VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D270/2005

CATCHWORDS

Costs – s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 – exercise of Tribunal's discretion under s109(2)

APPLICANT	Construction Engineering (Aust) Pty Ltd (ACN 005 490 773)
RESPONDENT	Victorian Managed Insurance Authority
JOINED PARTIES	David Mitchell, Wendy Cole, Matthew McNeill, Elliott Friedman, Joshua Friedman, Peter Papadopoulos, Rachel Bloom, Geoffrey Moar, Lesley Moar, George Mariotto, June Burchell, Mr Fung, Mrs Fung, Tom Tangas, Helen Davidson, David Graham, David Spedding, Mary Harper, Michael Heath, Marie Malcolmson, Rita Hollins
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	13 February 2007
DATE OF ORDER	8 March 2007
CITATION	Construction Engineering v Victorian Managed Insurance Authority [2007] VCAT 341

ORDER

1 The Applicant shall pay the Respondent's costs of and incidental to the application dated 4 August 2006 heard on 10 November 2006 including the costs occasioned by the adjournment of the hearing scheduled for 18 October 2006. In default of agreement such costs are to be assessed on a party/party basis by the principal registrar on County Court Scale 'D'.

2 The costs of the directions hearing held on 13 February 2007 are reserved.

3 I direct the Principal Registrar to file a copy of these Orders and Reasons on the files for proceedings D429/2005, D891/2005 and D384/2006 to which they also apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr N Frenkel of Counsel
For Respondents	Mr S Stuckey of Counsel
For Joined Parties	No appearance

REASONS

1 On 23 January 2007 being satisfied the Respondent had the power to give the directions the subject of this proceeding (and proceedings D429/2005, D891/2005, and D384/2006) I dismissed the Applicant's preliminary application dated 4 August 2006 whereby it sought:

1) A declaration that the Respondent had no power to give the directions the subject of the proceeding.

2) Alternatively to paragraph 1 above, an order that the Respondent's directions the subject of the proceeding be struck out.

3) An order that the Respondent pay the Applicant's costs of the proceeding.

2 The Respondent now seeks its costs of and incidental to the preliminary application including its costs occasioned by the adjournment of the hearing on 18 October 2006. Initially, the primary issue in dispute between the parties was the identification of the relevant and applicable policy of warranty insurance. This was resolved. Then, on 17 October 2006, the Applicant filed a Further Statement of Legal Contentions wherein it contended that the relevant Policy was inconsistent with the Ministerial Order and further that it was vague for uncertainty. Not surprisingly the Respondent sought an adjournment of the hearing to give it an opportunity to consider the 'new objections'.

The Respondent's position

3 Mr Stuckey of Counsel appeared on behalf of the Respondent and submitted that this is an appropriate case for the exercise of the Tribunal's discretion under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the *VCAT Act*') having regard to the matters set out in s109(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…
>
> …
>
> (c) the relative strengths of the claims made by each of the parties, including where 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

4 He submitted it is clear that the Applicant has unreasonably prolonged the proceeding – approximately six to eight months have been 'lost' pending resolution of the preliminary application. As early as 6 April 2006 the Tribunal made orders in anticipation of the appointment of an expert under

s94 of the *VCAT Act* but it was not until 4 August 2006, some four months later, that the Applicant made its preliminary application. The hearing was set down for hearing on 18 October 2006, and it was not until 17 October 2006 that the Applicant conceded the primary issue in dispute, and raised its 'new objections' thereby leading to an adjournment of the hearing until 10 November 2006.

5 In considering the relative strengths of the parties' positions, the Respondent contends that the Applicant, in conceding the issue in relation to the applicable Policy, conceded that its primary argument was unsustainable. It was suggested by Mr Stuckey that the 'new objections' were essentially a desperate attempt to rescue an application which was otherwise 'on the rocks'.

6 The issues raised by the application were particularly complex being effectively a wholesale attack on the operation and administration of Part 6 of the *House Contracts Guarantee Act* 1987. Had the application been successful it would have had far reaching ramifications for the administration of Part 6 and the operation of warranty insurance in Victoria might well have changed forever.

The Applicant's position

7 Mr Frenkel conceded that the Applicant's arguments in support of its preliminary application changed but submitted that, nevertheless, the appropriate order was that each party should bear their own costs of and incidental to the application, or alternatively that the costs be costs in the proceeding. He referred me to the comments of Deputy President Macnamara in *Pure Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* [2002] VCAT 1761 where he confirmed that there can be no presumption that there will be an order for costs in any proceeding in the Domestic Building List – each application for costs will be considered on its merits. He also referred me to the comments made by Judge Bowman in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2005] 1769 where he said at paragraph 6:

> "…I am not of the view that there is anything peculiar to cases in the Domestic Building List that in some way gives a successful party an entitlement to a reasonable expectation that a costs award will be made in its favour. …I prefer the approach adopted by Deputy President Macnamara in *Pure Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31 October 2002) to the effect that there is nothing in the nature of a proceeding in the Domestic Building List that would justify departure from the presumption contained in s.109 and the exceptions thereto. Each case must be viewed on its merits, and I am not of the opinion that some type of general approach should be adopted".

8 He agreed that the proceedings involve complex issues, and the Applicant and the Respondent are legally represented, and it may well be that costs

should follow the event when the proceedings are finally determined. However, the decision on the preliminary application is not a determination of the proceeding (this is clearly correct). Had these questions not been set aside for preliminary determination, they would have been determined as part of the final hearing, and accordingly, costs should be reserved or be costs in the proceeding, to be determined following a final determination of the proceeding. It might be that if the Applicant is ultimately unsuccessful that the Respondent would be successful in any application for costs. Alternatively, the Applicant having been unsuccessful in this preliminary application might ultimately succeed in its application for a review of the Respondent's decision, in which case it should have the benefit of any costs order. He submitted there can be no detriment to the Respondent if the costs are simply costs in the proceeding.

Discussion

9 I am persuaded it is appropriate to exercise the Tribunal's discretion and order the Applicant to pay the Respondent's costs of and incidental to the Applicant's application dated 4 August 2006 including the costs occasioned by the adjournment of the hearing scheduled for 18 October 2006, which I will consider separately.

10 In my view the issues raised by the Applicant's application dated 4 August 2006 were discrete, and had they been determined in favour of the Applicant would have led to a final disposition of the proceeding. It was therefore appropriate the application be set down for preliminary hearing. The application, as amended, has been dismissed. The proceedings will now progress in the normal course, having been delayed for a period of time whilst the preliminary issues were heard and determined. The Respondent, and the joined parties (who did not attend the preliminary hearing), have clearly been disadvantaged by the Applicant's conduct which has, in my view, unduly prolonged the proceeding. This is particularly true following resolution of the primary issue between the parties – the identification of the relevant policy of warranty insurance, when rather than simply accepting the situation, the Applicant seemingly looked for alternative 'objections' and raised for the first time issues which could well have been raised initially.

11 Further, in my view, it would be unfair to deprive the Respondent of an order for costs – these were important issues and if the Applicant had been successful I accept the decision would have had a significant impact on the operation and administration of Part 6 of the *House Contracts Guarantee Act* 1987 and, possibly, even the scheme of builders' warranty insurance as a whole.

The costs of the adjournment of the hearing on 18 October 2006

12 As noted above, the Respondent also seeks its costs of the adjournment of the hearing on 18 October 2006. This hearing was adjourned at its request

after the Applicant filed its Further Statement of Legal Contentions on 17 October 2006, raising the 'new objections' for the first time.

13 Mr Frenkel submitted that even if I were minded to exercise the Tribunal's discretion under s109(2) any order for costs should not include the costs of the adjournment of the hearing scheduled for 18 October 2006. As noted above, the primary issue between the parties until shortly prior to the hearing was the identification of the relevant, applicable policy of warranty insurance. He said that the Respondent failed to identify and provide it with a copy of the relevant policy until less than a week prior to the first scheduled hearing – on 11 October 2006 when it filed its submissions. The Respondent had been a week late with its submissions and it was for this reason that the Applicant had been unable to file and serve its reply submissions until late in the afternoon on 17 October – the day before the scheduled hearing date.

14 Mr Stuckey observed that the Respondent, whilst administering the HIH Recovery Scheme on behalf of the State of Victoria, is not the insurer, and does not have any personal knowledge or records. The copy it has of what has now been identified as the relevant policy was provided to it by the Applicant. He submitted that the only thing that had changed was that the Respondent had finally managed to persuade the Applicant that there was a policy which applied.

15 Further, the issues raised by preliminary application were resolved prior to the first return date, following which the Applicant raised the 'new objections'. It is immaterial when the Respondent served its submissions or identified the relevant policy. The adjournment was caused wholly and solely by the Applicant raising the 'new objections' late on the day prior to the first return date. I am therefore satisfied that the Applicant should pay the Respondent's costs occasioned by the adjournment of the hearing on 18 October 2006. I note both the Applicant and the Respondent attended on 18 October 2006 and the application for an adjournment was made at the commencement of the hearing.

The Directions Hearing on 13 February 2006

16 At the directions hearing on 13 February 2006, directions were made for the further conduct of the proceedings, and this application for costs was heard. I consider the appropriate order is that the costs of that directions hearing be reserved.

DEPUTY PRESIDENT C. AIRD