VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D181/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – S.109 – neither party effectively successful at earlier hearing – *Calderbank* offer.

APPLICANT:	Arrow International Australia Pty Ltd
FIRST RESPONDENT:	Indevelco Pty Ltd
SECOND RESPONDENT:	Perpetual Nominees Ltd as custodian of the Colonial First State Income Fund
JOINED PARTY:	John Zervos
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Bowman
DATE OF HEARING:	6 July 2006
DATE OF RULING:	26 July 2006
	Arrow International Australia Pty Ltd v Indevelco Pty Ltd Costs Ruling No 1 (Domestic Building) [2006] VCAT 1485

ORDERS

1. No order as to costs made as to hearing of 6th December 2005, directions hearing of 16th March 2006, insofar as same may have concerned costs, or as to written submissions concerning costs.
2. Liberty to apply.

Judge Bowman
Vice President

APPEARANCES:

For Arrow International Australia Pty Ltd:	Mr B. Miller of Counsel, instructed by Norman Czarny & Associates
For Indevelco Pty Ltd & Joined Party:	Mr Noble of Noble Lawyers

RULING AS TO COSTS NO. 1

GENERAL BACKGROUND

1 In this matter I gave a detailed ruling in relation to various interlocutory applications on 23rd December 2005, these having been argued before me on 6th December 2005. On the occasion of that ruling, I reserved the question of costs. Pursuant to that reservation, the applicant, Arrow International Australia Pty Ltd ("Arrow") now seeks its costs as against the first respondent, Indevelco Pty Ltd, and the joined party, John Zervos, who had a common interest in the proceedings and to whom I shall refer collectively as "Indevelco". The overall matter came on before me again by way of a directions hearing on 16th March 2006, at which directions hearing Arrow was in a position to argue the question of the reserved costs, but Indevelco was not. In the event, other matters, in addition to costs, were considered on that day.

2 Because Mr Herskope, who appeared on behalf of Indevelco, was not in a position to conduct the costs argument, he being of the belief that it would not be dealt with on that day, and in addition to fixing a timetable in relation to the conduct of the matter generally, I ordered that Arrow and Indevelco file and serve any written submissions in relation to the costs associated with the hearing conducted on 6th December 2005 on or before 30th March 2006. As shall be discussed, written submissions were subsequently received.

3 However, in the meantime and on 20th March 2006, the solicitors for Indevelco wrote to the solicitors for Arrow making what could be described as an offer of the type referred to in the decision of *Calderbank v Calderbank* [1975] All ER 333. That offer was, in essence, that there be no order as to costs in relation to the hearing of 6th December 2005.

4 I shall not enter into the factual background of this dispute, which is not relevant for the purposes of this ruling. The orders and associated reasons of 23rd December 2005 are relevant, but I shall not set them out again here. Suffice to say that, save for the question of the exchange of experts' reports and particularly provision of an expert's report by Indevelco, I dismissed both Arrow's application against Indevelco, and Indevelco's application against Arrow.

5 It is against that background that this ruling is made.

THE CASE ON BEHALF OF ARROW

6 The written submissions advanced by Mr Miller on behalf of Arrow could be summarised as follows. The ruling of 23rd December 2006 in relation to Arrow's request for Further and Better Particulars was that such request "really resolves into a complaint concerning the failure of Indevelco to supply an expert's report". After considerable requests, Indevelco effectively admitted that Arrow was entitled to Further and Better Particulars of the Points of Defence. Instead of providing them, it referred to an expert's report which, at that time, it did not yet have. Given the length of time which these proceedings have been on foot, Indevelco should have been aware that evidence would be necessary to support

its allegations. Indevelco has been ordered to provide an expert's report containing costings so as to provide the particulars requested. Until that report is provided, the particulars are insufficient. By providing particulars by way of referring to an expert's report which it did not have, Indevelco was effectively trying to buy time. It is no answer to say that it does not have to provide an expert's report until such time as there is an order in relation to such. Given that Indevelco sought to rely upon such a report in order to provide Further and Better Particulars, it should have delivered such a report without any need of an order. Arrow was successful in establishing that the provision of an expert's report was necessary, and consequently should be awarded costs, as until such time as such a report or Further Particulars are provided, the existing Further and Better Particulars remain insufficient.

7 The other orders made in relation to the applications effectively cancel each other out and do not otherwise justify an order for costs.

8 Certainly Indevelco should not be entitled to its costs in relation to this argument concerning costs. Had it been prepared to advance its arguments at the directions hearing on 16th March 2006, there would have been no alteration to the costs orders otherwise made on that day. The only reason why written submissions were ordered was because counsel for Indevelco was not in a position to argue the issue of costs on that day. Indevelco might argue that it has written a letter dated 20th March 2006 in which it has offered to resolve the issue of costs on the basis that there be no order as to costs, and has referred to the principles set out in the decision in *Calderbank*. However, such letter is a "without prejudice" communication and should not be considered by the Tribunal. It is not in the appropriate form. It does not carry with it the same consequences as an offer of settlement pursuant to ss.113 and 114 of the Act.

THE CASE ON BEHALF OF INDEVELCO

9 The submissions on behalf of Indevelco are brief. Essentially, they are to the effect that normally the appropriate order would be that there be no order as to costs in favour of either Arrow or Indevelco. This had been foreshadowed and in effect offered in the letter of 20th March 2006. If the order of the Tribunal is that it is appropriate that there be no order as to costs, by reason of that letter and the offer contained therein not being accepted, there should in fact be an order for costs made in favour of Indevelco.

RULING

10 The issue of costs is to be determined in relation to two separate hearings or situations. Firstly, there are the costs associated with the hearing of 6th December 2005. Secondly, there are the costs associated with the written submissions concerning costs ordered at the directions hearing of 16th March 2006. Depending upon my ruling in relation to the costs of 6th December 2005, a further issue may then arise concerning Indevelco's letter of 20th March 2006 in which the *Calderbank* type offer is contained.

11 I shall deal firstly with costs associated with the hearing of 6th December 2005. I am of the opinion that the appropriate order in relation to the hearing of 6th December 2005 is that no order as to costs should be made. I am not persuaded by the argument advanced by Mr Miller in relation to Arrow receiving its costs. Basically, my ruling of 23rd December 2005 was not favourable to Arrow. I ruled that, in essence, adequate particulars had been supplied. As I indicated in that ruling, the only exception which I made in relation to Arrow's application concerned the exchange of experts' reports. Whatever the history of the proceeding, when it was before me there was no order in place regarding the exchange of experts' reports. As I then observed, such an order seemed desirable. Such an order would form part of the normal timetable in a case of this nature, and indeed I note that, on 26th June 2006, Senior Member Lothian made such an order. Thus, apart from any consideration of s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998, in my view Arrow was not successful, and was certainly not successful to the degree that would attract an order for costs. The basic presumption contained in s.109(1) of the Act has not, in my opinion, been displaced. Accordingly, I make no order as to costs in relation to the hearing of 6th December 2005.

12 In relation to the directions hearing of 16th March 2006 which hearing related to costs issues between Arrow and Indevelco, I am of the opinion that no order as to costs should be made. In relation to costs related to and subsequent to Indevelco's letter of 20th March 2006 – that is, the costs associated with the written submissions – again I am of the view that there should be no order as to costs. This is not to discourage attempts to resolve arguments such as this by way of offers of settlement or by way of letters of the *Calderbank* type. Indeed, in some circumstances, that type of approach is to be encouraged, and, if the recipient of the offer or letter gets no better result than what has been offered, costs will frequently be ordered against that party. In addition, I am not persuaded by Mr Miller's arguments that the letter of 20th March 2006 should not be considered by the Tribunal. The letter of 20th March 2006 is an open letter. I read nothing into the absence of any particular heading upon it. It is an open offer to resolve the issue of costs on the basis that there be no order as to costs. That offer was not accepted. The relevant order which I now make is indeed that there be no order as to costs. But for the factors which I am about to mention, Indevelco may well have been entitled to its costs of the written submissions. Those factors are as follows.

13 Firstly, there is some force in the assertion that the whole necessity for written submissions arose because counsel for Indevelco was not in a position to argue the question of costs at the directions hearing on 16th March 2006, although counsel for Arrow was so prepared and I was anticipating such an argument. My recollection is that this assertion is correct, and that I ordered the filing and serving of written submissions in order to give Indevelco the opportunity to put considered arguments. In other words, what has been put on behalf of Arrow is that the whole issue of written submissions was caused by Indevelco's unpreparedness on 16th March, and that therefore Arrow should get its costs of the written submissions and certainly should not have to pay Indevelco's costs.

As stated, there is some force in this argument, but I am not prepared to order costs in favour of Arrow. It was provided with the opportunity to resolve the matter on the basis of no order as to costs, but chose not to grasp that opportunity. Nevertheless, I am not prepared to order that Indevelco receive its costs of the written submissions, because the whole costs issue could have been argued on 16th March without the necessity for written submissions, and it was Indevelco's unpreparedness that created that necessity.

14 Secondly, in the context of a very large and complex commercial cause, the expense associated with Indevelco's written submissions would appear to be absolutely minimal. Unless some part of them has gone astray – and there is no indication of this – the written submissions, unlike those on behalf of Arrow, basically amount simply to an assertion that there should be no order as to costs. That assertion is contained in a very brief letter. The balance of that brief letter effectively deals with the *Calderbank* situation, and proceeds on the basis that there will be no order as to costs, rather than setting out reasons why such an order would be appropriate. Not only would the costs associated with this be comparatively miniscule, the submission, being no more than an assertion, could not be regarded as particularly helpful. The letter may have anticipated the correct outcome, but there was nothing in it which was otherwise of assistance or persuasive.

15 Accordingly, I am also of the view that there should be no order as to costs in relation to the written submissions.

16 As I am of the opinion that there should be no order as to costs in relation to the hearing of 6th December 2005 (and that there should be no order as to costs in relation to the written submissions), it seems to me to be logical that there should, as stated, be no order in relation to costs associated with what could be described as the proposed costs argument on 16th March 2006, insofar as that directions hearing may have been anticipated to concern such question. As my ruling has been that there should be no order as to costs in relation to the hearing on 6th December 2005, it seems to me that neither party is entitled to its costs in relation to the arguments concerning same that may have been advanced that day. I have already dealt with the *Calderbank* offer. In addition, the directions hearing of 16th March 2006 dealt with matters in addition to the costs issue, so that the attendance of the parties was required in any event. For example, a timetable in relation to the future conduct of the matter was ordered. The reservation of costs made on 16th March 2006 remains insofar as it relates to the business otherwise conducted on that day.

17 In summary, I am of the view that, as far as these parties are concerned, no order as to costs should be made in relation to the hearing of 6th December 2005, the directions hearing of 16th March 2006, or the written submissions.

Judge Bowman
Vice President