VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D134/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – offers of settlement – whether offers should have been accepted - whether order for party/party or solicitor/client costs

APPLICANT	Body Corporate Strata Plan No. 419952
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Housing Guarantee Fund Ltd (Struck out from proceeding 2/5/06)
THIRD RESPONDENT	Sinclair Developments Pty Ltd (ACN 061 284 919)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	1 June 2006
DATE OF ORDER	15 June 2006

[2006] VCAT 1209

ORDER

1. The proceeding is struck out.

2. The First Respondent shall pay the Applicant's party/party costs up to and including 30 May 2006 save and except for its costs of and incidental to the directions hearing on 2 May 2006. In default of agreement, such costs to be assessed by the Principal Registrar in accordance with County Court Scale 'D'.

3. The Applicant shall pay the First Respondent's party/party costs of and incidental to the directions hearings on 2 May and 1 June 2006. In default of agreement, such costs to be assessed by the Principal Registrar in accordance with County Court Scale 'D'.

4. The Applicant shall pay the Third Respondent's party/party costs of and incidental to the directions hearing on 1 June 2006. In default of

agreement, such costs are to be assessed by the Principal Registrar on County Court Scale 'D'

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr T. Graham, Solicitor
For the First Respondent	Mr L. Schwarz, Solicitor
For the Second Respondent	Struck out from the proceeding 2/5/2006
For the Third Respondent	Mr S.G. Teale, Solicitor

REASONS

1. By application dated 1 March 2006 filed on 2 March 2006, the Applicant sought a review of a decision of the First Respondent dated 10 February 2006. The First Respondent acknowledges that its letter of 10 February 2006 was in similar terms to its decision which was the subject of a review application by a Body Corporate in proceeding D786/2005. The same firm of solicitors acts for the Body Corporate Applicants in both proceedings. By facsimile dated 20 May 2006, the First Respondent's solicitors forwarded to the Tribunal copies of correspondence to the Applicant's solicitors advising the decision of 10 February 2006 *'... is hereby withdrawn.'* The Applicant now seeks an order that the First Respondent pay its costs of this proceeding. The Third Respondent seeks an order that the Applicant pay its costs of the proceeding. The Applicant was represented by Mr Graham, solicitor, the First Respondent was represented by Mr Schwarz, solicitor and the Third Respondent by Mr Teale, solicitor

2. By way of background only, D786/2005 came on before me for preliminary hearing on 21 December 2005 at which time it was conceded on behalf of the First Respondent that the Applicant Body Corporate was entitled to make the claim in its own right. Subsequently, on 15 February 2006, the First Respondent was ordered to pay the Applicant's costs in that proceeding.

The Applicant's application for costs

3. The First Respondent instructed its solicitors on 27 April 2006, after attending an unsuccessful mediation on 4 April 2006. The mediation in this proceeding took place well after the concession on behalf of the First Respondent at the preliminary hearing on 21 December 2006 in D786/2005, and some six weeks after the costs decision in the same proceeding.

4. The Applicant seeks its costs of this proceeding, relying on the conduct of the First Respondent in maintaining a clearly untenable position until 30 May 2006 when the decision of 10 February 2006 was withdrawn. At the time of the decision on 10 February 2006, a concession as to the entitlement of a Body Corporate to make a claim on a policy of warranty insurance, had been made by the First Respondent in D786/2005 on 21 December 2005. In such circumstances it seems surprising that the decision on 10 February 2006 was made at all, and that a similar concession was not made until the First Respondent instructed solicitors to act on its behalf, apparently on 27 April 2006.

5. It was submitted on behalf of the First Respondent that the Applicant or its solicitors should have contacted the First Respondent requesting it review its decision of 10 February 2006 having regard to the Tribunal's decision in D786/2005. I reject this submission. It was not for the Applicant to advise the First Respondent of concessions made by it, or its conduct of previous proceedings.

6. It was submitted on behalf of the First Respondent that in accordance with the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 the appropriate order would be for each party to bear its own costs. Alternatively, if I am minded to exercise the Tribunal's discretion under s109(2) that the First Respondent should be ordered to pay the Applicant's costs on a party/party basis on County Court Scale 'D' until 28 April 2006, the date on which the first of a number of offers of settlement was made, and thereafter the Applicant should pay the First Respondent's costs on a solicitor/client basis. Alternatively, that the Applicant's costs should be paid by the First Respondent on a party/party basis on County Court Scale 'D' until the date of the offer which the Tribunal deems the Applicant should have accepted, and thereafter the Applicant should pay the First Respondent's costs on a solicitor/client basis.

7. Five offers of settlement, all 'without prejudice save as to costs' were served on the Applicant's solicitors on behalf of the First Respondent in the following terms:

The first offer - 28 April 2006

> *1. That our client's decision dated 10 February 2006 is withdrawn.*
> *2. That our client pay your client's party/party costs of the proceeding to date on County Court Scale C.*
> *3. That within 7 days of acceptance of this offer, our client be provided with contact names and details of each unit owner in order to arrange access and advise each owner of the Body Corporate claim in order to continue processing your client's claim.*

8. This offer was stated to be open for acceptance until 4.00 p.m. on 28 April 2006. Although there was no written reply to this offer, it is apparent from the next offer, dated 2 May 2006, that there was a telephone conversation between the solicitors for each of the parties, although there is no evidence before me as to the content of those conversations.

The second offer - 2 May 2006

9. This offer was in substantially the same terms as the previous offer with the following additional paragraph

> *4. Provided that the Applicant complies with paragraph 3 hereof within the time referred to therein, the First Respondent agrees to conduct an inspection of the subject property within 30 days of the date hereof.*

10. This offer was stated to be open for acceptance until 11.00 a.m. the same day. The proceeding was listed for a directions hearing on 2 May 2006 at 12 noon. This directions hearing was adjourned as the Third Respondent had not been served at the correct address. As is apparent from the next offer, the solicitors for the Applicant and the First Respondent had some discussions following the directions hearing.

The Third offer – 3 May 2006

11. This letter restated the offer of the previous day with the following addition to item 4 '*… and make its decision within 90 days of your client's acceptance of this offer.'*

12. This offer was stated to be open for acceptance until 4.00 p.m. on 10 May 2006. On 8 May 2006, the Applicant's solicitors responded in writing for apparently the first time requesting an extension of time, until 17 May 2006, to enable the calling of a meeting of the Applicant to consider the settlement proposal. The following enquiry was also made:

> "*Please advise also if you are prepared to put a further proposal which contains an express reservation of all rights relating to the proceeding, including the right to seek review of any future determination by your client in relation to the mattes which are the subject of the my client's claim dated 27 January 2006 and proceeding D134/2006".*

13. The First Respondent's solicitors replied on 10 May 2006 advising that the offer would remain open until 17 May 2006, and:

> *2. As the writer advised you in our conversation subsequent to the Directions Hearing on 2 May 2006, we are not prepared to amend our client's offer. In particular, we confirm that we do not see the need to keep the current proceedings on foot in respect of any future decisions which our client may make, which should, in our view, be the subject of a further (separate) Application. In any event, with respect, what you are seeking is, in our view, premature, presumptive and inappropriate.*
>
> *If our client's offer is not accepted within the time required, we will seek our client's instructions to simply withdraw its decision dated 10 February 2006 at the Directions Hearing on 1 June 2006 and proceed with its usual processing of your client's claim (without any agreed time frame).*

14. Inexplicably, the response to this letter was a letter from the Applicant's solicitors enclosing *'my clients solicitor/client bill of costs'* in the sum of $3,374.40.

The fourth offer – 25 May 2006

15. The First Respondent's solicitors wrote to the Applicant's solicitors again, this time advising that the First Respondent was prepared to re-open and amend its offer, providing that Minutes of Consent Orders were filed with the Tribunal including orders that the proceeding be dismissed and the First Respondent pay the Applicant's costs fixed in the sum of $3,000.00 (in lieu of the previous offer to pay party/party costs on County Court Scale 'C'). The Applicant was to obtain the consent of the Third Respondent to the making of such Consent Orders. The offer was stated to remain open for acceptance until 4 p.m. on 29 May 2006.

The fifth offer – 30 May 2006

16. There was a final offer on 30 May 2006, following confirmation that the decision of 10 February 2006 was withdrawn, whereby the First Respondent offered to pay the Applicant's party/party costs on County Court Scale 'D'. This offer was stated to remain open for acceptance until 2.00 p.m. on 31 May 2006. Unlike the previous offers, this offer was not conditional on the Applicant providing contact details for each of the unit owners.

Discussion

17. I reject the submission on behalf of the First Respondent that s109(1) should apply and each party should bear its own costs. I am satisfied the Respondent has conducted this proceeding in a way which clearly disadvantaged the Applicant. The Applicant took the appropriate course in applying to the Tribunal for a review of the decision of 10 February 2006 – a decision made at a time when the First Respondent had conceded on 21 December 2005, in D786/2005, that a Body Corporate could lodge a claim in its own capacity. It was not for the Applicant to remind the First Respondent of its own concessions.

18. Further, by the time of the mediation on 4 April 2006, the First Respondent having had the benefit of my decision in D786/2005 should have been in no doubt as to its possible exposure to costs. I accept that once solicitors were instructed to act on its behalf on 27 April 2006, an offer of settlement was made the following day. However, that, and the subsequent offers (not including the offer of 30 May 2006) were all conditional upon the Applicant providing information that I am not persuaded it was required to provide to enable the processing of the claim. Whilst access for the purposes of inspection might well be necessary, there is simply no evidence that this could not have been arranged by the Applicant, as and when requested by the Respondent.

19. In circumstances where the First Respondent's decision was clearly untenable, it was, in my view, unreasonable for it to make conditional offers for withdrawal of that decision. By doing so, and in attempting to maintain an untenable position in the face of its own concessions, albeit in another unrelated proceeding, the First Respondent has clearly conducted this proceeding in a way which unnecessarily disadvantaged the Applicant.

20. The offer of 30 May 2006 is the offer which should have been the first offer made by the First Respondent. It was the fifth offer made almost 'at the last minute', the proceeding having been listed for a directions hearing on 1 June 2006.

21. For the reasons set out above, I am persuaded that having regard to the conduct of the First Respondent I should exercise my discretion under s109(2) in favour of the Applicant. I will therefore order that the First Respondent pay the Applicant's party/party costs of the proceeding up until and including 30 May 2006, save and except for its costs of and incidental to the directions hearing on 2 May 2006. The directions hearing on 2 May 2006 was adjourned when it became apparent that the Third Respondent –

the builder – had not been served at its current registered office, hence its non-appearance at the mediation on 4 April 2006 or the directions hearing on 2 May 2006. I will order the Applicant to pay the Respondent's costs of that directions hearing. In default of agreement such costs are to be assessed by the Principal Registrar on County Court Scale 'D'.

22. However, I am not persuaded that there was any good reason for the Applicant not to have accepted the offer of 30 May 2006. It should have been apparent to the Applicant from my decision in D786/05 that in all probability any order for costs would be on a party/party basis on County Court Scale 'D'. Further, once the decision of 10 February 2006 was withdrawn, the Applicant had obtained the remedy it sought in its application for review of that decision. I will order the Applicant to pay the First Respondent's costs of and incidental to the directions hearing on 1 June 2006. However, considering the offer of 30 May 2006 in the context of the First Respondent's conduct of the proceeding up until that date, I am not persuaded that I should order solicitor/client costs, and will order the Applicant to pay the First Respondent's party/party costs. In default of agreement, such costs to be assessed by the Principal Registrar on County Court Scale 'D'.

23. I should perhaps mention in passing that I am not persuaded that the initial inclusion of the Housing Guarantee Fund Limited as the Second Respondent by the Applicant is of any consequence. Its affairs were assigned to the First Respondent on 1 February 2006 and the proceeding as against the Second Respondent was struck out by consent of the Applicant and the First and Second Respondents at the directions hearing on 2 May 2006, the First and Second Respondents being represented by the same firm of solicitors.

Should the proceeding be dismissed?

24. When the matter came on before it became apparent that there was some disagreement between the parties as to whether the proceeding should be dismissed, or held in abeyance pending the First Respondent's decision on the claim. It seems to me that the matters the subject of this application have now been determined. The Applicant sought a review of the First Respondent's decision to reject the claim, on what, by reference to the concession and the costs decision in D786/2005, were clearly untenable grounds. If the application had proceeded to hearing, and been successful, the application the subject of this proceeding would have been determined and the proceeding finalised. This is not a situation analogous to that considered by me in *Gendala v AAK Construction Group Pty Ltd* [2004] VCAT 1042 where I found that it was desirable to allow Points of Claim to be amended to include a review of a subsequent decision in the interests of avoiding multiplicity of proceedings. In the absence of any determination of the application on its merits, I am of the view the appropriate order is that the proceeding be struck out – it is clear there is nothing left for the Tribunal to determine. Such an order will not, in my view, act as an impediment to the Applicant bringing a further application for review of any subsequent decision of the First Respondent.

The Third Respondent's costs

25. The Third Respondent builder seeks orders that the Applicant pay its costs of this proceeding. Had the Applicant accepted the First Respondent's offer of 30 May 2006 the directions hearing would not have proceeded, and the Third Respondent would not have incurred the costs of attending.

26. It was clearly appropriate that the builder be a party to this proceeding. Its interests are clearly affected by any decision of the First Respondent (s60 of the *Victorian Civil and Administrative Tribunal Act* 1998). However, for the reasons set out above I am satisfied that it would have been reasonable for the Applicant to have accepted the First Respondent's offer of 30 May

2006 and avoided the necessity for all parties to have attended the directions hearing. I reject the submission on behalf of the Applicant, that acceptance of any of the offers of the First Respondent would not have resolved the proceeding as against the Third Respondent. No claims are made against the Third Respondent in this proceeding – it is a party because their interests are affected (s60 and clause 13.5 PNDB1). I will therefore order that the Applicant pay the Third Respondent's party/party costs of and incidental to the directions hearing on 1 June 2006. In default of agreement, such costs are to be assessed by the Principal Registrar on County Court Scale 'D'. Its costs are otherwise its own responsibility.

DEPUTY PRESIDENT C. AIRD