VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION
DOMESTIC BUILDING LIST

VCAT Reference: D307/2004

CATCHWORDS

Costs – settlement offers – s112 of the *Victorian Civil and Administrative Tribunal Act* 1998
[2006] VCAT 184

APPLICANT:	Greenhill Homes Pty Ltd (ACN 006 540 521)
RESPONDENT:	Allianz Australia Insurance Limited (ACN 000 122 850)
FIRST JOINED PARTY:	Carmello Tieri
SECOND JOINED PARTY:	Vittoria Tieri
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Costs Hearing
DATE OF HEARING:	30 January 2006
DATE OF ORDER:	17 February 2006

ORDERS

1. The Applicant shall pay the Respondent's party/party costs including reserved costs up to 7 June 2005. In default of agreement I refer the assessment of such costs to the principal registrar in accordance with County Court Scale 'D'.

2. The Applicant shall pay the Respondent's costs including reserved costs on an indemnity basis from 7 June 2005.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr S Nixon, Solicitor
For the Respondent:	Mr M Whitten of Counsel
For the Joined Parties:	Mrs C Tieri

REASONS

1. On 12 October 2005 I made orders dismissing the application, and reserving the question of costs. The Applicant now seeks its costs of this proceeding and the Joined Parties also seek an order for their costs. At the Costs Hearing the Applicant was represented by Mr Nixon, solicitor, the Respondent by Mr Whitten of Counsel and the Joined Parties by Mrs Tieri.

2. The background to this proceeding is set out in detail in the Reasons for my earlier decision dated 12 October 2005. It is not necessary to repeat it here other than to once again note the ever evolving nature of the application as set out in the various iterations of the Points of Claim. What started off as an appeal on liability, over time developed into an application that the Tribunal determine the Applicant's position under the policy of insurance and whether there were any limits on the amount recoverable from it by the Respondent. Liability was effectively settled on February 2005 where Mr Lorich, the expert appointed under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 delivered his report wherein he concluded the Applicant's works were defective and that extensive rectification work was required. It was after delivery of Mr Lorich's report that the Applicant's substantive application changed.

3. Not only did Mr Lorich's report support the Respondent's decision and confirm that the Applicant's appeal on liability was lacking in merit, as is apparent from my Reasons for Decision dated 12 October 2005, the Applicant was unsuccessful in its claim that its liability in relation to the defective building works was limited to $5,000.00.

4. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides that each party must pay its own costs unless the Tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out in

s109(3). Of particular relevance are ss109(3)(c) and (d)

> 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.

5. In determining whether to exercise its discretion the Tribunal should have regard to the conduct of the parties. It is clear that the Applicant has conducted this proceeding in a manner which has clearly disadvantaged the Respondent. As set out in my Reasons dated 12 October 2005, the Applicant's case was ever evolving resulting in the filing of Third Amended Points of Claim with leave being sought to further amend during delivery of final submissions. Costs have been reserved during the interlocutory process and it is apparent that the Respondent has incurred significant 'costs thrown away' occasioned by the numerous amendments to the Points of Claim whereby the Applicant sought to rely on ever evolving grounds to minimise its potential liability to the Respondent.

6. Whilst the Tribunal has previously held that there should be no presumption that costs will be awarded to a successful party in relation to an application for review of the decision of an insurer (*Australia Country Homes v Vasiliou*, (unreported, 5 May 1999 and *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024), each case must be considered on its merits, having regard to the conduct of the parties.

7. I am satisfied that the Applicant's application for review in respect of liability was lacking in merit. As noted above Mr Lorich's report confirmed the Respondent's decision on liability was correct. Notwithstanding the Applicant's assertions to the contrary, he found that there were significant areas of defective work requiring rectification. In relation to the representation claim I found that there had been no reliance by the Applicant on any representation. I accept the submission on behalf of the Respondent that these were matters that should have been properly addressed and verified prior to the substantiative claim being made. It seems to me that the Applicant having become aware of the decision in *Moutidis v HGFL* [2003] VCAT 1347 sought to rely on that decision, without giving careful consideration to the differing fact situations. At paragraph 25 of my Reasons dated 12 October 2005 I made the following observations:

> However, unlike in this case, in *Moutidis* Bowman J was satisfied that the builder had relied on the written and oral representations in entering into the contract of insurance, and that the policy provisions did not accord with his reasonable belief of the terms and conditions of that contract of insurance. For the reasons set out above, I cannot be satisfied there has been a similar reliance, in this case, particularly, in circumstances where the builder has relied on the Policy for making the payment of the 'obligation amount', and not any previous agreement.

The Respondent's application for costs

8. The Respondent seeks an order for party/party costs up until 4 February 2005 and an order for indemnity costs after that date. The Respondent made two offers of settlement. On 4 February 2005 the Respondent offered to settle the proceeding on the basis that the Applicant withdraw its application, that it carry out the rectification works referred to in Mr Lorich's report, and that it pay the Respondent's party/party costs on County Court Scale C. On 7 June 2005 the Respondent offered to settle the proceeding on the basis that the Respondent would accept the sum of $5,000.00 which had been tendered by the Applicant in settlement of the amount due under the policy, that the Applicant would carry out the rectification works referred to in Mr Lorich's report, that the Respondent would pay the Applicant the sum of $40,572.51 once those works were complete,

and that the Applicant would otherwise withdraw the application with no order as to costs. I note in passing that it seems surprising that the offer of 7 June 2005 was not accepted by the Applicant although one can only hazard a guess that the question of costs may have been the sticking point.

9. There appears to be no dispute that these offers were made in accordance with ss113 and 114 of the Act. Section 112 provides

> **Presumption of order for costs if settlement offer is rejected**
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> (1) This section applies if—
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and
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> (b) the other party does not accept the offer within the time the offer is open; and
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> (c) the offer complies with sections 113 and 114; and
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> (d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.
>
> (2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.
>
> (3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal—
>
> (a) must take into account any costs it would have ordered on the date the offer was made; and
>
> (b) must disregard any interest or costs it ordered in respect of any period after the date the offer was received.

10. Although not addressed about the application of the decision in *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024, I must nevertheless have regard to it. *Kaldawi* concerned an application by owners for review of a decision by the Housing Guarantee Fund Limited, where Senior Member Young held at paragraph 6:

> The creation of the Tribunal, its powers and control of its procedure are set out in the *Victorian Civil and Administrative Tribunal Act 1998* this Act uses the words at the commencement of Section 112(1)(a) "*A party to a proceeding (other than a proceeding for review of a decision)*" to delimit the category of proceeding to which a settlement offer under Section 112 is allowed. Section 42

> of the Act defines the review jurisdiction as the jurisdiction conferred *"by or under an enabling Act to review a decision made by a decision-maker*." I can see no reason why the words "*for review of a decision*" in Section 112 of the Act would have a different meaning from "*for a review of the decision*" in Section 61 of the *Domestic Building Contracts Act* 1995 other than the former is general and the latter is particular. Also, I consider that an insurer under the provisions of the *Domestic Building Contracts Act* 1995 is a "*decision-maker*" under the Act. Therefore, I consider that the respondent is prohibited by the Act from making an offer under Section 112 of the Act in respect of this application.

11. As noted above the Applicant's application has changed on a number of occasions. Whilst it initially commenced as an application for review of the Respondent's decision (although not formally enlivened I accept this was an application for review under s61 of the *Domestic Building Contracts Act* 1995) and as such I am of the view that the decision in *Kaldawi* applies, the Applicant's substantive application changed after the delivery of Mr Lorich's report in February 2005 which confirmed the Respondent's had made the correct decision on liability. The first offer of settlement was served on 4 February 2005 – whilst liability was still in issue and therefore the application for review of the decision on liability still alive, and before the Applicant first sought to rely on what it later alleged was its maximum liability of $5,000.00 under the policy. The Second Further Amended Points of Claim wherein the Applicant acknowledged the works are defective but for the first time claimed that its maximum liability was $5,000.00 and further, that if it was to carry out any rectification works, it would be entitled to be reimbursed for the costs of such works by deduction of the excess $5,000.00, were not filed until 21 April 2005. In my view up until that date the application proceeded as an application for a review of an administrative decision and as such the 4 February 2005 offer was prohibited by s112 of the Act.

12. However I am satisfied that the offer of 7 June 2005 has been properly made within the terms of s112. By the time that offer was made the Applicant was no longer asserting that the works were not defective, nor seeking a review of the Respondent's decision on liability. The Respondent had not made a decision on quantum (and as I understand it has still not made a decision on quantum). Therefore as the Points of Claim dated 21 April 2005 concede the issue in

relation to liability as at that date the application is no longer an application for a review of an administrative decision and in such circumstances I consider I am able to take the offer of 7 June 2005 into account.

13. I am not satisfied that there is any reason for me to depart from the presumption under s112 and make any other order under s112(2) than that from 7 June 2005 the Applicant pay the Respondent's costs on an indemnity basis. For the period up 7 June 2005 I will order that the Applicant pay the Respondent's costs on a party/party basis, in default of agreement to be assessed by the Principal Registrar on County Court Scale 'D' which I accept is the appropriate scale.

The Joined Parties' Application For Costs

14. The Joined Parties - Mr & Mrs Tieri, the owners of the subject property - have also made an application for their costs of this proceeding. They have not been legally represented but effectively seek their out of pocket expenses together with loss of income. As noted in my earlier decision of 12 October 2005 this is an unfortunate situation for the owners. I noted at that time that although liability was no longer an issue from 1 February 2005 that rectification works were still to be carried out as at 12 October 2005 and as at 30 January 2006, when this application for costs was heard, work had not commenced, or even been arranged.

15. Mrs Tieri confirmed that the Respondent had reimbursed her and her husband in the sum of $1,027.00 being reimbursement of the cost of reports obtained from the Building Commission, CTI Consultants Pty Ltd and Clarke Bros Renderers and Painters. She said they were seeking reimbursement from the Applicant of the cost of the initial report from BSS Design Group Pty Ltd obtained on 12 February 2003 and 50% of what she described as 'miscellaneous costs' from the Applicant and the Respondent respectively ($801.00 each) and $1,455.00 from Greenhill Homes for loss of income. The amount claimed for miscellaneous costs has subsequently increased to $1698.95.

16. The Tribunal's power to order costs in favour of unrepresented parties was considered by the President, Morris J in *Aussie Invest Corporation Pty Ltd v Hobsons Bay City Council* [2004] VCAT 2188 where at paragraph 18 he made the following comments:

> …Hence there is no power for the tribunal to make an award of costs in favour of an unrepresented person in relation to expenses which would have been incurred if the person engaged professional services, but were not in fact incurred. Further, there is no power for the tribunal to make an order as to costs in favour of an unrepresented person based upon the time spent by that person in relation to the proceeding. However, where an unrepresented person loses wages or incurs travelling expenses in order to attend the hearing of the proceeding this is an outgoing directly related to the proceeding which can be indemnified.

17. However, whilst the Tribunal may have power to award costs in favour of unrepresented person, it must always have regard to the provisions of s109 of the Act. Section 109 is quite clear – each party must bear their own costs unless the Tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out in s109(3). I am not persuaded that the Tribunal's discretion should be exercised in favour of an unrepresented party where to do so would allow that party to benefit from an order for costs in circumstances where it would not otherwise be in a position to recover costs if legally represented, for instance when attending a hearing in their capacity as a party to the litigation and/or to give instructions to their legal representatives.

18. At the hearing I expressed some concern that I did not have properly itemised details of the miscellaneous costs and Mrs Tieri undertook to provide those by the end of that week. This was received on 3 February 2006 and whilst it includes copies of telephone accounts itemising various mobile telephone calls, copies of other invoices were not included.

19. The power to award costs in s109 relates only to costs of a proceeding.

Although parties to this proceeding, Mr and Mrs Tieri have not commenced their own proceeding. It appears that a significant portion of the miscellaneous costs claimed by Mr and Mrs Tieri were incurred well before they lodged their insurance claim in November 2003, and the Applicant lodged its application with this tribunal in May 2004. Mr and Mrs Tieri also claim the cost of legal advice they obtained in April/May 2005 (the exact date in unclear). They have not been represented at any time during the course of the proceeding and I cannot be satisfied these costs should properly be described as *'costs in the proceeding'*. Although some of the miscellaneous costs were incurred after the commencement of this proceeding I am not persuaded I should exercise my discretion under s109 as I cannot be satisfied they can properly be described as costs incurred *'in the proceeding'*.

20. Similarly, the BSS Report was obtained by Mr and Mrs Tieri many months before they lodged their insurance claim. After it was sent to the Applicant in February 2003 some rectification works were carried out which were ultimately found to be inadequate. In my view, it cannot be said that this was a report obtained in the course of or even in contemplation of this proceeding, and in fact, it is the later reports that seem to have been relied upon by the Respondent which has reimbursed Mr and Mrs Tieri the cost of obtaining them.

21. For the reasons set out above, I am not persuaded this is an appropriate case for an order for reimbursement of loss of income (specific details of which have not been provided). I accept that Mr Tieri attended the mediation, directions hearing, and a Compulsory Conference. These were all attended in his capacity as a party and are costs which I consider should properly be regarded as *'the time spent by that person in relation to the proceeding'* which as noted above were held by Morris J in *Aussie Invest* not to be recoverable by an unrepresented party. Had the Joined Parties been represented it would nevertheless have been in their interests to attend at the mediation and compulsory conference and I am not persuaded that either the Applicant or the

Respondent should be responsible for their personal costs of attending. I note in passing that had the Applicant been successful it would not have been in a position to recover its lost income.

DEPUTY PRESIDENT C. AIRD