VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D275/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – s. 109 - whether reasonable to order – third party proceedings – respondent successful against Applicant – reasonable to award the respondent costs against the applicant – respondent consequently fails against third party - reasonable of respondent to join third party – third party's costs – ordered directly against the Applicant – relevant considerations as to whether to award costs

APPLICANT	Vero Insurance Limited (ACN: 005 297 807)
FIRST RESPONDENT	Peter Eckberg
SECOND RESPONDENT	Hassall & Byrne, solicitors
THIRD RESPONDENT	Grant Wharington
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 December 2009
DATE OF ORDER	29 March 2010
CITATION	Vero Insurance Limited v Eckberg & Ors (Domestic Building) [2010] VCAT 373

ORDER

1. Order the Applicant to pay the costs of the First and Second Respondents of this proceeding including the costs of this application for costs, such costs to be assessed if not agreed in accordance with Scale "D" of the County Court Scale except that counsel's fees shall be allowed at $3,300.00 per day and $330.00 per hour for preparation.
2. Further order the Applicant to pay to the First Respondent interest on the sum of $99,000 at the prescribed rate from 17 April 2007 until 10 September 2009 in accordance with s.57 of the *Insurance Contracts Act* 1984.
3. Liberty to apply.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr S. Waldron of Counsel
For the First Respondent	Ms D. Eckberg on behalf of her husband Mr P. Eckberg
For the Second Respondent	Mr K. Oliver of Counsel
For the Third Respondent	Mr G. Wharington in person

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D48/2006

APPLICANT	Peter Eckberg
RESPONDENT	Grant Wharington
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 December 2009
DATE OF ORDER	29 March 2010

ORDER

The Applicant's application for costs is dismissed

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	In person

REASONS

Background

1. These two proceedings were determined by separate orders of the Tribunal on 10 September 2009.

2. In proceeding D48/2006 the Applicant Mr Eckberg sought damages against the Respondent Mr Wharington with respect to defective workmanship in the construction of a house formerly owned by Mr Eckberg in Pattersons Lakes. For the reasons given in the decision I found that Mr Eckberg's claim against Mr Wharington had been compromised by Terms of Settlement that they had signed whereby Mr Eckberg agreed to enter into a contract to sell the house to Mr Wharington for an agreed price and Mr Wharington agreed to enter into the contract and not to appeal against a decision by the domestic building insurer, Vero Insurance Limited, to pay an amount of $99,000.00 to Mr Eckberg with respect to the defects in the house.

3. In my order in that matter I declared that the Tribunal had no power to deal with Mr Eckberg's further claim against Mr Wharington for breach of the contract to purchase the house which he had elected to rescind. I found that any such claim must be brought elsewhere due to the limited jurisdiction of this Tribunal.

4. In the other proceeding, D275/2007, Vero sought a declaration, that because Mr Eckberg had entered into the Terms of Settlement with Mr Wharington and in particular, in view of the releases contained in those terms, it was no longer obliged to pay the sum of $99,000.00 that it had earlier determined to pay to Mr Eckberg in satisfaction of his claims. In that proceeding Mr Eckberg sought by way of counterclaim a declaration that the Terms of Settlement did not prevent Vero from seeking to recover the $99,000.00 from Mr Wharington by way of assignment or subrogation.

5. In that second proceeding I found that, on its proper construction and also as a matter of law, the Release contained in the Terms of Settlement could not and did not extend to the rights of Vero to claim by way of subrogation or assignment the sum of $99,000.00 that it had agreed to pay to Mr Eckberg. As a consequence, Vero was obliged to pay that amount to him.

6. Vero's claim was therefore dismissed and Mr Eckberg was successful.

7. The Second Respondent, Hassall & Byrne, were Mr Eckberg's solicitors who were present and advising him at the time the Terms of Settlement were signed. Since it was common ground that they had not advised him that if he executed the Terms of Settlement he would be precluded from recovering the $99,000.00 that Vero had agreed to pay him, he joined them to the proceedings and sought relief from them in the alternative for damages for negligent professional advice in case I should find that the Terms of Settlement had the effect for which Vero contended. Since Mr

Eckberg succeeded against Vero he necessarily failed against Hassall& Byrne.

The costs hearing

8. Costs of both proceedings were reserved and, on 14 December 2009 the matter came before me again for the purpose of arguing costs.

9. Mr Waldron of Counsel appeared on behalf of Vero, Mr Oliver of Counsel appeared on behalf of Hassall & Byrne and Mr Eckberg was represented by his wife, Drajica Eckberg. Mr Wharington appeared on his own behalf.

Proceeding D48/2006

10. In proceeding D48/2006, there were only two parties, Mr Eckberg and Mr Wharrington. Much of the argument during the hearing had centred upon whether or not there were defects in the house and whether and to what extent it was defectively constructed and those issues were determined in favour of Mr Eckberg.

11. However Mr Wharrington argued that he had been released by the Terms of settlement. Having entered into the contract to purchase the property he had performed his obligations under the Terms. Mr Eckberg's rights thereafter were to be pursuant to the Contract of Sale. I accepted that submission. The contract of sale had been rescinded by Mr Eckberg due to Mr Wharrington's alleged breach of it, as to which there was strong evidence and it seemed to be this breach that Mr Eckberg was really concerned about. However, this Tribunal has no jurisdiction to entertain a claim for damages arising out of a breach of contract for the sale of land and so I could not deal with it.

12. In essence, Mr Eckberg's claims were defeated by the Terms of Settlement that he had signed and that was a point taken by Mr Wharington in his defence. Mr Eckberg sought an order for his costs against Mr Wharrington but, despite Mrs Eckberg's submission on his behalf, the application for costs must fail, because Mr Eckberg's claim against Mr Wharington substantially failed through want of jurisdiction.

Proceeding D275/2007

13. The starting point for any application for costs before this Tribunal is s109 of the *Victorian Civil and Administrative Tribunal Act* 1998. That section (where relevant) provides as follows:

> (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."

The claim by Hassall & Byrne

14. The substantial application was that of Hassall & Byrne who seek their costs indirectly against Vero in the form of a "bullock" order. That is, that there be an order for their costs against Mr Eckberg and an order in favour of Mr Eckberg against Vero for the amount that he would have to pay Hassall & Byrne. Alternatively, it was suggested that I should make a "Sanderson" order, that is, order that Vero pay the costs of Hassall & Byrne directly.

15. The choice of either of these orders is within the discretion of the Tribunal. I am satisfied that I have jurisdiction to make them, so long as the order is made against a "party" within the meaning of s109(2) and it is appropriate to exercise the discretion to be found in that sub-section; that is, it is "fair to do so".

16. I accept Mr Oliver's submission that the claim by Mr Eckberg against Hassall & Byrne was in the nature of a third party proceeding. Mr Eckberg would have been ill advised not to have joined Hassall & Byrne in view of the very nature of the claim brought against him by Vero.

17. In regard to the matters referred to in s109(3) of the Act those relied upon were as follows.

The relative strengths of the claims (s109(3)(c)

18. The principles of law argued at the hearing were very complex indeed and required substantial argument. I do not accept Mr Oliver's submission that Mr Eckberg's claim against Hassall & Byrne was not strong. It was dependent entirely upon the determination of a number of very difficult legal arguments as between Vero and Mr Eckberg. The argument was articulated on behalf of both Hassall & Byrne and Mr Eckberg by Mr Masel of Counsel who appeared on behalf of Hassall & Byrne. It was only after hearing very able arguments from both Mr Masel and Mr Waldron that these difficult legal issues were determined. Had the legal argument resulted in a different decision, Mr Eckberg's case against Hassall & Byrne would have been stronger.

19. Although following very careful analysis it transpired that Mr Eckberg and Hassall & Byrne succeeded against Vero on most of the arguments raised, it is only with the benefit of hindsight that it could be said that the cases of Vero and Mr Eckberg were not strong. It could not fairly be said that either case was not arguable.

The nature and complexity of the proceeding (s103(3)(d)

21. This factor is highly relevant. The case was one of great legal complexity requiring experienced junior counsel on both sides. Without that, the argument could not have been properly ventilated. As a result, Hassall & Byrne were put to considerable expense because Vero brought the case against Mr Eckberg which ultimately failed. They could not have avoided that expense. That would support an award of costs in their favour against Vero. As to Mr Eckberg, he was in an invidious position. He had to join Hassall & Byrne to protect himself if he should fail against Vero. It could not sensibly be suggested that he had any real choice. He faced the same complex arguments but, fortunately for him, these were argued, indirectly on his behalf, by Mr Masel. I would have been deprived of the benefit of Mr Masel's arguments had Hassall & Byrne not been joined and they were arguments that I largely accepted.

The Calderbank offer

22. On 24 April 2008 Hassall & Byrne offered to settle the claim brought against them by Mr Eckberg by paying to him the sum of $70,000.00 less an amount of $11,600.00 that he owed Hassall & Byrne with respect to his legal fees.

23. In regard to the reasonableness or otherwise of Mr Eckberg having not accepted the offer of settlement, I was referred by Mr Oliver to the Court of Appeal decision in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No. 2)* (2005) 13 VR 435 where, in a joint judgement, the members of the Court said (at p.442):

> "It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time a court considering a

submission that the rejection of Calderbank offer was unreasonable should ordinarily have regard to at least the following matters:

(a) the stage of the proceeding at which the offer was received;

(b) the time allowed for the offeree to consider the offer;

(c) the extent of the compromise offered;

(d) the offeree's prospects of success, assessed as at the date of the offer;

(e) the clarity with which the terms of the offer were expressed;

(f) whether the offer foreshadowed an application for indemnity costs in the event of the offerees rejecting it."

24. In the present case, although the offer of settlement was not immediately made after joinder, which occurred on 17 July 2007, it was made more than a year before the hearing and so a great deal of costs might have been saved if the offer had been accepted. Also, Mr Eckberg had plenty of time to consider the offer. However his prospects of success at the time the offer was received were unknown. Ultimately, his success against Hassall & Byrne depended upon him failing in his principle case against Vero. If he were to accept the offer he would be taking the risk that he might fail against Vero and so be left with only the proceeds of settlement against Hassall & Byrne. On the other hand, if he were to succeed against Vero he would receive a windfall on the terms of the amount offered. Such questions are difficult and at the time he received the offer he was unrepresented.

25. Quite obviously, the outcome of the case, if Vero is ignored, was less favourable to him than the offer. However, that is a very artificial way of looking at it. The reasonableness or otherwise of his conduct in rejecting the offer must be judged in the light of all of the relevant surrounding circumstances and these include the proceeding as a whole. I cannot say that he acted unreasonably in rejecting the offer. His exposure to the proceeding was greater than $70,000.00 and if Vero's claim had succeeded he would in turn have been seeking considerably more than that from Hassall & Byrne.

The law

26. In regard to orders for costs of third party proceedings where the Plaintiff fails against the Defendant I was referred to a number of authorities.

27. In "Law of Costs" G.E. Dal Pont, the learned author says (at paragraph 11.32):

"However, most commonly the usual order will be that the Defendant be entitled to recover from the Plaintiff both his or her own costs and those of a third party the Defendant has been ordered to pay. This is because logic dictates that a Defendant who successfully defends the Plaintiff's

> claim will in most cases fail against the third party, that it was the Plaintiff's claim that prompted the third party proceedings, and it was reasonable for the Defendant to join the third party in the proceeding. The order may be either that the Plaintiff indemnifies the Defendant for the third party's costs or that the Plaintiff pay those costs direct to the third party. Where the Plaintiff is impecunious, the court will not ordinarily make the latter kind of offer, as the third party, who has been wholly unsuccessful, should not have to bear the burden of the Plaintiff's impecuniosity. This rather should rest with the Defendant as it is the Defendant who is failing as the third party".

28. There could be no suggestion in this case of any impecuniosity on the part of the Applicant so it would not be inappropriate to make a "Sanderson" order on that account if the circumstances otherwise justified it.

29. Mr Waldron submitted that Hassall & Byrne became involved through their own volition. Certainly, at the directions hearing of 17 July 2007 at which they were joined, they sought leave to intervene but the reasons for decision on that day indicate that Mr Eckberg by his Counsel said that he intended to bring proceedings, against Hassall & Byrne, against his Counsel who appeared for him on the day and also against Mr Wharington.

30. In those circumstances, it is not surprising that Hassall & Byrne would seek leave to intervene. The driving force behind their involvement however was Mr Eckberg's expressed intention of suing them and that intention arose from the nature of Vero's claim. I do not think in any real sense that Hassall & Byrne has involved itself in this litigation voluntarily and unnecessarily.

31. Mr Waldron said that Mr Eckberg's claim against Hassall & Byrne was not in the nature of a third party proceeding but I think that is clearly what it was. Mr Waldron claimed Mr Eckberg's claim was only sustainable if the Applicant succeeded. That is so but it was important that Hassall & Byrne be heard in regard to whether or not it should succeed, otherwise that question would have to be dealt with in later separate proceedings by Mr Eckberg against Hassall & Byrne with the possibility of inconsistent findings.

32. Once Vero alleged that Mr Eckberg had lost the benefit of his claim due to having acted in accordance with his solicitor's advice, the bringing of an alternate claim against his solicitors who advised him was inevitable. It is true that Points of Claim articulating the Third Party claim were not filed until the following year but I do not see that as relevant. The only reason Hassall & Byrne became involved in the proceeding was because of the order that would be sought against them if Vero succeeded.

33. Submissions were made in regard to settlement offers by Monahan & Rowell on 23 July 2007 and the Calderbank letter referred to. I do not think that this really assists the determination. These were two linked

proceedings and it would have been extraordinarily difficult to settle them on the basis of acceptance of a Calderbank offer.

34. Mr Waldron said that most of the hearing time was taken up in the arguments concerning D48/2006 and an apportionment of the hearing time should be made. I do not accept that submission. The Tribunal ordered that both proceedings be heard together. Vero had applied unsuccessfully to have the two claims heard separately but was not successful. That was a judgment made by the Tribunal for reasons given at the time. Hassall & Byrne would not have had to participate in this joint proceeding had the present proceeding not been commenced. They were not involved at all in the other proceeding but, due to their joinder to Vero's application, they had to incur all of the costs they have incurred. It would not have been practical for them to have attended the hearing for only part of the time.

35. Mr Waldron suggested that it was reasonable for Vero to bring the proceeding in all of the circumstances because it was not known what Mr Wharington's attitude would be following payment of the $99,000.00 to Mr Eckberg. There was no indication by Mr Wharrington at the hearing that he had intended to take this course until he was alerted to the argument by Vero by the issue of this proceeding. I think it is quite clear that, both when he entered into the Terms of Settlement and for some time afterwards, he understood that he would be having to pay the $99,000.00 and that is why he had sought to be made a party to the other proceeding. It does not appear that any attempt was made to ascertain his attitude before Vero refused payment and commenced this proceeding, although in fairness to Vero, how one would go about that without alerting Mr Wharrington to the argument is difficult to imagine.

36. The points argued at the hearing in answer to Vero's claim were squarely put to it well before the hearing. It nonetheless proceeded and it did so in the knowledge that the Tribunal had ordered that the two proceedings be heard together. It was a complex matter. It is a case where it would be appropriate to make an order for costs.

What sort of order?

37. In a court where costs follow the event the successful defendant in a situation like this is ordered to pay the costs of the Third Party against whom he has failed. He then obtains an order for those costs from the unsuccessful Plaintiff by means of a Bullock order or avoids liability altogether by means of a Sanderson order.

38. This is a Tribunal in which costs do not automatically follow the event. Orders for costs are only made where it is fair to do so in all the circumstances, including those described in s.109(3). It may not be "fair" to order a Respondent to pay the costs of a successful third party if, in all the circumstances, he cannot be blamed for having joined him. Usually, the party who will have caused the costs of everyone to be incurred will be the unsuccessful Applicant who brought the proceeding in the first place.

39. In all the circumstances I think it would be fair that there be an order for the costs of Hassall & Byrne but it would not be fair for these to be made against Mr Eckberg. It would be fair for the order to be made against Vero which has caused all these costs to be incurred by taking what was a technical point to avoid a liability under a policy of insurance that it had earlier acknowledged. It then failed on that technical point. The order should be analogous to a "Sanderson" order, that is, that the costs of Hassall & Byrne be paid directly by Vero.

Conclusion

40. I am satisfied that this is an appropriate case in which to award costs in favour of Hassall &Byrne against Mr Eckberg and to order that Vero pay those costs.

41. I am also satisfied that it is appropriate to order that Vero pay Mr Eckberg's costs in proceeding D275/2007insofar as he has incurred any. These will not include the various experts' reports because they were obtained for use in the other proceeding.

42. Despite some suggestion as to solicitor /client costs I see no reason to depart from the usual practice of allowing party/party costs on Scale "D" of the County Court Scale. There has to be some special reason to award anything more than party/party costs and I do not believe that it is justified here. However due to the difficulty of the legal argument I accept Mr Oliver's submission that the case warranted more senior counsel than the Scale fees for counsel would contemplate. I think the rates that he suggested of $3,300.00 per day and $330.00 per hour for preparation are justified.

The claim for interest

43. In his defence and counterclaim dated 8 April 2008 Mr Eckberg sought orders against Vero for payment of the sum of $99,000.00 or alternatively, various declarations. He also sought interest. In my reasons for decision and the orders that I made I overlooked the claim for interest. This oversight was raised during submissions. Indeed, Mr Eckberg applied on 14 December 2009 not just for costs but also for an order for the interest that he had claimed.

44. Mr Oliver referred me to s.57 of the *Insurance Contracts Act* 1984. That section provides as follows:

> **"Interest on claims**
>
> (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.
>
> (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld

payment of the amount and ending on whichever is the earlier of the following days:

(a) the day on which the payment is made;

(b) the day on which the payment is sent by post to the person to whom it is payable.

(3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations.

(4) This section applies to the exclusion of any other law that would otherwise apply.

(5) In subsection (4):

"law" means:

(a) a statutory law of the Commonwealth, a State or a Territory; or

(b) a rule of common law or equity.

45. Mr Waldron said that the money was not unreasonably withheld in the circumstances. I do not agree. I think that since I have found that there was no lawful justification for the money not being paid I must find that withholding it was unreasonable. It can never be reasonable for an insurer to withhold payment of money on a mistaken interpretation of its legal position. It might choose to do so, but if it does, it should do so at its own risk, not at the expense of the insured who was entitled to the money from the beginning.

46. I shall order that Vero pay interest to Mr Eckberg on the said sum of $99,000 from the date upon which payment ought to have been made until the date of the order. Notice of the decision to pay the $99,000 was given on 20 March 2007 and Mr Wharrington had 28 days to appeal. Since he had agreed not to do so, the money ought to have been paid, at the latest, by 17 April 2007. Mr Eckberg should receive interest from that date until the date of the order, which was 10 September 2009.

47. The rate on interest is that fixed by Regulation 32 of the *Insurance Contract Regulations* 1985, namely, 3% above the 10 year Treasury Bond yield. Since I would require evidence of the 10 year Treasury Bond yield over the period in question I am unable to perform the calculation. I will reserve liberty to apply in the unlikely event that there is any dispute as o the amount.

SENIOR MEMBER R. WALKER