

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D448/2002

CATCHWORDS

Domestic building – successful claim – indemnity costs

FIRST APPLICANT	Richard Gower
SECOND APPLICANT	Elizabeth Gower
FIRST RESPONDENT	Vero Insurance Limited
SECOND RESPONDENT	Mardik Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	15 July 2005
DATE OF ORDER	25 July 2005
[2005] VCAT 1447	

ORDER

1. Order First Respondent to pay the costs of the Applicants costs (including any reserved costs and those incurred in respect of this application for costs) on an indemnity basis. In default of agreement by 31 August 2005, I refer the assessment of such costs to the Principal Registrar under s111 of the Act who shall assess the same on an indemnity basis. In that event, by 30 September 2005 the Applicants must file and serve their bill of costs and the First Respondent, if objecting, must do so in writing by document filed and served by 21 October 2005. Thereafter the Principal Registrar must carry out his assessment.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicants	Mr R Andrew of Counsel
For 1 st Respondent	Mr M Thompson of Counsel
For 2 nd Respondent	No appearance

REASONS

1. On 26 February 2004 I ordered the First Respondent (Vero) to pay the Applicants the sum of \$90,417.00. I reserved liberty to the Applicants to apply for costs. See [2004] VCAT 1087.
2. Pursuant to the liberty reserved, the Applicants now do apply for their costs. They submit that I may order them indemnity costs based on the terms of the insurance policy. Alternatively they submit I should order them indemnity costs under s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.
3. The First Respondent does not oppose me ordering costs under s109 but on a party/party basis under County Court Scale “D” or perhaps Scale “C”.
4. The argument that the Applicants are entitled to indemnity costs on the first basis (that is, under the policy) relies on a reading of a provision in the insurance policy – all “reasonable legal costs and expenses” of successfully enforcing the claim against the insurer. This was recently considered by the Court of Appeal in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd* [2005] VSCA 165.
5. It seems to me that if the Applicants have any entitlement under the policy in this regard then it is something which should have been specifically pleaded. That is, the Applicants should have pleaded the term and its breach and the loss suffered

in consequence. But this is not something which they have done except inferentially by the allegation of the insurer's failure to indemnify them and its breach of the policy. I cannot see anywhere that they have specifically alleged breach of the term of the policy relating to legal costs and expenses. It seems to me that that is a separate cause of action. But relying upon the decision in *Maclaw* I am not persuaded that breach of that term would give rise to indemnity costs in any event. It was sought to distinguish *Maclaw* in this regard but I do not consider the basis of distinction is cogent.

6. I therefore reject the argument that I may now order indemnity costs under the policy. If I am able to order costs under the policy on this occasion – and I do not consider I can do so – I am not persuaded that I am able to order indemnity costs considering the remarks of their Honours in *Maclaw*.
7. However, I am persuaded it is fair that I should order the Applicants their costs under s109. I act under s109(2) having regard to the criteria in s109(3). I note, as well, the First Respondent does as such not oppose my ordering costs under s109.
8. The question is whether I should order indemnity costs or not or whether the usual rule of party/party costs should apply. The First Respondent submitted the latter but did not address me at length on the point. Counsel for the First Respondent on this occasion had not appeared at the hearing. On the other hand the Applicants provided me with detailed submissions in support of the former – that is, indemnity costs.
9. Indemnity costs are exceptional but I am satisfied that in this case, in the exercise of my discretion, I should proceed to order that indemnity costs be paid. The factors referred to in the submissions of the Applicants persuade me that this is the course I should follow. In particular I refer to the conduct of the hearing by the First Respondent. Two principal witnesses called by the First Respondent, I

considered, did not give truthful evidence. I refer to paras 13 and 14 of my Reasons. I do not consider I should allow the Applicants to be out of pocket by their proper pursuance of their claim. Nor do I consider they should be restricted to party/party costs in light of the unsatisfactory evidence called by the insurer. I do not think it proper that the Tribunal should lightly disregard the giving of untruthful evidence on behalf of an insurer. Properly advised, I consider the insurer should have settled this matter instead of causing it to go on for hearing. Properly advised, the First Respondent should have seen the evidence of Mr Gridley and Mr Prime for what it was. Again I refer to my Reasons. The Tribunal, I consider, should express its disapproval of the First Respondent's actions – in putting the Applicants to the expense of a protracted legal hearing – by an appropriate award of indemnity costs.

10. Consequently I order the First Respondent to pay indemnity costs such that the Applicants are indemnified against all their reasonable costs of the proceeding. I include any reserved costs which also must be paid on an indemnity basis.
11. I order accordingly.

SENIOR MEMBER D CREMEAN