VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D144/2004
D145/2004

CATCHWORDS

Slip rule, when applicable, costs, assessment of costs, assessment of costs arising under a domestic building insurance policy.

D144/2004

APPLICANT	Ceri Wyn Lawley
FIRST RESPONDENT	Terrace Designs Pty Ltd (ACN 004 984 025)
SECOND RESPONDENT	Geoffrey Joseph Graham
THIRD RESPONDENT	Arthur John Gunston t/as AJ Gunston
FOURTH RESPONDENT	Vero Insurance Limited (ACN 005 297 807)
FIFTH RESPONDENT	Civil and Soil Pty Ltd (ACN 076 191 056)
SIXTH RESPONDENT	Matine Deana Casagrande (as executrix of the Estate of Alvisio Casagrande, deceased)
SEVENTH RESPONDENT	Robert Brotchie and Associates Pty Ltd (ACN 007 122 018) (released from proceeding 29/4/2005)

D145/2004

APPLICANT	Suzanna Baines
FIRST RESPONDENT	Terrace Designs Pty Ltd (ACN 004 984 025)
SECOND RESPONDENT	Geoffrey Joseph Graham
THIRD RESPONDENT	John Gunston t/as AJ Gunston
FOURTH RESPONDENT	Vero Insurance Limited (ACN 005 297 807)
FIFTH RESPONDENT	Civil and Soil Pty Ltd (ACN 076 191 056)
SIXTH RESPONDENT	Alvisio Casagrande
SEVENTH RESPONDENT	Robert Brotchie and Associates Pty Ltd (released from proceedings 29/4/2005)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young

HEARING TYPE	Hearing
DATE OF HEARING	10 August 2010
DATE OF ORDER	30 April 2010
CITATION	Lawley & Anor v Terrace Designs Pty Ltd & Ors (Domestic Building) [2010] VCAT 512

ORDER

1 Under s119 of the *Victorian Civil and Administrative Tribunal Act* 1998, in proceeding No.D144/2004 the word "proceeding" in Order 7 of the orders of 6 March 2007 is deleted and substituted in its place are the words "enforcement of her claim".

2 Under s119 of the VCAT Act, in proceeding No. D144/2004 the number "9" in the second order numbered 9 in the orders of 6 March 2007 is deleted and substituted in its place is the number "10".

3 Under s119 of the VCAT Act, in proceeding No. D144/2004 Order 11 is added to the orders of 6 March 2007 as follows:-

> "11. The sixth respondent will pay the applicant's costs of the proceeding as against the sixth respondent from 9 May 2005, including any reserved costs, such costs to be assessed on a party and party basis in accordance with the County Court Scale of Cost, Scale D, as agreed; and, failing agreement to be assessed by the Principal Registrar in accordance with Section 111 of the VCAT Act."

4 Under s119 of the VCAT Act, in proceeding No. D144/2004 the words "six and seven" are deleted from Order 9 of the orders of 6 March 2007 and substituted in their place are the words "six, seven and eleven".

5 In both proceedings, Nos. D144/2004 and D145/2004 a directions hearing to be presided over by Senior Member Young and Senior Registrar Jacobs is set down for 2.15 p.m. on 24 May 2010 at 55 King Street, Melbourne with an estimated duration of 2 hours.

6 The parties should ensure that their costs consultants attend the directions hearing.

7 Costs reserved.

SENIOR MEMBER R. YOUNG

APPEARANCES:

For the Applicants	Mr K. Oliver of Counsel
For the Fourth Respondent	Mr K. Howden of Counsel, with Mr Weingard, Cost Consultant
For the Sixth Respondent	Mr D. Klempfner of Counsel, with Ms D Paver, Cost Consultant

REASONS

A INTRODUCTION

1 This hearing results from applications made by a number of parties in these proceedings. These applications are:-

(a) in proceeding D144/2004 the fourth respondent seeks an order under the slip rule, s119 of the *Victorian Civil and Administrative Tribunal Act* 1998 to delete the word "*proceeding*" in Order 7 of my orders of 6 March 2007 and substitute in its place the words *"enforcement of her claim"*.

(b) in proceeding D144/2004, the applicant seeks an order under the "slip rule" that the sixth respondent pay the applicant's costs of the enforcement of her claim against the sixth respondent from 9 May 2005, including any reserved costs, such costs to be assessed on a party and party basis in accordance with Scale D of the County Court scale, as agreed; and failing agreement, to be assessed by the Principal Registrar in accordance with s111 of the VCAT Act 1998, such order to be Order 11 of the orders of 6 March 2007;

(c) as a concomitant to the order sought in (b) above, that Order 9 of the orders of 6 March 2007 be amended by the deletion of the words *"six and seven"* and their substitution with the words *"six, seven and eleven"*; and,

(d) that in both proceedings orders be made as to the method of assessment of the applicant's costs which will be met by the various respondents ordered to pay costs.

2 These applications arise out of my determination and orders in relation to costs, *inter alia*, of 6 March 2007. These two proceedings were heard together and there was a joint determination of 11 July 2006 of the substantial issues in both proceedings.

3 It should be noted that between my costs orders of 6 March 2007 and this hearing, the original determination of 11 July 2006 was appealed to the Supreme Court. This appeal was heard and determined by The Honourable Mr Justice Byrne. As a result of His Honour's judgement, the third respondent was held to have no liability to the applicants. By His Honour's orders of 9 June 2008, the orders against the third respondent in my orders of 6 March 2007, being Orders 5 and 6, were set aside in both proceedings.

4 Although the orders of 6 March 2007 dealt with the fact that the assessment of costs for which the fourth respondent is liable under a domestic building insurance policy in favour of the applicant owners must be made by the tribunal member, following the decision in *Housing Guarantee Fund Limited v Ryan* [2005] VSC 214, those orders did not deal with the precise method as to how this would be carried out; nor, how it would interface with the assessment of costs to be carried out by the Principal Registrar.

There are a number of methods by which this can be accomplished and these will be further addressed below.

5 The hearing of 10 August 2009 involved complex issues as to the application of the new regime for the assessment of a respondent's liability for damages under Part IVAA – *Proportionate Liability* of the *Wrongs Act* 1958, at the time of the subject hearing there had been no extant determinations in relation to the application of that part of the Wrongs Act and the effect it would have on the assessment and liability for costs. The hearing went for three days with the main issue between the parties being whether the liability of the respondents for the applicants' costs should be on an apportioned basis; such that each respondents' liability for costs would be a fixed proportion of the total costs, as was the findings of their liability for damage under the new system of proportionate liablity. Another significant issue was the claim by the third respondent that as the sixth respondent had settled with the applicant, Ms Lawley, for a sum of $65,000.00 when the building surveyor's liability had been fixed by the Tribunal in its substantive determination at $16,024.52, that difference should be reflected in reductions of the liabilities to the other liable respondents proportionally.

B FOURTH RESPONDENT'S APPLICATION FOR AMENDMENT OF ORDER 7 OF 6 MARCH 2007 IN D144/2004

6 During their submissions in relation to this application the applicant and the fourth respondent came to an understanding that the application should be allowed and I will make an order with amendment as set out above in paragraph 1.

C MS. LAWLEY'S APPLICATION FOR A COSTS ORDER AGAINST THE SIXTH RESPONDENT AND AMENDMENT OF ORDER 9.

7 Under the slip rule the applicant in proceeding no. D144/2004, Ms. Lawley is seeking that the Tribunal make following order:-

> *"11. The sixth respondent will pay the applicant's costs of the proceeding as against the sixth respondent, including any reserved costs, such costs to be assessed on a party and party basis in accordance with the County Court Scale of Costs, Scale D, as agreed; and, failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the VCAT Act."*

8 The applicant in D145/2004 entered Terms of Settlement with the sixth respondent on 19 January 2006. Under Clause 1 of the Terms of Settlement the parties agreed that:

> *"Casagrande will pay Lawley: Lawley's costs of her claim against Casagrande on a party/party basis from 9 May 2005 to be assessed on County Court Scale D".*

9 In my orders of 6 March 2007 in respect of proceeding D144/2004, I made no orders as to the costs between the sixth respondent and the applicant. In my reasons I stated at paragraph [53]:-

> "*On 19 January 2006 Ms Lawley settled with the sixth respondent in relation to quantum and costs and there is no requirement for an order as to costs against the building surveyor"*.

10 The applicant submitted that this was an obvious mistake or omission as both of the applicants and the sixth respondent had submitted, to the Tribunal which resulted in the orders of 6 March 2007, that an order be made that the sixth respondent pay the applicant's costs.

11 The applicant had sought such an order in paragraph [12] of its submission to the costs hearing and the sixth respondent in its proposed orders that it sought at that costs hearing included a costs order in the following terms:-

> "*Subject to paragraph 10, the sixth respondent pay the applicant's party/party costs of her claim against the sixth respondent from 9 May 2005 to be assessed on County Court scale D in default of agreement"*.

12 The words "*Subject to paragraph 10*" have no affect in my consideration as they relate to an application by the sixth respondent made at the costs hearing that a respondent's liability for costs to the applicant be apportioned as any findings of damage were apportioned under Part IVAA of the Wrongs Act. I denied this application; and, the third respondent appealed that finding but the original determination was upheld by The Honourable Mr. Justice Byrne.

13 The applicant submitted that, as both parties had agreed that a costs order should be made at the time of the making of those orders, it was clearly a mistake or omission to omit such an order from the resulting orders of 6 March 2007. The applicant submitted that the fact that there was now a controversy over whether an order should be made did not mean that the slip rule does not apply. The applicant submitted that the time at which you assess whether the slip was made was at the time that the orders were made. At the time the orders of 6 March 2007 were made the Tribunal should have been aware that both parties had sought a costs order. Thus, the applicant submitted if the matter had been brought to my attention at the time of making the orders then it would go without saying that I would have made the order as requested: *Hatton v Harris* [1892] A.C. 547 at 558*; L. Shaddock & Assoc. Pty. Ltd. v Parramatta City Council (No.2)* (1982) 151 C.L.R. 590 at 593. The applicant submitted that the fact that one party now wants to resile from the position that it had adopted at the costs hearing does not create a controversy that would be a successful bar to the application of the slip rule.

14 The applicant further submitted on the basis of the order sought by the sixth respondent to be included in the orders of 6 March 2007 was that costs would be assessed on County Court Scale D in default of agreement; therefore, the sixth respondent was anticipating that there may be

disagreement on costs and it was appropriate for the Tribunal to order how that disagreement be resolved by prescribing the method by which such costs should be assessed.

15 The sixth respondent submitted that there were a number of grounds upon which I should refuse this application. The first was that in my reasons of 6 March 2007 at paragraph [53] I gave direct and clear consideration as to whether an order should be made against the sixth respondent for costs in relation to the applicant's proceeding and that I made a binding determination supported by reasons that no such costs order should be made. The sixth respondent said that the proper course for the applicant was to have appealed my failure to make the costs order sought in the orders of 6 March 2007.

16 Second, the sixth respondent submitted that the costs orders it proposed in its proposed orders of 28 August 2006 in relation to the payment of the applicant's costs was framed so that she would only be liable for a fixed percentage or proportion of the common costs incurred by the applicant. The sixth respondent acknowledged that this proposed apportionment of the common costs was rejected in my reasons of 6 March 2007 and that in the orders resulting from my reasons, I stated in Order 9 that the respondents ordered to pay the applicant's costs were joint and severally liable for such costs. The sixth respondent submitted that, as a consequence of this rejection and taking into account the reasons I had given in paragraph [53] for not making a costs order in those orders that meant I had made a finding that the Terms of Settlement govern the costs liability of the sixth respondent to the applicant. The sixth respondent cited in support of this submission the decision of Senior Member Walker in *Bilbarin Nominees Pty Ltd v Di Mella Constructions Pty Ltd* [2004] VCAT 1816 at paragraph 20 where the Senior Member held that the parties can agree to resolve a dispute between them on any terms they choose and that the terms of the contract specify their obligations and in the circumstances of that case the party allegedly at fault had not indicated it was unwilling to comply with the terms of its offer. Thus, the sixth respondent says this means that the costs as between applicant and sixth respondent should be assessed as a term of the contract comprised by the Terms of Settlement and not under a statutory scheme imposed by the Tribunal under the VCAT Act.

17 The sixth respondent submitted, as a fourth ground, that the Terms of Settlement may have left open the manner of resolving any disputes as to the assessment of the applicant's costs; however, this was insufficient to give VCAT jurisdiction to resolve any dispute between the parties as to costs and no costs order should be made. The sixth respondent submitted that if the applicant was dissatisfied that there was not any method to assess costs between the parties that were in dispute; she could sue for breach of the Terms of the Settlement; or, alternatively make application under S.115 of the VCAT Act to have the Tribunal make an order giving effect to the terms. However, the sixth respondent said the applicant had not made any

request for the payment of the costs set out in the single bill of her costs and that this application was trying to jump the gun to lead straight to an assessment. What has not been presented by the applicant is a bill purely and simply of the applicant's costs in accordance with the Terms of Settlement.

18 The sixth respondent submitted that the single bill as submitted by the applicant was not something that the sixth respondent could deal with as it was costed on the basis of the Supreme Court scale which was the scale upon which the fourth respondent's contribution to the costs would be assessed and not Scale D as for the sixth respondent.

19 In Order 9 of the orders of 6 March 2007 the Tribunal ordered that the fee for the applicants' counsel be allowed at $2,000.00 per day and the sixth respondent submitted that this was a further instance of where the Tribunal's orders of 6 March 2009 do not comply with the Terms of Settlement, as the allowance is in excess of Scale D, which is a term of the Terms of Settlement. This is not something that the sixth respondent contracted for under the Terms of Settlement and in the light of the terms no such order could be made.

20 As a fifth ground to deny the application the sixth respondent submitted that the application fails to consider the effect on the Tribunal's orders of 6 March 2007 of the Supreme Court orders arising from the appeal. The applicant seeks to amend Order 9 of the orders of 6 March 2007 by replacing the words "*3, 6 and 7*" with the words "*3, 6, 7 and 11*". However, Order 6 which related to an order for the third respondent to pay the applicant's costs of the proceeding against him was set aside by The Honourable Mr Justice Byrne in his orders of 23 May 2008, when he upheld the third respondent's appeal. Therefore, the sixth respondent submitted that Order 9 of 6 March 2007 no longer operates in the way it was pronounced; thus, the proposal to amend Order 9 by the inclusion of the word "11*"* in the list of numerals is both unworkable and impermissible.

E ANALYSIS OF THE SECOND APPLICATION

21 The "*slip rule*", s119 of the Act, is in the following terms:-

> *"119 Correcting mistakes*
>
> *(1) The Tribunal may correct an order made by it if the order contains -*
>
> *(a) a clerical mistake; or*
>
> *(b) an error arising from an accidental slip or omission; or*
>
> *(c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or*
>
> *(d) a defect of form.*

(2) The correction may be made -

(a) on the Tribunal's own initiative; or

(b) on the application of a party in accordance with the rules."

22 On 21 August 2009, after the hearing of 10 August 2009, the sixth respondent's solicitors wrote to the Tribunal requesting that I take into account a recent decision of Senior Member Lothian regarding the operation of the slip rule: *RF Construction Management Pty Ltd v Castlemar Investments Pty Ltd & Ors*) [2009] VCAT 1629. On 24 August 2009 the applicant's solicitors wrote to the Tribunal submitting that there was no new legal principles evident in the determination and that the circumstances in that case made it distinguishable from this application. The applicant submitted that I should disregard the sixth respondent's request that Member Lothian's reasons be taken into account.

23 I don't consider that there is any new development of principle in the decision of Senior Member Lothian that would change my thinking on the application of the slip rule or would in any way be at variance with the explanations of the application of the slip rule as set out in the cases cited above. The circumstances of Senior Member Lothian's determination were that she did not consider that there had been an error or omission made; and, thereby, there was no fact grounding an application of the slip rule and the application was dismissed.

24 In her determination Senior Member Lothian referred to the case of *Scott & Ors v Evia Pty Ltd & Ors* [2008] VSC 328, a decision of Hanson J. I consider that His Honour's explanation of the application of the slip rule is both clear and comprehensive. The circumstances of that case were that an application was made under the slip rule in the Supreme Court Rules Rule 36.07 to correct an alleged error of the taxing master. At paragraph [24] His Honour said:

> *"The fundamental premise of an amendment under the slip rule is that the judgment or order contains an error arising from an accidental slip or omission. In this case, however, the taxing master intended to make the order as expressed. Thus, no question of accidental slip or omission arose."*

25 In relation to the application of the slip rule generally His Honour observed at paragraph [27]:

> "*It is important not to overlook that the power to amend lies in the discretion of the court. It has long been held, and it is obvious enough, that an amendment may be refused where it will be unjust and inequitable to order it. See L Shaddock & Associates Pty Ltd v Council of the City of Parramatta* [1982] HCA 59, *where in the judgment of the High Court it was observed that:*

> *"There is a discretion in the court to refuse an order if something has intervened that would render it inexpedient or inequitable that it be made …"".*

26 In *Elyard Corporation Pty Ltd v TBD Needham Sydney Pty Ltd* [1995] FCA 1685, Langdon J. observed at 212 that *"the slip rule exists to avoid injustice"*. I consider these citations taken together show the approach that should be taken in the application of the slip rule and the width of the considerations that should be made in assessing whether it is appropriate to exercise the power under the slip rule.

27 The first thing to assess is whether there has been an error or omission, the time at which such error or omission must occur for the slip rule to be applicable is at the time of making the orders. This gives rise to the explanations of the application of the slip rule as "*the correction would at once have been made if the matter had been drawn to the attention of the judge who made the decree"*: *Hatton & Harris* at page 558 and *"if the matter had been drawn to the Tribunal's attention at the time, would the correction have been made at once?"* – Morris J, *Mitchell v Corangamite Shire Council* at paragraph [13].

28 The time and the context at which the application of the slip rule is considered is at the time of the hearing at which the alleged error or omission arose. Thus, references that the rule is not applicable where it involves a matter of controversy between the parties refers to controversy at the time of the hearing, not subsequent to or matters that have arisen after such orders arising from the hearing were made.

29 When my reasons were published my only reference to a costs order requiring the sixth respondent to pay the costs of the applicant was in paragraph [53] which has been set out above. There was no detailed analysis of why I decided that there would be no order as to costs, the only reason given was that there had been a settlement between the parties. It is clear that both parties had requested me to make an order that the sixth respondent pay the applicant's costs of the proceeding against her on Scale D ; and, it is clear to me that if I was not going to make such an order in the face of a common consent of the relevant parties then I would address the issue directly and state in detail why I considered that such an order was inappropriate. Thus, by an oversight I failed to make an order that the parties were in agreement about. If I had given an *ex tempore* decision as to the orders I was making on the final day of the hearing and said there would be no order that the sixth respondent pay the costs of the applicant and both parties had raised with me the fact that they had both requested that such an order be made then I had no reason at that time to not agree to the request and I would have made the order sought.

30 Further, in the assessment of the costs I was mindful that, given the number of respondents and the complexity of my substantive orders, as to both the different basis on which costs would be assessed and the differing scales on which they would be assessed, the cost assessments could be very lengthy

and very expensive unless close attention was paid to the implementation of an economic and effective process of cost assessment. This is why I did not order multiple bills but a single bill of costs was to be prepared by the applicants and that envisaged that all of the parties involved in the costs assessment would sit down and carry out the assessment at the same time.

31 The sixth respondent cited *Bilbarin* in support of its contention that the parties had agreed in the Terms of Settlement as to how the sixth respondent would pay the costs of the applicant and the Tribunal had no jurisdiction to force a statutory process onto the parties. I accept the determination of *Bilbarin*, but it is not applicable here as although the parties have agreed as to the sixth respondent's liability for the costs of the applicant they have not agreed as to the method by which such costs should be assessed in the event that the parties disagreed as to the costs, in this regard the terms are silent. This is a necessary term if the parties are to have the primary intent between them as to costs satisfactorily implemented. In fact, the sixth respondent in her proposed order as to her payment of the applicant's costs anticipated that the parties could disagree as to costs. Therefore, I do not consider it is a breach of the terms to include the process for the assessment of costs if the parties cannot agree. Further, the costs assessments in these proceedings are likely to be lengthy and expensive for all participating parties and to further complicate it with separate assessments for each respondent responsible for costs could result in a large amount of needless expense. I am sure that a single costs assessment involving all participating parties is the most economic.

32 In relation to the allegation that the application is too late, I consider that this has been a very complex matter going through a large number of hearings and the appeal resulted in changes to the number of respondents that were found liable and this resulted in the parties taking a long time to work through what was the effect of my original orders and, subsequently, the effect of the appeal on those orders. Secondly, there was a series of correspondence between the applicant and the sixth respondent over a number of years as the parties discussed the lack of a costs order between them as allowed for in the Terms of Settlement and what would be the appropriate course to follow. Given these considerations, I do not consider that the applicant took an inordinate amount of time in which to bring this application or that the sixth respondent has suffered any significant detriment as a result of that time.

33 In relation to the submission that the sixth respondent's obligations to pay the costs of the applicant arise from the Terms of Settlement; and, under those terms the sixth respondent maintains that her liability for the applicant's costs does not include joint and several liability. I do not agree. There is nothing in the terms specifying what form of liability the sixth respondent will have for the applicant's costs and at the costs hearing of 28 August 2007, the sixth respondent had vigorously sought to have the Tribunal rule that her liability for the applicant's costs should only be a

fixed apportioned share of those costs. She based her submissions supporting this claim on the operation and interpretation of Part IVAA: *Proportionate Liability* of the *Wrongs Act*. I denied this application with detailed reasons set out in my determination of 6 March 2007. The sixth respondent did not refer to the Terms of Settlement during this application for apportioned costs. The Terms of Settlement in respect to this aspect were not a controversy between the parties at the costs hearing. I consider that this submission was made and ruled upon in the previous costs hearing and where it was denied.

34 I consider that any costs order that I make under this application should be in the same terms as the Tribunal normally makes; and, for consistencies sake it should be in the same form as the other costs orders of 6 March 2007. Order 9 of the orders of 6 March 2007 were applicable to all orders for costs I made that day and equally that order should be applicable to any order for costs I make under the slip rule.

35 My orders of 6 March 2007 certified for the applicant's counsel in the sum of $2,000.00 per day, which is in excess of County Court Scale D. The sixth respondent submitted in relation to her costs this was impermissible because the Terms of Settlement stated that costs were to be assessed in accordance with Scale D. However, *Appendix A: Scale of Costs* to the *County Court Civil Procedure Rules* 2008 in the third paragraph to the preface to the scale it states that:

> *"In appropriate cases should the Judge, Registrar or Costs Court consider the fee, cost or disbursement provided by the scale to be inadequate to compensate for the work actually done, the Judge, Registrar or Costs Court may make an appropriate fee which in the circumstances is considered to be fair and reasonable."*

36 That means that under the scale, which includes Scale D, I am given the power to increase the cost of an item if I consider it fair and reasonable. I consider this power is contained within the terms of the Scale of Costs and, therefore, for the applicants to apply for an increase in Counsel's fee is not a breach of the Terms of Settlement. Further, when opposing the certification for counsel the sixth respondent did not raise that such an application by the applicant was a breach of their Terms of Settlement.

37 In relation to the sixth respondent's claim that the orders of 6 March 2007 cannot be amended because of the unknown effect on the orders of Byrne J. of 9 June 2008, I disagree. If such a sweeping statement was true it would seriously hamper the administration of justice. I accept that it could be true in certain circumstances. But, those circumstances have to be identified and none have been by the sixth respondent. In conclusion, I do consider that by an oversight I omitted to make the order sought by both parties that the sixth respondent pay the applicant's costs and I will make it in a form consistent with the other costs orders made on 6 March 2007. To be consistent with the other orders for costs made on 6 March 2007, I will amend Order 9 of those orders by the inclusion of the number '11'.

F APPLICATION FOR FIXING THE METHOD BY WHICH THE APPLICANTS' COSTS WILL BE ASSESSED

38 The fourth application was made by the applicants and fourth respondent to establish a format for the assessment of the applicants' costs that are to be paid by the fourth respondent and by the sixth respondent in the light of the decision in *Housing Guarantee Fund v Ryan.* This decision requires that the costs of the fourth respondent must be assessed by the Tribunal. Therefore, the question is how will the costs assessment be conducted for both the fourth respondent and the sixth respondent. The applicants submitted the Tribunal had its responsibility to assess costs of the fourth respondent and the Principal Registrar had the responsibility to assess the costs of the sixth respondent; and, to ensure such costing was carried out in a minimum of time and cost; it should be carried out co-operatively with the relevant parties from both proceedings and preferably at the same time.

39 The applicants submitted that the parties to this application had discussed the alternatives in the method of assessment of the costs; which they consider are:-

(a) for the assessment of the costs of the fourth respondents, appoint the Principal Registrar as a special referee under s95 of the VCAT Act to give an opinion as to what were the appropriate costs for the Tribunal to order the fourth respondent to pay in respect of the applicants' costs; or,

(b) that to do this in the cheapest and quickest manner it would be best for the Tribunal and Principal Registrar to sit together contemporaneously so as to use the Principal Registrar's skill and experience in costing and such that any questions of law or jurisdiction can be referred to the Tribunal; and, the Tribunal can making the necessary findings in relation to the assessment of costs for which the fourth respondent will be responsible.

40 The applicants submitted it was common ground amongst the parties in both the proceedings that the costs hearing would take 3-4 days; and, if possible that it would be best to get all assessments of costs carried out in the one operation.

41 The fourth respondent agreed that a single assessment would take approximately 3-4 days. Its preferred arrangement was to refer the assessment of its costs to the Principal Registrar under sub-section 95(1)(b) as a special referee to give an opinion; and, after the assessments of costs were completed the Tribunal would attend the last day of the costs assessment hearing; and, in accordance with *Housing Guarantee Fund v Ryan*, make any necessary determinations and orders in relation to the costs the fourth respondent would be required to pay.

42 The fourth respondent submitted that the form of the bill in the *Lawley* matter, File No. D144/2004, made it very difficult for each respondent to assess which items of costs they should be wholly or partially responsible

for; and, if partially responsible, to what extent. In the *Baines* proceeding, File No. D145/2004, the bill of costs was colour co-ordinated with the colours indicating which respondent was responsible for an item of cost, whether wholly or partially and there was a separate colour indicating common costs. The fourth respondent seeks that the *Lawley* bill of costs be similarly colour co-ordinated to provide for ease of understanding of the fourth respondent's costs consultant. The fourth respondent submitted that following this determination that there be an initial directions hearing before the Principal Registrar to determine the form of the bill and all of the preliminary issues that need to be decided before the actual assessment begins.

43 The costs consultant for the sixth respondent, Ms Paver, submitted that in carrying out an assessment the Principal Registrar normally writes his allowance for each item beside the each item as the assessment is carried out. However, it was complicated here because there were different costs orders for different respondents which gave different bases upon which the costs needed to be paid and different scales under which the costs had to be assessed. In relation to the bases, the fourth respondent has been ordered to pay the applicants' costs on a solicitor/client basis and the sixth respondent is to pay the applicants' costs on a party/party basis. In relation to scales, the costs to be paid by the fourth respondent are to be assessed on the Supreme Court Scale and the costs to be paid by the sixth respondent are to be assessed on the County Court Scale D. Therefore, Ms Paver submits that the *Lawley* bill needs to be redrawn in a spreadsheet form with more columns that reflect the different bases and different scales under which each item is assessed. This would allow the cost assessment to be carried out normally, on an item by item basis sequentially.

44 Ms Paver recommended that a directions hearing be held to be presided over jointly by the Principal Registrar and the Tribunal, to assess what further amendments or further requirements needed to be added to the existing *Lawley* bill so that the taxation process proceeds smoothly and ensure it is completed within the allotted time. When the assessment has been completed the matter could then be brought back before the Tribunal for it to decide the issues to be decided in relation to the orders for payment of the costs required of the fourth respondent.

45 In closing, Counsel for the applicants submitted that he could not answer the requests for amendment to the existing *Lawley* bill of costs as he had not prepared for this to be dealt with at this hearing.

46 I consider that the most appropriate thing to do at this stage is to involve Principal Registrar Jacobs and so I will make an order that there will be a joint directions hearing for one half a day presided over by both of us at which we will consider:-

(a) the amendments or the provision of further information, if any, that should be to Ms. Lawley's single bill of costs to make it more amenable to an effective and economic assessment process;

(b) the most economic and effective method of assessing the fourth respondent's liability for costs; and,

(c) how to most effectively organise a single assessment of costs between the applicants and the respondents liable to pay costs.

47 A directions hearing to be presided over by Principal Registrar Jacobs and myself is set down for 2.15 p.m. on 24 May 2010 at 55 King Street, Melbourne, with an estimated duration of 2 hours. The parties are requested to ensure that their costs consultants attend.

SENIOR MEMBER R. YOUNG