they contain various allegations essentially relating to the builder's frustration as to the handling of the owners' various claims leading to the insurer's decisions on liability they fail to disclose any grounds for alleging that those decisions were wrong in law. I am not satisfied that the application for a review of the decision on liability had any merit at all.

22. However, I am satisfied that it was entirely reasonable for the builder to appeal the decision on quantum. To recap: the owners obtained a quotation from R L Green Building Services in the sum of $41,790.00 and the insurer obtained a quotation from Master Menders in the sum of $55,111. On 17 June 2004 the insurer settled with the owners and paid them the sum of $38,000.00 in full and final settlement of their claim.

On 5 August 2004 the insurer made a decision on quantum in the sum of $69,408.00 which was based on a quotation obtained from Master Menders dated 1 June 2004. It is clear that all of those sums were significantly greater than the amount ultimately assessed by Mr Martin in the sum of $10,568.50.

23. The insurer submits that its decision in relation to quantum was based on the lower of the two quotations obtained by it from the open market. However the insurer is unable to satisfactorily explain why having paid $38,000.00 to the owners it should be entitled to recover the sum of $69,509.85 from the builder. I accept that the owners were required to assign their rights in relation to this proceeding to the insurer under the Terms of Settlement which then gave the insurer the right to conduct the claim on behalf of the owners as distinct from the insurer exercising subrogated rights. However, I am not persuaded that this entitles the insurer to seek to recover more than it actually paid to the owners for the rectification works. Mr Nixon referred me to the decision in *Ewert v Audehm & Ors* [2001] VSC 380, which was an appeal from a decision of this tribunal. Although not referred to any particular paragraphs of that decision I have considered the comments and observations made by Ashley J. In *Audehm* he considered the owners' assignment of their rights to the HGFL under the Release and whether this enabled the HGFL to recover a potential windfall of approximately three and a half times more than it paid to the owners. At paragraph 72 he observed:

> *It would be compatible with such purpose that in this case the parties intended the nominal value of the rights of action assigned to HGF to somewhat exceed $40,000. For it could not be assumed that, on trial of proceedings, the nominal value of the rights would be reflected in a court order. Moreover, there may have been some "related costs". But it strains credulity to accept, in the circumstances of the case, a presumed intention of the parties that the owners would assign to HGF rights of action whose nominal value exceeded by three and a half times the amount which HGF had paid to them".*

24. It is apparent that an appropriate basis for assessment of damages is the actual cost of carrying out works in circumstances where works have already been carried out and, by way of analogy to this situation, such sum can only be the actual amount paid to the owners. In *Hyder Consulting (Australia) Pty Ltd v Wilhemsen Agency Pty Ltd* [2001] NSW CA 313 Giles J A said:

> 'That if the rectification work has been carried out and the actual cost is known, that provides sound evidence of the reasonable cost and should ordinarily provide the basis for damages.'

25. In this case, although the cost of rectification of the accepted items was subsequently determined by Mr Martin to be $10,568.50 the amount paid to the owners was $38,000.00. I am not persuaded that it was ever appropriate or reasonable for the insurer to seek to recover from the builder more than the amount that was actually paid to the owners. Had the owners conducted this proceeding in their own names they would not have been in a position to recover the amount of the higher quotation from the builder unless the tribunal had been satisfied that it was the most reasonable quotation for rectifying the accepted items. It seems (as effectively conceded at paragraph 4 of the Respondent's Submissions in Reply) that the insurer finally made the decision to pay $38,000.00 to the owners because of its failure to process their claim diligently and expeditiously.

26. Section 109 (1) of the *Victorian Civil and Administrative Tribunal Act* 1998 provides that each party must pay its own costs unless the tribunal is satisfied it should exercise its direction under s109 (2) having regard to the matters set out in s109 (3):

> (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.

27. I am satisfied that the insurer has conducted proceeding D580/2004 in a way which has disadvantaged the builder. Its decision on quantum was clearly inflated, and there has been no satisfactory explanation as to why it could ever had any entitlement to recover approximately $30,000.00 more than it actually paid to the owners. I have no hesitation in exercising my discretion under s109 (2) having regard to the provisions of 109(3) of the Act and ordering costs in favour of the builder in relation to its application for a review of the insurer's decision on quantum. A curious submission was made on behalf of the insurer that if I was minded to make an order for costs in relation to the 'quantum appeal' that these should be offset against the insurer's costs in relation to the 'liability appeal'. Notwithstanding the position set out in the Respondent's Submissions in Reply Mr Nixon said that the insurer was not otherwise claiming costs but did so insofar as such a set-off might be appropriate. In my view a party either applies for costs or it does not. It

is inappropriate to make a conditional application for costs that is only to be considered in circumstances where a party might otherwise be exposed to a costs order.

28. I note that the builder seeks costs on a solicitor/client basis. Considering the recent decision in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 it is clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. At paragraph 91 Nettle J A said:

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building this 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 …'

29. The builder has referred me to the offers of settlement made by it during the course of the proceeding. The builder concedes that although these offers purport to have been made pursuant to s112 of the Act that they cannot be regarded as offers under the Act following the decision in *Kaldawi v Housing Guarantee Fund Limited* [2004] VCAT 2024. In *Kaldawi* it was held that settlement offers pursuant to s112 of the Act cannot be made where the proceeding relates to a review of the decision pursuant to s61 of the *Domestic Building Contracts Act* 1995. However it may be that they can be regarded as Calderbank offers which I accept may be considered in determining whether the tribunal should exercise its discretion under s109(2) of the Act (*H.F.K. Cement Rendering v Mina* [2005] VCAT 551.

30. The builder made the following settlement offers:

12 May 2004	The builder offered to pay the insurer $2,849.00 in full settlement of the proceeding.

13 July 2004	The builder offered to undertake all works contained in the works schedule agreed to between the experts.
15 December 2004	The builder offered to settle the proceeding on the basis the insurer pay its party/party costs calculated pursuant to County Court Scale A less the sum of $3,080.00.
7 April 2004	The builder offered to pay the insurer $10,000.00 inclusive of costs and interest

31. The final quantum as determined by Mr Martin is greater than each of these offers. At page 3 of his report Mr Martin makes the following observation:

> *I have considered the costings prepared by Donaldson Homes Pty Ltd in the amount of $2,849.00; the quotation submitted from Ken Mahoney Carpentry Service in the amount of $3,080.00 and the pricing calculation carried out by Tim Casamento of Buildspect & Co in the amount of $6,376.37. I do not believe that the pricing in either of these documents is high enough.*

32. In relation to the quotations from R L Green Building Services and Master Menders Mr Martin makes the following observation:

> *NOTE: In my opinion, the difference between $10,568.00 and the amounts tendered by the two builders provided by the insurer is explained by the excessive scope of works and market opportunity*.

33. Although it is submitted by the builder that the offer of 12 May 2004 would have been the cost to it of carrying out the rectification works, and that it should have been given the opportunity to do so, as noted above, the builder had previously indicated to the insurer on 2 June 2000 *'… I now do not wish to have any further dealings with the matter and leave it to you to complete'* and again on 12 December 2002

> …. *any further work is beyond our guarantee obligation and Mr Fisher should attend to those things himself.*

34. I will therefore order the insurer to pay the builder's costs in respect of proceeding D580/2004. For the reasons set out above I am not satisfied these should be on a solicitor/client basis and will therefore order that in default of agreement the builder's costs be assessed by the principal registrar in accordance with County Court Scale D. Although the amount subsequently recovered by the insurer falls with County Court Scale A, the sum claimed by it clearly falls within Scale D.

35. On 30 November 2004 Senior Member Davis ordered that both proceedings be heard and determined at the same time. I note the Consent Orders made on that day apply to both proceedings, and that they record both proceeding numbers. It seems that after that date documents were variously filed with reference at times to both proceedings, and at others to one or other of the proceedings. It seems to me that my order for costs should apply to the period up until and including 30 November 2004 in relation to D580/2004 only and for the period from 1 December 2004 in relation to both proceedings as I apprehend it will be difficult to identify the costs applicable to each separate proceeding from that date, save and except for the costs of and incidental to the insurer's Application for directions/orders dated 9 September 2005 in D668/2003. No orders for costs are made in relation to the builder's application for an extension of time in D668/2003. This application was resolved between the parties and orders by consent made on 30 November 2004 after both parties had filed extensive affidavit material.

DEPUTY PRESIDENT C AIRD