

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D259/2002

CATCHWORDS

Domestic building – HIH policy – costs.

APPLICANT	J Vincent Nominees Pty Ltd (ACN 005 36 950)
FIRST RESPONDENT	SMA Projects Pty Ltd (ACN 077 824 018)
SECOND RESPONDENT	Housing Guarantee Fund Ltd
THIRD RESPONDENT	Centrum Architects Pty Ltd (ACN 065 422 835)
FOURTH RESPONDENT	Boswell Shaw Giasi Marshall Pty Ltd (ACN 069 822 082)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	6 December 2005
DATE OF ORDER	12 December 2005
CITATION	[2005] VCAT 2603

ORDER

1. I order the Second Respondent to pay the costs of the Applicant of the proceeding on a party/party basis. In default of agreement by 20 January 2006 I refer the assessment of such costs to the Principal Registrar who shall assess the same according to County Court Scale “D”. In that event, by 28 February 2006 the Applicant must file and serve its bill of costs in faxable form. By 24 March 2006 the Second Respondent, if objecting, must do so in writing by document filed and served accordingly. Thereafter the Principal Registrar must carry out his assessment.
2. I reserve costs otherwise including:

- (a) the costs of the Applicant as against the Second Respondent of and incidental to the hearing on 6 December 2005.
 - (b) the costs of the First Respondent as against the Applicant of and incidental to the hearing on 6 December 2005.
3. I direct the Principal Registrar to list this matter before me on a date to be notified to the parties:
- (a) to resolve any costs issues arising under paragraph 2 hereof; and
 - (b) for the making of further directions with respect to the proceedings between the Applicant and the First, Third and Fourth Respondents. Allow 2 hours.
4. All parties or their Counsel must attend such directions hearing if desiring to be heard.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant:	Mr M Hoyne of Counsel
For the First Respondent:	Mr S R Grahame of Counsel
For the Second Respondent:	Mr S Stuckey of Counsel
For the Third Respondent:	No appearance
For the Fourth Respondent:	Mr A Sella, Solicitor

REASONS

1. Notice of hearing for 6 December 2005 was sent out to the parties in this matter on 6 October 2005. Accordingly, for reasons I gave at the time, I refused an application for an adjournment made by the Applicant because its Counsel of choice was unavailable. The Applicant had had sufficient time, in my view, to arrange alternative Counsel. There would be prejudice to the Respondents in costs if this matter were to be adjourned. And the Applicant was not prepared to consent to any costs orders being made on account of an adjournment being granted.
2. The Applicant itself is, in fact, applying for costs. In the first place, it argues that the Second Respondent should pay indemnity costs. Secondly, it argues that the Second Respondent should be ordered to pay the costs of the proceeding of the other parties.
3. The application for costs is made by letter dated 16 December 2004. Earlier, on 13 February 2004, I made a declaration (when Deputy President) that the Second Respondent “is liable to indemnify the Applicant in the sum of \$100,000.00 plus reasonable costs as defined (the Applicant’s claim having been accepted)”. The reference to “reasonable costs as defined” is a reference to “reasonable costs” as mentioned in the HIH policy in question.
4. Despite the wording of the declarations I made, I am satisfied that the policy does not preclude me from ordering costs, if proper to do so, under s.109 of the *Victorian Civil and Administrative Act 1998*. I do not see how the discretion of the Tribunal to order costs under s.109 can be ousted. The

discretion, subject to the terms of s.109, always remains open, statutorily given.

5. I propose, therefore, that I should proceed to act under s.109. It is very clear to me, however, that the discretion to order indemnity costs should rarely be exercised. I note in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 at [91] – [92] Nettle J A says this: “I also agree ... that where an order for costs is made in favour of a successful party in Domestic Building List proceedings, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of a successful claimant in Domestic Building List proceedings on an indemnity basis. But those occasions will be exceptional ...”

6. I have perused my Reasons for Decision delivered on 13 February 2004. Although they demonstrate significant ambiguity on the Second Respondent’s part, I cannot say they demonstrate that an order for indemnity costs is warranted. In my view they show nothing exceptional – except perhaps a marked degree of incompetence in this instance on the part of the Second Respondent. But incompetence is not, in my view, sufficient to show the case is one which is “exceptional” in the sense meant by Nettle J A. There is nothing else, on Affidavit or otherwise, showing the exceptionality required, which I can identify in the case. I, therefore, reject the view I should order indemnity costs.

7. I propose, however, to order the Second Respondent to pay party/party costs. It seems to me that, out of the activities of the Second Respondent, the Applicant has been unnecessarily disadvantaged. I consider it fair, under s.109 (2), having regard to s.109 (3), to depart from the initial position established by s.109 (1). I did not understand the Second Respondent, on this occasion, to be seriously pressing the contrary.

8. As regard the second costs issue, I am quite satisfied it would be premature, and unfounded in law, for me to order that the Second Respondent pay the costs of the other Respondents. The merits of the case between the Applicant and the other Respondents have never been determined. How can I tell whether the Applicant would succeed against those parties or not? Moreover, if I base myself in the wording of the policy, the relevant provision states that the insurer is liable for costs incurred by an insured “associated with the successful enforcement of a claim against the Insurer”. The important words are, in my view, “against the Insurer”. I cannot see how, in the circumstances of this case, based on what was submitted to me, claims against other parties are associated with the successful enforcement of a claim “against the Insurer”. It is possible they could be so in some other case but not in this one on the basis of what was submitted to me. More especially is this so when the claims made against the other parties have never yet been determined. Nor can I see any basis for proceeding in this way under s.109. The fact is, outcomes of the claims against the other

parties are not yet known. The focus of attention, to this point, despite the proceedings having commenced in 2002, has been the case against the Second Respondent.

9. I therefore reject the view that I may order the Second Respondent to pay the costs of the other Respondents.
10. I shall order that the Second Respondent pay the costs of the Applicant of the proceeding on a party/party basis according to County Court Scale "D". In default of agreement, I refer the assessment of such costs to the Principal Registrar under s.111 of the Act and I make consequential directions.
11. I reject the application of the Applicant that the Second Respondent pay the costs of the other Respondents. On that issue the Applicant has not been successful. Yet, I consider the First Respondent, which appeared by its Counsel, was entitled to be heard in opposition, although this was itself opposed by the Applicant. It would be very rare indeed that a party in a case would not be heard when desirous of making submissions. The application of 16 December 2004 clearly calls for the attendance of all parties, as I note. In that regard, in the event that the Applicant failed in this aspect of the matter, the First Respondent sought its costs.
12. I doubt very much that the Applicant can resist the First Respondent's application for costs. I would have thought that those costs would be on the

scale I have mentioned and would be “of and incidental to” the hearing on 6 December.

13. I cannot recall the Applicant seeking its costs of the hearing on 6 December against the Second Respondent. This may be oversight. I intend to reserve same.

14. I shall make orders and directions accordingly.

SENIOR MEMBER D. CREMEAN