

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST
[2006] VCAT 180

VCAT Reference: D786/2005

CATCHWORDS

Is refusal to process a claim a decision to deny the claim? – costs

APPLICANT: Body Corporate Plan No. PS404277D
RESPONDENT: Victorian Managed Insurance Authority
WHERE HELD: Melbourne
BEFORE: Deputy President C. Aird
HEARING TYPE: Costs Hearing
DATE OF HEARING: 7 February 2006
DATE OF ORDER: 15 February 2006

ORDER

1. 'Victorian Managed Insurance Authority' (VMIA) is substituted for 'Housing Guarantee Fund' as the Respondent.
2. The Respondent shall pay the Applicant's costs including reserved costs. In default of agreement, such costs to be taxed by the principal registrar in accordance with County Court Scale 'D'.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant: Mr S.R. Grahame of Counsel
For the Respondent: Mr L.M. Schwarz, Solicitor

REASONS

1. By Notice of Complaint and Statutory Declaration, date stamped by the Respondent as having been received on 14 September 2005, the Applicant, Body Corporate PS 404277D, lodged a claim with the Respondent (formerly Housing Guarantee Fund Limited and now Victorian Managed Insurance Authority) in relation to certain alleged defects in the common property. Attached to the Notice of Complaint was Schedule A – Owner List Building 404277D which sets out the names of the owners of each of the units. The Notice of Complaint was sent under cover of a letter dated 14 September 2005 from the Applicant’s solicitors. It is relevant to set out extracts from that letter.

“We refer to the above property and in particular to the common property contained within the above Plan of Subdivision. A copy of the registered Plan of Subdivision is enclosed. We act for Body Corporate Plan No. 404277D, the registered owner of all that common property on the above Strata Plan.

In accordance with the relevant provisions of the Subdivision Act 1998, our client is the legal owner of that common property as nominee and trustee for the individual lot owners on the Plan of Subdivision.

Details of those Lot owners is attached in the accompanying document entitled “Owner List – Building 404277D” and marked as Annexure A to the enclosed Notice of Complaint and Statutory Declaration.

We are instructed by the Body Corporate to lodge a claim for defective building works, which defective works are located within and on the common property.

...

We advise the claim for Defective Works is hereby lodged by the Body Corporate Plan of Subdivision 404277D in its capacity as legal owner of all of that land comprised in the common property and its capacity as nominee of an agent and trustee for and on behalf of all unit owners named in Annexure A to the extent of their respective interests as tenants in common in the common property.

The claim form has been completed by our Body Corporate client in the above capacity”.

2. On 20 September 2005 the Respondent wrote to the Applicant's solicitors advising:

"We refer to your letter dated 14 September 2005 and have noted the contents therein.

We advise that we are not prepared at this time to proceed with the processing of the Body Corporate claim relating to It is a requirement with the assessment of any Body Corporate claim by HGF that a claim form is completed and associated documents forwarded by each individual unit owner.

In addition, we require confirmation the (sic) each and every unit owner has consented to the making of the claim by the Corporate for all common property defects and, in particular, that each unit owner has acknowledged that:

- (i) Any payment that may be made by the HGF toward the cost of rectifying the common property defects listed in the Body Corporate claim form and accepted in accordance with the terms and conditions of the relevant policy of insurance and provisions of the House Contracts Guarantee (HIH) Act 2001 ("the Act") will result in a rateable deduction from each unit owner's policy of insurance limit (maximum \$100,000.00) for any future claims (by the owner or the Body Corporate);*
- (ii) In the event the claim/s are accepted by HGF, each under owner(sic) will be required to pay an excess pursuant to the terms of the relevant policy of insurance in respect of each unit; and*
- (iii) If any indemnity is granted under section 37 of the Act, each unit owner will be required to execute a Release & Authority form, as well as assigning his or her rights against the insurer (HIH), the builder or any other person to the State of Victoria.*

We therefore point out, that because the Body Corporate does not have a policy of insurance in its own right, but seeks to rely on the policies relating to each and every unit owner, each member of the Body Corporate is required to complete a claim form.

...

We are unable to consider and provide any assessment of the Body Corporate claim until such time as we receive all the documentation requested in this letter.

Your clients have the right to appeal this decision to the Victorian Civil and Administrative Tribunal, provided you do so within 28 days of receipt of this decision. ...

3. On 19 October 2005 the Applicant made application to this tribunal seeking a review of the decision of the Respondent on the grounds that the decision is “erroneous”. Directions were made on 29 November 2005 requiring the Applicant to file and serve Points of Claim and “a draft of the questions it wishes to have referred for a preliminary determination”.
4. Points of Claim were filed and served on 8 December 2005 in which the Applicant refers to relevant sections of the *Subdivision Act 1988* which it asserts give it the responsibility and authority to make the claim in respect of the common property and, at paragraph 17, that the Respondent *refused to consider and/or rejected the Insurance Claim*. On 12 December 2005 draft questions were filed by the Applicant as follows:
 - (a) *Is the Applicant an “insured” pursuant to the policy?*
 - (b) *Is it a requirement of the House Contract Guarantee (HIH) Act 2001 (“HIH Act”) that before the HGF can give consideration to or make an assessment of the claim that:*
 - (i) *A claim form be completed and associated documents be forwarded by each individual unit owner?*
 - (ii) *Each and every unit owner has consented to the making of the claim?*
 - (c) *In the event that the claim is accepted by the HGFL, is it a requirement of the policy and/or the said HIH Act that each and every unit owner be required to pay an excess pursuant to the terms of the policy in respect of each unit?*
 - (d) *In the event that an indemnity is granted under section 37 of the House Contracts Guarantee (HIH) Act 2001 is each unit owner required to:*
 - (i) *Execute a Release and Authority form?*
 - (ii) *Assign his or her rights against the insurer (HIH), the builder or any other person to the State of Victoria?*
5. These questions came on for hearing before me on 21 December 2005 at which time it was conceded by the Respondent that the Applicant was entitled to make the claim in its own right and that the claim would be accepted and processed

upon confirmation that it was being made by the Applicant in its own right and not on behalf of the individual unit holders. At that time Mr Grahame of Counsel appearing on behalf of the Applicant indicated that his client would be seeking its costs of the proceeding.

6. The Applicant's solicitor has filed an affidavit affirmed on 6 February 2006 setting out copy correspondence between him and the Respondent's solicitor following the hearing on 21 December 2005. However despite Mr Schwarz's best endeavours on behalf of the Respondent, as set out in the correspondence and his submissions at the Costs Hearing, I reject absolutely the contention that it is the Applicant which has changed its position in relation to its claim. It is clear, when considering the Notice of Complaint, that the original claim was made by the Applicant. The letter of 14 September 2005 sought to explain the capacity in which the Applicant had the authority and responsibility to make that claim. Notwithstanding Mr Schwarz's assertion that the Points of Claim and the position now adopted by the Applicant differ, I am satisfied that a proper reading of the Points of Claim does no more than expand upon the basis of its authority to make the claim in respect of the common property. Any confusion that has arisen in relation to this claim clearly arises from the Respondent's letter of 20 September 2005.

7. In its letter of 20 September 2005 the Respondent makes it clear that it will not accept a claim from the Applicant under any circumstances. It is not simply a matter of expressing confusion as to the capacity in which the claim has been lodged by the Applicant but rather an assertion that the Applicant is unable to rely on the insurance policy in its own right and must rely on the policies relating to each and every unit owner. In paragraph 2 of the letter of 20 September 2005 the Respondent states: "*It is a requirement with the assessment of **any** (emphasis added) Body Corporate claim by HGF that a claim form is completed and associated documents forwarded by each individual unit holder*"

8. It was further submitted by Mr Schwarz that the letter of 20 September 2005 could not properly be regarded as a rejection of the claim by the Applicant but was rather an indication that it was unable to proceed with processing the claim pending completion of further documentation. I reject this submission. The letter of 20 September is quite clear - the Respondent is denying the Applicant's ability or authority to make such a claim under the relevant policy. This is clearly a decision, the status of which is reinforced in the final paragraph whereby the Respondent advises the Applicant of its rights to appeal its decision to this tribunal.

9. I accept that s109 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that each party should bear its own costs unless the tribunal is prepared to exercise its discretion under s109(2) having regard to the provisions of s109(3). I am satisfied the Respondent has conducted this proceeding in such a way as to disadvantage the Applicant. It is, in my view, disingenuous to suggest that the Applicant lodged its appeal prematurely and that the matters might otherwise have been resolved or clarified without the need for the Applicant to lodge its application. Conversely, one might well say that the Respondent could have sought clarification of the capacity in which the complaint or claim was made by the Applicant if it considered there was any confusion caused by the letter of 14 September 2005, which as noted above accompanied a Notice of Complaint which clearly stated the owner was the Body Corporate. The Applicant had no alternative but to lodge this application to protect its position in relation to its appeal rights.

10. Once the application had been lodged and Points of Claim filed and served there could have been no doubt as to the capacity in which the claim had been made by the Applicant. I reject the submission that the Points of Claim set out a different position to that which is disclosed by the letter of 14 September 2005. As noted above, all it does is expand upon the authority of the Applicant to make the claim.

11. I also make the observation and accept the submission on behalf of the Applicant that the correspondence from the Respondent's solicitors since the hearing on 21 December 2005 has decidedly unhelpful in all the circumstances. One could be forgiven for interpreting it as an attempt to further delay processing of the claim whilst attempting to establish a basis for avoiding the application for costs by suggesting other impediments to the processing of its claim. I note that at the costs hearing Mr Schwarz confirmed that the failure by the Applicant to properly complete the Statutory Declaration and provide a copy of the Body Corporate Rules was not an impediment to the processing of the claim. Nevertheless I suggest it would be prudent for the Applicant to formalise the application by arranging for the statutory declaration to be declared and providing a copy of the Body Corporate Rules to the Respondent as soon as convenient to ensure the timely processing of this claim.

12. In all the circumstances I am satisfied I should exercise my discretion under s109(3) and order that the Respondent pay the Applicant's costs of this proceeding including all reserved costs. In default of agreement I refer the assessment of such costs to the principal registrar in accordance with County Court Scale D which it seems to be the appropriate scale.

DEPUTY PRESIDENT C. AIRD