VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D173/2006

CATCHWORDS

Section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, 'slip rule', whether consent orders to give effect to Terms of Settlement should be amended to include 'reserved costs'

FIRST APPLICANT	Maclaw No 651 Pty Ltd
SECOND APPLICANT	Renaissance Projects Pty Ltd
FIRST RESPONDENT	Pacific Indemnity Underwriting Agency Pty Ltd
SECOND RESPONDENT	Gordian Run-off Limited (formerly GIO Insurance Limited) (proceeding s/out against see order 28/6/2006)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	1 February 2007
DATE OF ORDER	13 February 2007
CITATION	Maclaw No 651 Pty Ltd v Pacific Indemnity Underwriting Agency Pty Ltd (Domestic Building) [2007] VCAT 166

ORDER

1 Pursuant to s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 I order that Orders 1,2,3,5 and 6 of the Orders made on 5 October 2006 be amended to include the words 'including reserved costs' after the word 'costs' wherever it so appears.

2 Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr M. Gronow of Counsel
For First Respondent	Mr J. Gorton of Counsel
For Second Respondent	Released from proceeding 28 June 2006

REASONS

1 On 5 October 2006 I made orders, in a form which had been agreed by the Applicants and the First Respondent. During the assessment of costs it became apparent that the orders did not include any order for 'reserved costs'. The Applicants now seek that the orders be corrected under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 by the addition of the words 'including reserved costs' in Orders 1,2,3,5, and 6. Section 119 is commonly referred to as 'the slip rule' and provides:

> 119. Correcting mistakes
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> (1) The Tribunal may correct an order made by it if the order contains—
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> (a) a clerical mistake; or
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> (b) an error arising from an accidental slip or omission; or
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> (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
>
> (d) a defect of form.
>
> (2) The correction may be made—
>
> (a) on the Tribunal's own initiative; or
>
> (b) on the application of a party in accordance with the rules.

2 The application was opposed by the First Respondent. Mr Gorton of Counsel appeared and submitted that there were two questions to be determined:

i Can or ought the tribunal revisit the orders and make the order sought under the slip rule, and

ii In any event, in whose favour should the reserved costs be ordered.

3 The powers of courts and tribunals to amend orders under the slip rule was considered by Senior Member Steele as she then was in *Herniman Associates Pty Ltd v Meers* [2006] VCAT 800 where she helpfully considered the relevant authorities. Her comments at paragraph 7 are particularly relevant:

> It is clear that the slip rule applies to an accidental omission of a legal representative to ask for, or of a court to provide for something which ought to have been provided for and which would have provided for if the attention of the court had been directed to it at the time: L Shaddock and Associates Pty Ltd v Parramatta City Council (No2) (1982) 151 CLR 590 at 594-5; Commonwealth v McCormack (1984) 155 CLR 272.

4 In this case, the Applicants submit that due to an accidental slip or omission by their legal representatives, the phrase 'including reserved costs' was omitted from the Minutes of proposed orders filed by the parties pursuant to the Tribunal's orders dated 9 August 2006. The test in determining whether an order should be amended is whether the tribunal would have made the order at the relevant time had it been asked to do so.

5 When parties agree to compromise a proceeding, unless they expressly reserve a particular question or issue to be otherwise determined, all matters between them have been resolved. In my view, when parties compromise a proceeding on the basis that one party will pay another's costs, that in absence of any express reference to 'reserved costs' or any express reservation to have the issue of 'reserved costs' determined at some other time, it is implicit that they are included. In most cases, reserved costs follow the event. If, following a final determination by a court or tribunal, there is an order that a party pay the costs of another party, unless the court or tribunal is specifically asked to rule on each instance where costs were reserved, they are included in the order for costs. I have no doubt that similar orders would have been made in this case, had the request been made at the time.

6 Further I note that where the tribunal determines an application for costs of an interlocutory application appropriate orders are made. Where an application for costs is not made or the question is not determined, the usual order is 'costs reserved' or 'costs in the proceeding' – the two phrases being used interchangeably. It is rare indeed when the question of costs of a proceeding finally come before the tribunal for the tribunal to be asked to revisit and rule on each occasion where costs were reserved.

7 Interestingly Order 63.22 of the Supreme Court Rules, perhaps in the interests of avoiding disputes such as this, enables the taxing master to order the payment of such costs where the court has failed to do so. Similarly the Federal Court Rules provide that reserved costs follow the event, unless the court orders otherwise.

8 I was referred to a number of authorities by Counsel for the First Respondent which reinforce my view that the application should be granted. The comments of Deputy President Macnamara in *Kurc v Eyecare Pty Ltd* [2006] VCAT 1707 are apposite:

> A consent judgement entered by mistake is not susceptible of correction under the slip rule. See *Williams Civil Procedure Victoria* [I 36.0.7-45] and the cases therein referred to. Here, whilst the parties ultimately agreed that the form of order gave effect to my costs ruling it was not in the sense used in the paragraph in *Williams* just quoted, a consent order, it was made following a contested costs hearing. [11]

9 Although the orders were 'consent orders', they were simply a form of orders agreed by the parties to give effect to terms of settlement and as directed by my orders of 9 August 2006. I am not persuaded that I am

exercising or that I am being asked to exercise an independent discretion - *Storey & Keers Pty Ltd v Johnstone* (1987) 9 NSWLR 446, 457 where McHugh JA said:

> The rationale of the slip rule also requires that an omission or mistake should not be treated as accidental if the proposed amendment requires the exercise of an independent discretion or is a matter upon which a real difference of opinion might exist.

Nor am I *functus officio* in relation to the question of costs. In *Palang Engineering v MCM Chemical Handling* [2006] VCAT 1925 the tribunal was asked to revisit its determination on the question of costs which it declined to do considering itself to be *functos officio*. However, I have not made a decision on costs, rather I made orders as requested by the parties to give effect to Terms of Settlement and I am satisfied that if I had been requested at the time to include 'reserved costs' in those orders I would have done so.

10 I will therefore make the orders sought. The parties suggested that the costs of this application should be reserved, and I will do so with liberty to apply. However, if the parties are able to agree the question of costs and forward Minutes of Consent Orders I will make them in Chambers in the interests of minimising further costs to the parties. It is desirable that this unfortunate matter be finally concluded.

DEPUTY PRESIDENT C. AIRD