VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D406/2008

CATCHWORDS

Domestic Building, costs, ss109 and 112 of the *Victorian Civil and Administrative Tribunal Act* 1998, whether an appeal from a decision of a warranty insurer is "a proceeding for a review or a decision" under s112(1)(a) of the VCAT Act, exercise of discretion under s112.

APPLICANT	Vasco Trajcevski
RESPONDENT	Allianz Australia Insurance Ltd (ACN 000 122 850)
JOINED PARTY	Clarendon Homes (Vic) Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	22 January 2009
DATE OF ORDER	18 February 2009
CITATION	Trajcevski v Allianz Australia Insurance Ltd (Domestic Building) [2009] VCAT 137

ORDER

1 The Applicant must pay the Respondent's costs from and including 18 November 2008. Failing agreement, the costs are to be assessed by the Principal Registrar under s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on Magistrates Court Scale C.

2 There is no order for costs between the Applicant and the Joined Party.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	In person
For Respondent	Mr Brett Powell of Counsel
For Joined Party	No appearance

REASONS

1 These reasons concern the Respondent's claim for costs against the Applicant. On 22 January 2009 I heard and dismissed the Applicant's claim and reserved this decision concerning costs. The Joined Party did not attend the hearing, made no application for costs and none will be entertained from it now.

2 The Applicant owns a home in Taylors Lakes. It was built by the Joined Party in 2001 for Mr and Mrs Adalier, who are not parties to this proceeding. The Respondent is the warranty insurer. The Applicant and Maja Trajcevska bought the home from Mr and Mrs Adalier by contract dated 26 November 2005.

3 The Applicant said in evidence that there was a sudden leak in a hot water pipe in the wall between the laundry and pantry. He said, and I accepted his evidence, that the leak was caused by a nail penetrating the pipe. I accept the submission of the Respondent that the warranty policy indemnified the current owner of the home for the warranties set out in section 8 of the *Domestic Building Contracts Act* 1995, one of which is that the work will be carried out in a proper and workmanlike manner. If he could have proved that the offending nail was the fault of the Joined Party or one of its employees or sub-contractors, he would have succeeded. His claim failed because he was unable to prove that the only explanation for the presence of the nail in the pipe was defective work by the Joined Party.

4 Further, the Applicant's claim was for $5,846.50. He had documentary evidence to show that he had incurred expenses of $346.50, but no proof at all concerning the remaining $5,500.00. He said it would be for a building inspector to check that the water had not caused damage, for rectification of a stud that had been cut by the repairing plumber, Beston Plumbing Services Pty Ltd, and for repair of plaster cut out by the plumber to gain access to the point where the pipe leaked.

5 The Applicant had twice been ordered to provide full particulars of his claim, but did not. On 15 July 2008 Deputy President Aird ordered that if he were amending his claim:

> Any such amendment must be accompanied by fully itemised particulars of the amount claimed together with copies of any invoices or quotations on which the Applicant relies.

On 20 November 2008 I ordered:

> By 4 December 2008 the applicant must file and serve any documentary evidence upon which he will rely concerning the value of damage to items not yet repaired and the statement from the plumber concerning the cause of the damage.

6 The Applicant had told me in the directions hearing of 28 November 2008 that he would have a statement from the plumber who had repaired the pipe. At the hearing on 22 January 2009 he told me that he did not know the

name of the man from Beston Plumbing who attended at his home and that a lady he spoke to said they were unwilling to attend because they frequently contract with the Joined Party.

7 Upon pronouncement of my decision to dismiss the application, Mr Powell of Counsel for the Respondent applied for costs. His application was for costs for the period from 26 June 2008 to 16 November 2008 under s109 of the *Victorian Civil and Administrative Tribunal Act 1998,* and from 17 November 2008 on, under s112.

THE S109 APPLICATION

8 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("VCAT Act") says 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.

9 As emphasised by the Supreme Court in *Vero Insurance Limited v The Gombac Group* [2007] VSC 117, the Tribunal should approach the question of entitlement to costs under s109 on a step by step basis:

> (i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal may make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

10 The claim was for a small amount and the proceeding was short and simple, which militated against an order for costs being made under s109.

11 On 26 June 2008 solicitors for the Respondent wrote to the Applicant and offered to consent to the Applicant withdrawing proceedings and both parties (the Joined Party had not been joined at that stage) bearing their own costs. The letter stated in part:

> In my view your Tribunal application against Allianz cannot succeed for the following reasons:
>
> - the alleged defects at your property are due to a nail piercing the water pipe. As the Builder completed the Building Works on or about June 2002 it is highly unlikely that the alleged defects at your property were caused by the Builder whilst undertaking the Building Works.
> - you have not made an insurance claim with Allianz. Accordingly the Tribunal has no power to hear your application.

The letter went on to point out that the builder was not a party to the proceeding.

12 At the next directions hearing, the builder was joined as the Joined Party and arrangements were made for the Applicant to make an insurance claim. As to the first bullet point, it is unfortunate that a pipe might fail just before the warranty insurance period expires, but not impossible. For example, the nail might finally have rusted to the point where its remains were blown out of the hole by water pressure. The Respondent did not arrange for a site visit and there is no indication that it sought expert advice about whether a pipe, pierced by a nail during building, could function properly for almost six years before suddenly failing.

13 In *Konko v Kamay* [1997] VCAT 966 I took into account a "Calderbank" offer under s109(3)(e). I found that when the offer was made it was reasonable that the Applicant accept it but that he did not.

14 This case is not the same. In hearing the substantive case I found that the Applicant had done nothing that caused the pipe to be pierced by a nail and there was nothing done by Mr and Mrs Adalier of which he was aware that caused the problem. For example, he said nothing appeared to have been nailed into the adjacent walls at that point.

15 I find that he did not act unreasonably in failing to accept the offer. He is not a lawyer and although the Respondent's letter of 26 June 2008 proved, with the benefit of hindsight, to be a sensible way to resolve the dispute, it is rather dismissive and does not demonstrate how the Respondent might be entitled to a costs order.

16 I decline to make the order sought under s109.

THE S112 APPLICATION

17 On 17 November 2008 the Respondent's solicitors sent the Applicant an offer from both the Respondent and the Joined Party expressed to be made in accordance with s112 of the VCAT Act. Again, it was an offer that should the Applicant withdraw the application, the Respondent and Joined Party would bear their own costs. It warned the Applicant that if the offer was not accepted within the 14 days it was open for acceptance, they would rely on the letter to seek their costs.

18 The letter contained a very clear warning of the consequences of failing to accept the offer:

> If this offer is not accepted by the Applicant and if the Applicant receives a determination at any hearing of this proceeding which is not more favourable to the Applicant than this offer, then the Respondents will rely upon section 112 of the *Victorian Civil and Administrative Tribunal Act* 1998 in seeking to have the Tribunal exercise the presumption of an order for costs in favour of the Respondents from the date this offer was made.

19 I find that the settlement offer of 17 November 2008 made by the Respondent and Joined Party to the Applicant is, with one important possible exception (discussed below), in accordance with the provisions of sections 112, 113 and 114 of the VCAT Act. S112 provides:

> Presumption of order for costs if settlement offer is rejected
>
> (1) This section applies if
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
>
> (b) the other party does not accept the offer within the time the offer is open; and
>
> (c) the offer complies with sections 113 and 114; and
>
> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

20 I also find that the order made in the proceeding is not more favourable to the Applicant than the offer. The result, dismissal of the Applicant's claim, is the same outcome as withdrawal of the proceeding by the Applicant.

"A proceeding for review of a decision"

21 The important exception is whether an appeal against a decision of a warranty insurer falls within the exception to S112(1)(a). Section 60 of the *Domestic Building Contracts Act 1995* ("DBC Act") provides in part:

> (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 from a guarantee then the **House Contracts Guarantee Act 1987**…
>
> …
>
> (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. [Emphasis added]

22 In *Vandee Properties Pty Ltd v Boroondara CC* [2002] VCAT 1352, Senior Member Byard said:

> a particular proceeding provided for in an enabling enactment does not become part of the review jurisdiction of VCAT simply because the word "review" may appear in the enabling provision.

And in Gombac Gillard J said at paragraph 69:

> In my opinion, there is a fairly strong argument that the review of an insurer's decision under the Domestic Building Contracts Act is, for the purposes of the proceeding in VCAT, a proceeding pursuant to the original jurisdiction. This is because the insurer does not make, or is not deemed to have made, a decision under the Domestic Building Contracts Act. The decision is made pursuant to a contract of insurance issued by reason of a Ministerial directive. It is unnecessary for me to reach any concluded decision on this issue. Accordingly, I will say no more.

23 In contrast, in *VMIA v Roe* [2007] VSC 56, Smith J said of an application by homeowners against a warranty insurer that they:

> …commenced proceedings at VCAT, pursuant to ss.60 and 61 of the *Domestic Building Contracts Act* 1995, to review the rejection of their claim by HGFL. Such a review is a merits review and VCAT is empowered to make such decisions it thinks fit.

24 The two judgements were published within months of each other, and the later, Gombac, did not refer to the earlier, Roe. It is not clear whether Smith J had the nature of VCAT's jurisdiction in mind, whereas Gillard J clearly did. I find that the exception does not apply to this appeal against the decision of the insurer.

The Tribunal's discretion

25 The Tribunal has a discretion under S112(2), which provides:

> If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an

> order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made. [Emphasis added]

S112 is the opposite of s109. The Tribunal starts with the presumption that a party who has made a proper offer to which s112 responds will get an order for costs, but the Tribunal has a discretion. I find that discretion is as to both whether to order costs at all, and if so, amount, in accordance with the commentary of the learned author Pizer at [4009] of the Annotated VCAT Act, 3rd edition.

26 There are reasons for exercising my discretion against the Respondent. The amount in dispute was small, the case simple and but for the warranty insurers' automatic entitlement to legal representation under s62(2)(g) of the VCAT Act I would not have allowed lawyers to appear. On the other hand, the offer of 17 November 2008 was very clear and explained the consequences of not accepting the offer. The Respondent has been put to the unnecessary expense of appearing to defend a case against it, where the Applicant failed to follow directions of the Tribunal. I therefore do not exercise the discretion against the Respondent.

27 The Applicant must pay the Respondent's costs from 18 November 2008, being the day upon which the Applicant would have received the offer, which was sent to him be express post on 17 November 2008. I find that 18 November 2008 is the date upon which the offer was made in accordance with s112(2). Failing agreement, the costs are to be assessed by the Principal Registrar under s111 of the VCAT Act on a party-party basis on Magistrates Court Scale C.

SENIOR MEMBER M. LOTHIAN