

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D410/2007

CATCHWORDS

Costs – application for review of decision of warranty insurer - s109 *Victorian Civil and Administrative Tribunal Act 1998* – relevant considerations – ‘settlement offer’ as to quantum by second and third respondents when decision under review on liability only.

APPLICANT	Joe Borg t/as Sunview Homes
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Adam Shakespeare
THIRD RESPONDENT	Karishma Jones
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF COSTS HEARING	2 July 2008
DATE OF ORDER	8 July 2008
CITATION	Joe Borg trading as Sunview Homes v Victorian Managed Insurance Authority & Ors (Domestic Building) [2008] VCAT 1271

ORDER

1. The Applicant shall pay the Respondents’ costs of this proceeding, including reserved costs. In default of agreement such costs are to be assessed by the principal registrar on a party/party basis on County Court Scale ‘D’.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant

Mr J. Sharkie, solicitor

For First Respondent

Mr S. Stuckey of Counsel

For Second and Third Respondents

Mr C. Young of Counsel

REASONS

- 1 On 4 March 2008, following a hearing of the applicant builder's application for review, I affirmed the decision of the First Respondent (VMIA) dated 28 May 2007 to grant indemnity to the Second and Third Respondent owners. I reserved the question of costs with liberty to apply. VMIA and the owners have applied for orders that their costs be paid by the builder. VMIA seeks its costs on a party/party basis on County Court Scale 'D' and the owners seek their costs on an indemnity basis, or alternatively on a party/party basis on County Court Scale 'D'. The background to this proceeding is set out in my earlier Reasons and it is not necessary to repeat it here.
- 2 The builder was represented at this costs hearing by Mr Sharkie, solicitor and VMIA was once again represented by Mr Stuckey of Counsel. The owners, who although legally represented throughout this proceeding, appeared on their own behalf at the hearing but were represented by Mr Young of Counsel at the costs hearing.
- 3 Section 109 of the *Victorian Civil and Administrative Tribunal Act* provides that each party should bear its own costs of a proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) viz:
 - (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.

VMIA's application for costs

- 4 VMIA seeks its costs on a party/party basis on County Court Scale 'D'. Mr Stuckey of Counsel again appeared on its behalf. VMIA relies on s109(3)(b), (c) and (d).
- 5 He submitted this was an appropriate case for the discretion of the Tribunal's discretion. Although it involved technically complex issues, the builder was unsuccessful in its application for a review, because I found that it had failed to build the property in accordance with the contractual documents, and had breached its contractual and statutory warranties.
- 6 Whilst conceding the plumbing issues at the hearing (after the plumbing experts had met), the builder continued to deny liability for rectification of movement to the kitchen area. As set out in my earlier Reasons this was rejected and liability for those works confirmed.

The owners' application for costs

- 7 Counsel for the owners adopted the submissions made on behalf of VMIA in support of their application for costs and addressed me in relation to their application that their costs be paid by the builder on an indemnity basis. They rely on a settlement offer dated 27 September 2007 which Counsel submitted should be considered in conjunction with a quotation for rectification works from Master Menders dated 1 July 2008 for \$80,850.00. The letter of 27 September 2007, from their solicitors to the builder's solicitors, is in the following terms (setting out the relevant paragraphs only):

I am instructed by my clients that in order to rectify the defective works currently on the site, my clients will be obliged to pay the sum of \$35,000 for the purposes of slab lifting, replacement of guttering, root barriers, costs to be associated with works once the slab has been lifted, repairing and repainting internal walls, repairing and repainting a section of the ceiling and the re-grouting of tiles in the bathroom.

My clients are however prepared to resolve the matter on the following terms:

1. that your client forward to my offices the sum of \$30,000 by way of bank cheque within 14 days of the acceptance of this offer.

The offer also anticipated that the proceeding would be discontinued, there would be mutual releases and each party would bear their own costs. It was made a few days prior to the due date for the filing of Points of Defence.

The builder's position

- 8 The builder relies on s109(1) of the *VCAT Act* and submits that each party should bear their own costs of this proceeding. In relation to the matters set out in s109(3)(c), (d) & (e) it was submitted on behalf of the builder that its application for a review of VMIA's decision was well founded and based on expert opinion and that it was tenable in fact and law.

Discussion

9 *In Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:

- (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 having regard to the matters stated in s109(3). That is a finding essential to making an order.

I am persuaded this is an appropriate case for the exercise of the Tribunal's discretion under s109(2) and that it is fair to do so.

10 It cannot be said that the builder was responsible for unreasonably prolonging the proceeding as contemplated by s109(3)(b). However, the builder's case was weak (s109(3)(c)). I found the builder did not comply with its contractual and statutory obligations. Although ultimately its breaches formed the primary basis of my decision, the expert evidence was technically complex with the parties' experts proffering very different opinions as to the cause of the distress and damage to the owners' home (s109(3)(d)). Further, although it was submitted on behalf of the builder that the application for review was based on expert evidence, the only expert evidence before me on behalf of the builder, is a report from Mr Gibney dated 28 September 2007. Mr Gibney states that he was initially instructed to review the documentation, and that it was not until after the mediation on 31 July 2007 that he received instructions to attend site and provide a written report. The application for review was filed on 25 June 2007, well before Mr Gibney attended site. This is a proceeding which might well have been avoided if the builder had understood and accepted responsibility for his failure to comply with the contractual documents.

11 I am not persuaded there is anything exceptional about the conduct of the builder in this proceeding that would give rise to an order for indemnity costs as sought by the owners. As confirmed in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 indemnity or solicitor/client costs should only be ordered in exceptional circumstances. As Nettle JA said:

'I also agree ... that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional ...' [91-92]

12 In conceding that the offer did not comply with ss112-115 Mr Young suggested that it should nevertheless be taken into account under s109(3)(e) '*any other matter the Tribunal considers relevant*'. This was an application

for review of VMIA's 'liability' decision, as set out in its letter of 28 May 2007, which was a direction to carry out rectification works as set out in the Schedule of Works which was attached. It was that decision which was affirmed. Whilst I can understand that the settlement offer was made with good intentions, VMIA has not made a decision on quantum and I do not consider the untested quotation from Master Menders for the carrying out of rectification works to be relevant.

- 13 Given the complexity of the legal and technical issues I am satisfied that County Court Scale 'D' is the appropriate scale. VMIA seeks an order that Counsel's fees be certified at \$3,000 per day, and \$300 per hour for conferences and other attendances. I am not persuaded there is any reason why indemnity costs in respect of Counsel's fees should be ordered for the reasons set out above. I will therefore order that the builder pay the respondents' costs and in default of agreement that they be assessed by the principal registrar on a party/party basis on County Court Scale 'D'.

DEPUTY PRESIDENT C. AIRD