VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D142/2003

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 – whether tribunal exercising original or review jurisdiction when considering application for review of insurer's decision under s61 of the *Domestic Building Contracts Act* 1995

[2006] VCAT 238

APPLICANT	The Gombac Group Pty Ltd
FIRST RESPONDENT	Vero Insurance Limited (formerly Royal & Sun Alliance Insurance Australia Ltd)
SECOND RESPONDENT	Tom Papaioannou
THIRD RESPONDENT	Greg Wodetzki
FOURTH RESPONDENT	Trenerry Properties Pty Ltd (Released from proceedings 11/11/2003)
FIFTH RESPONDENT	Anthony Peter Nelson (Released from proceedings 11/11/2003)
SIXTH RESPONDENT	Nicholas Scott Nelson (Released from proceedings 11/11/2003)
SEVENTH RESPONDENT	Anna Louise Kirby (Released from proceedings 11/11/2003)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 December 2005
DATE OF ORDER	24 February 2006

ORDER

1. There are no orders as to costs as between the Applicant, the First, Second and Third Respondents.

2. Liberty reserved until 20 March 2006 to the Fourth, Fifth, Sixth and Seventh Respondents to apply to have their application for costs heard. Any such application to be listed before Deputy President Aird for

hearing. Should such application not be received, their application for costs shall stand dismissed.

3. The directions made on 15 December 2003 for the conduct of the costs hearing shall apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr Stuckey of Counsel
For the First Respondent	Mr Rodriguez, Solicitor
For the Second Respondent	No appearance
For the Third Respondent	No appearance
For the Fourth Respondent	Released from the proceedings 11/11/2003)
For the Fifth Respondent	Released from the proceedings 11/11/2003)
For the Sixth Respondent	Released from the proceedings 11/11/2003)
For the Seventh Respondent	Released from the proceedings 11/11/2003)

REASONS

1. On 23 December 2004 I dismissed the Applicant builder's application for a review of the First Respondent's ('the insurer') decision on liability. The Applicant sought and obtained leave to appeal to the Supreme Court which appeal was subsequently dismissed. The insurer and the owners seek their costs of the proceeding. The insurer seeks its costs on an indemnity basis. The builder was represented at the costs hearing by Mr Stuckey of Counsel and the insurer, by Mr Rodriguez, solicitor. Mr Papaioannou, one of the owners, did not attend the costs hearing, but wrote to the tribunal seeking reimbursement of the five days he took leave without pay to represent himself and his co-owner at the hearing.

2. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the *VCAT Act')* provides that each party must pay its own costs unless the tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out in s109(3). In deciding whether to exercise my discretion under s109(2) the insurer submits I should take the following into account:

   (i) the length of time taken to dispose of the proceeding - the application for review was issued in March 2003 and was not heard until November 2004 with my decision being delivered on 23 December 2004.

   (ii) joinder of four additional parties on 20 May 2003 at the request of the builder and their subsequent release from the proceeding on 11 November 2003. This conduct was described by Mr Rodriguez as being vexatious (s109(3)(a)(vi)).

(iii) The relatively low cost of rectification which was assessed by the insurer at $18,000.00 in or about September 2004. A reduced quantum of $15,000.00 was agreed by the parties in November 2004 during the hearing. Mr Rodriguez submitted that the hearing in relation to what he described as an unmeritorious appeal, resulted in a waste of resources for the insurer, the owners and the tribunal. He indicated that the insurer has spent in excess of $100,000.00 in relation to this proceeding and the appeal including legal and experts' costs.

(iv) The complexity of the proceeding, particularly the technical issues (s109(3)d)).

3. He confirmed that there was no allegation that the builder's position was untenable – rather that having regard to the relative strengths of the parties' claims (s109(3)(c)), the builder's was the weaker. However, I am not persuaded that this alone is sufficient reason for me to exercise my discretion.

4. It was submitted on behalf of the builder that the principles set out in s109(1) should be applied and each party ordered to pay their own costs of this proceeding. I was referred to the decision in *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024 where at paragraph 8 Senior Member Young said

> *"I consider that an application under Section 61 of the Domestic Building Contracts Act 1995 to seek a review of an insurer's decision is a form of administrative review"*.

and:

> *"I have previously found that costs in administrative reviews are less likely to be awarded than where the matter is an inter-parties commercial dispute: Australia Country Homes v Vasiliou, (unreported, 5 May 1999").*

5. Mr Stuckey submitted that as the *Domestic Building Contracts Act* 1995 ('the *DBC Act')* provides a mechanism for the application for review of an insurer's decision insurers know, and should expect, that their decisions will be subject to such applications. Whilst I accept this in principle, I am not persuaded it automatically follows that costs will not be awarded where an application for review is unsuccessful. In deciding whether to exercise its discretion under s109(2) the tribunal must have regard to the conduct of the parties. I do not accept the submission on behalf of the insurer that the builder has unreasonably prolonged this proceeding and/or conducted it vexatiously. Although the insurer seeks to rely on the joinder and then release of additional parties by the builder, I am not privy to the basis upon which those parties were released so am unable to comment. In any event I am not persuaded that this resulted in any disadvantage to the insurer.

6. It was suggested by Mr Stuckey that the insurer was the only party which could be regarded as having been responsible for *'…prolonging unreasonably the time taken to complete the proceeding'* (s109(3)(b)) in causing an adjournment of the hearing in January 2004 when its expert expressed some concern about the structural adequacy of the building. Although this concern was ultimately found to be groundless, it was, in my view, nevertheless prudent that it be raised and considered and clearly does not fall within the conduct contemplated by s109(3)(b).

7. Much was made on behalf of the insurer of the relatively low cost of rectification works and what was described as the 'extraordinary and unjustifiable waste of resources' in circumstances where at the date of the costs hearing the owners had still not been paid the agreed sum of $15,000.00 by the insurer, although it was apparently to be paid within the following few days. I find it extraordinary suggestion that, on the one hand, a builder should be criticised for exercising its statutory rights to seek a review of an insurer's decision, because of the high cost of doing so – both

financial and in terms of resources, whilst on the other, the insurer should be free of reproach for defending its decision irrespective of the cost implications, and then be entitled to recover the cost of doing so from the applicant for review.

8. Although submitted on behalf of the insurer that this was an unmeritorious application for review, I accept that there were a number of complex technical issues to be considered and determined, and note that the builder was successful in obtaining leave to appeal, although that appeal was subsequently dismissed. The mere fact that the builder was unsuccessful is not sufficient reason for me to depart from the provisions of s109 (1).

9. It was submitted on behalf of the builder that as no financial interest of the insurer was at stake, the insurer freely elected to participate in the proceeding and defend the application for review rather than leaving it to the owners to do so. This is a very curious submission. This proceeding commenced as an application for review of the insurer's decision under s61 of the *Domestic Building Contracts Act* 1995. It was entirely appropriate that the insurer justify and defend that decision. The owners had no standing to do so – it was not the owners' decision that was the subject of the application. The owners are parties to this proceeding because their interests are affected and they have a right to be heard, not because they were required to somehow establish the insurer had made the right decision.

10. I am not persuaded that this is an appropriate case for an exercise of the tribunal's discretion under s109(2) in favour of the insurer. I should nevertheless consider whether in considering an application for review of an insurer's decision under s61 of the *DBC Act* the tribunal is exercising original or review jurisdiction. The tribunal's powers in relation to an application for review of a decision of an insurer are set out in s60 of the *DBC Act* which provides:

(1) The Tribunal may review any decision of an insurer with respect to anything arising from any required insurance under the **Building Act 1993** that a builder is covered by in relation to domestic building work or from a guarantee under the **House Contracts Guarantee Act 1987** or from an indemnity under Part 6 of the **House Contracts Guarantee Act 1987**.

(2) Despite sub-section (1), the Tribunal does not have any power to review a decision of an insurer—

(a) to refuse to insure, or to refuse to renew or extend the insurance of, a builder; or

(b) concerning premiums or charges to be paid for any insurance or the conditions under which any insurance will be offered, renewed or extended.

(3) After conducting a review, the Tribunal may confirm, annul, vary or reverse the decision, and may make any order necessary to give effect to its decision.

11. An application for a review of an insurer is made under s61 of the *DBC Act:*

(1) Any person whose interests are affected by a decision of an insurer with respect to anything arising from any required insurance under the **Building Act 1993** that covers a builder in relation to domestic building work or from a guarantee under the **House Contracts Guarantee Act 1987** or from an indemnity under Part 6 of the **House Contracts Guarantee Act 1987** may apply to the Tribunal for a review of the decision.

(2) If the decision contains a direction that must be complied with within 27 days of the date the person receives notice of the decision, the application must be made before the date the decision must be complied with.

(3) In all other cases, the application must be made within 28 days of the date the person receives notice of the decision.

12. Mr Rodriguez submitted that in considering applications for review under the *DBC Act* the tribunal is exercising original jurisdiction. He referred me to s42 of the *VCAT Act* which provides:

(1) Review jurisdiction is jurisdiction conferred on the Tribunal by or under an enabling enactment to review a decision made by a decision-maker.

(2) For the avoidance of doubt, the Tribunal's jurisdiction under Part 6 of the **Guardianship and Administration Act 1986** is original jurisdiction, not review jurisdiction.

and to the definition of 'decision maker' in s3 of the VCAT Act *'means a person who makes, or is deemed to have made, a decision under an enabling enactment'*.

13. He submitted that where the decision, the subject of an application for a review, was made under the *House Contracts Guarantee Act* 1987 (*'the HCG Act'*) the tribunal would be exercising its review jurisdiction. However, relying on ss3 and 41 of the *VCAT Act* he sought to distinguish the situation where the decision, the subject of an application for review, is made by an insurer under a policy of warranty insurance. I am of the view that this is an artificial distinction. There is no distinction in s60 of the *DBC Act* between decisions made by the Housing Guarantee Fund Limited (now the Victorian Managed Insurance Authority) under the *HGC Act* and decisions made by insurers under statutory insurance policies. They are all subject to the same provisions and I am satisfied it is clear that although an insurer may not seem to fall within the definition of 'decision maker' in s3 of the *VCAT Act* in considering any application for a review of an insurer's decision under s61 of the *DBC Act* the tribunal is exercising review jurisdiction albeit of a discrete and unique nature.

14. Further, although Mr Rodriguez sought to distinguish the decision in *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024 on the basis that it only applies to applications for review of decisions made by the HGFL under the *HCG Act*, no such distinction was made by Senior Member Young. At paragraph 6 he said:

> *… Also, I consider that an insurer under the provisions of the Domestic Building Contracts Act 1995 is a "decision-maker" under the Act.*

and at paragraph 8

> *I consider that an application under Section 61 of the Domestic Building Contracts Act 1995 to seek a review of an insurer's decision is a form of administrative review.*

15. I concur with and adopt these findings which I am satisfied set out the correct and only reasonable interpretation of s61 in the context of the statutory insurance scheme. In declining to exercise the tribunal's discretion under s109(2) I have had regard to the decision in *Kaldawi.*`

The owner's application for costs

16. Mr Papaioannou, seeks reimbursement for the loss of five days leave without pay which he took to attend the hearing to represent his interests and those of his co-owner. In this regard I refer to my recent decision in *Greenhill Homes Pty Ltd v Allianz Australia Insurance Limited* [2006] VCAT 184 and in particular to my comments at paragraph 17 which I consider to be equally applicable to this proceeding:

> *However, whilst the Tribunal may have power to award costs in favour of unrepresented person, it must always have regard to the provisions of s109 of the Act. Section 109 is quite clear – each party must bear their own costs unless the Tribunal is satisfied it should exercise its discretion under s109 (2) having regard to the matters set out in s109 (3). I am not persuaded that the Tribunal's discretion should be exercised in favour of an unrepresented party where to do so would allow that party to benefit from an order for costs in circumstances where it would not otherwise be in a position to recover costs if legally represented, for instance when attending a hearing in their capacity as a party to the litigation and/or to give instructions to their legal representatives.*

17. Accordingly there will be no orders for costs in this proceeding as between the Applicant, the First, Second and Third Respondents.

The costs application by the Fourth, Fifth, Sixth and Seventh Respondents

18. Although the Fourth, Fifth, Sixth and Seventh Respondents were released from the proceeding on 11 November 2003, at a directions hearing on 15

December 2003 the proceeding as against them was reinstated to enable them to make an application for costs and such application set down for hearing which was subsequently adjourned. On 29 April 2004 their solicitors wrote to the tribunal requesting that their clients' application for costs be adjourned to a date six weeks after the hearing of the substantive application. Unfortunately, they were not sent a Notice of Hearing for the costs hearing held on 14 December 2005. However, Mr Rodriguez advised he had written to their solicitors advising them of the costs hearing but had not received a response. In the circumstances it seems appropriate to reserve liberty to the Fourth, Fifth, Sixth and Seventh Respondents to have their application for costs listed for hearing.

DEPUTY PRESIDENT C. AIRD