VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D173/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Costs – s109 *Victorian Civil and Administrative Tribunal Act* 1998 – relevant considerations – caution in exercising discretion where not presiding member

FIRST APPLICANT	Maclaw No 651 Pty Ltd
SECOND APPLICANT	Renaissance Projects Pty Ltd
FIRST RESPONDENT	Pacific Indemnity Underwriting Agency Pty Ltd
SECOND RESPONDENT	Gordian Run-off Limited (formerly GIO Insurance Limited) (proceeding s/out aganist see order 28/6/2006)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	26 June 2006
DATE OF ORDER	9 August 2006
CITATION	Maclaw No 651 Pty Ltd v Renaissance Projects (Domestic Building) [2006] VCAT 1600

ORDER

By 23 August 2006 the Applicant and the First Respondent must bring in signed Minutes of Consent Orders in relation to the 'Settlement Costs' and to give effect to these Reasons.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the First Applicant	Mr M. Settle of Counsel
For the Second Applicant:	Mr M. Settle of Counsel
For the First Respondent	Mr J. Gorton of Counsel

REASONS

1 This proceeding is a consolidation of proceedings A508/1998, A507/1998 and A509/1998 insofar as it relates to any costs applications arising out of those proceedings. Previously the First Applicant was the Applicant in proceeding A508/1998 and A509/1998 and the Second Applicant was the Applicant in proceeding A507/1998. In each proceeding the First Respondent was formerly the Third Respondent and the Second Respondent was formerly the Fourth Respondent. The Applicants and the Second Respondent have resolved their issues and consent orders were made on 28 June 2006.

2 The Applicants and the First Respondent ('PIU') have agreed that I should determine the following matters as set out in paragraphs 5 and 6 of PIU's Notice of Objections dated 22 March 2006 viz:

> Notice of Orders sought by the third respondent (PIU)
>
> 5. The third respondent seeks orders against the applicants that they pay the third respondent's costs in respect of:
>
> (a) the directions hearing before Member Davis on 4 October 2001;
>
> (b) the directions hearing before Member Cremean on 26 October 2001;
>
> (c) the two day hearing before Member Cremean on 29 and 30 October 2001;
>
> (d) the directions hearing before Member Cremean on 14 December 2001;
>
> (e) the directions hearing before Member Cremean on 13 February 2002
>
> 6. Further, the applicant (sic) seeks the costs of all interlocutory steps of and associated with the above hearings and an order that these costs and the costs referred to in paragraph 5 above include the costs of both senior and junior counsel as and when retained by the third respondent.
>
> and that otherwise the assessment of costs will be conducted by the Taxing Registrar of VCAT, Mr Anthony Jacobs.

3 However, it is apparent from the submissions filed on behalf of each of the parties and the oral submissions made at the hearing, that both parties are seeking their costs of and incidental to the Summonses for Directions dated 22 May 2001 ('the 22 May Summons') and filed by the Applicants on 27 July 2001 and the Summonses for Directions dated 15 October 2001 and filed by the Respondents on 16 October 2001 ('the 16 October Summons').

BACKGROUND

4 The three proceedings which have been consolidated for the purposes of the costs applications only, have had a long and, what can best be described,

tortuous history. They were commenced in 1998 and after a determination of Judge Davey was appealed, the proceedings settled in 2000. Proceeding A508/1998 was settled in May 2000 when the First Applicant accepted an Offer of Compromise. Proceedings A509/1998 and A507/1998 were settled by terms respectively in October and November 2000. Each settlement provided for payment by the insurers of the Applicants' 'reasonable legal costs and expenses' the meaning of which led to a further dispute between the parties. On 14 December 2001, Deputy President Cremean, as he then was, determined that it meant indemnity costs. This decision was upheld on appeal, but ultimately overturned by the Court of Appeal in June 2005.

5 On 13 February 2002 Deputy President Cremean made orders in each proceeding, in relation to the payment of the 'settlement costs' which he fixed, and also ordered that the Third and Fourth Respondents pay the Applicants' costs of the 'application filed 22 May 2001', which I accept referred to the 22 May Summons, on an indemnity basis. The 16 October Summons was dismissed and no orders for costs of that summons were made.

6 Following the decision of the Court of Appeal on 29 June 2005, which found in favour of the Respondents in A508/1998 and A509/1998 and determined that 'reasonable legal costs and expenses' meant party/party costs, the matter was *"…remitted for further determination by the Tribunal according to law, including the issues of the costs of the summonses dated 22 May 2001 and 15 October 2001."* (Order 1(ii)). Similar orders were made by Master Evans in A507/1998 on 16 December 2005. On 24 February 2006 the Court of Appeal varied the orders of 29 June 2005 and, in particular, ordered that the Tribunal was to be constituted by a member *'…other than the member who made the orders, the subject of this appeal.'*

7 The applications before me relate to the costs incurred by the parties in the applications before the Tribunal as to the meaning of the term 'reasonable legal costs and expenses'. They do not relate to the costs of the appeals.

PIU'S APPLICATION FOR COSTS

8 Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 is quite clear. It provides that each party should bear its own costs of a proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) viz:

> (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 by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether 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.

9 Any exercise of the discretion must always been in the context of whether it is 'fair to do so' Having not conducted the hearing or any of the directions hearings it is my view that any exercise of the Tribunal's discretion under s109(2) should be approached with extreme caution where a Member, other than the Presiding Member, is required to consider any application for costs. .

10 The hearing proceeded on 29 and 30 October 2001 and Deputy President Cremean handed down his decision at a directions hearing on 14 December 2001. It was submitted on behalf of PIU that, although the Tribunal initially found against it, and ordered on 14 December 2001 that the insurers pay the Applicants' costs on an indemnity basis, following its successful appeal to the Court of Appeal, the Tribunal's discretion under s109(2) should now be exercised in its favour because:

i there is a propensity in the Tribunal to order costs in matters such as these;

ii the applications were complex and highly litigious;

iii Significant sums of money were involved.

Propensity

11 I was referred to a number of authorities in support of this submission. However, it is clear that each case must be considered on its merits with regard to the matters set out in s109(3). In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 Ormiston J said:

> '…there should be no presumption, as seems to have been assumed in both the Tribunal and the Trial Division, that costs ought to be paid in favour of claimants in domestic building disputes brought in VCAT…' [34]

12 In *Sabroni Pty Ltd v Catalano* [2005] VCAT 374 although Judge Bowman was satisfied that an order for costs should be made because of the nature

and complexity of the issues before him, and the adversarial manner in which the proceeding was conducted, he said:

> 'Despite the observations of Member Young in *Australia's Country Homes Pty Ltd v Vasiliou* (delivered 5 May 1999), 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. There is nothing in the wording of s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 that warrants such almost automatic expectation. In this regard I prefer the approach adopted by Deputy President Macnamara in Pure *Capital Investments Pty Ltd v Fasham Johnson Pty Ltd* (delivered 31 October 2002). Deputy President Macnamara concluded 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, and I am of the same opinion. Each case, whether it be in the Domestic Building List or elsewhere, must be viewed on its merits. It may well be that cases in the Domestic Building List, because of their nature, have a propensity to fall within the exceptions contained in s.109(3), but that does not mean that each case should not be considered on its merits, or that cases in the Domestic Building List automatically fall into a different category when issues of costs arise.' [5]

13 I have considered the other authorities to which I was referred by counsel for PIU in support of the submission that where proceedings are of a generally commercial nature there should be a reasonable expectation that costs will follow the event. However, I do not find them to be particularly relevant as they precede those referred to above.

Nature and complexity of the proceeding

14 It is apparent that the substantive dispute in each proceeding was generally commercial in nature, relating as they did to a multi-million dollar development, and that the costs incurred by the parties in relation to the substantive dispute were also significant. However, the substantive disputes were settled and it was the interpretation of a term of those settlements which was before the Tribunal which, in my view, in itself, could not be described as a commercial dispute.

15 It was suggested on behalf of the Applicants that there was nothing complex about the matter until it came before the Court of Appeal. It is apparent from the Tribunal's Reasons dated 14 December 2001 that various issues were raised by the insurers in response to the 22 May Summons, including whether the insurers had a joint liability to pay the settlement costs, or whether they were only obliged to make payment in accordance with the percentages set out in the Schedule to the Insurance Policy. Although this argument was essentially abandoned by PIU at the hearing it was a matter of the utmost importance to the Applicants following the insolvency of HIH, and an argument they had to be prepared to meet. The Applicants have clearly been disadvantaged by PIU's conduct having been put to the cost of preparing to meet an argument which was essentially

abandoned at the hearing, and it would be unfair for them to be burdened with costs of doing so. It was a matter before the Tribunal which Deputy President Cremean considered in his Reasons. The determination that the insurers were jointly liable to pay the Applicants' costs was not appealed.

16 Although Deputy President Cremean, in determining that 'reasonable legal costs and expenses' meant indemnity costs, relied on a previous decision of the Tribunal in *Reid v FAI General Insurance Co Ltd* [1999] VCAT 1773, his Reasons reveal that he did so whilst having regard to a number of other authorities to which he was referred, together with what, he found, to be the intent of the applicable legislation and the relevant Ministerial Order. However, it is not out of the ordinary for the Tribunal to consider conflicting submissions, authorities and to be called upon to interpret the meaning of certain words and phrases in a particular context.

Conduct of the parties

17 Although it seems that Deputy President Cremean's Reasons that he had serious concerns about the manner in which the proceeding had been conducted by the insurers, I have not had regard to those comments in determining this costs issue. However, it is apparent from the orders made during the interlocutory steps that the insurers were less than diligent in responding to the 22 May Summons. They did not appear at the directions hearing on 31 July 2001 being the first return date of the 22 May Summons. They did not comply with the directions made on that date, and on 13 September 2001 the Applicants filed further Summonses for Directions seeking an amendment of the timetable. These were returnable at the directions hearing on 4 October 2001 where Member Davis, by reference to the provisions of s78 of the *VCAT Act*, found that the insurers had been conducting the proceeding in a way which disadvantaged the Applicants. Although costs were reserved on that day I am satisfied that PIU should pay the Applicants' costs of this directions hearing.

18 Following the directions hearing on 4 October 2001 the insurers filed the 16 October Summonses whereby they sought that bills in taxable form be filed and served seven days prior to the hearing. These Summonses were returnable on 26 October 2001 at which time they were adjourned by consent to be heard at the commencement of the hearing. It seems from the Tribunal's Reasons dated 14 December 2001 that the directions hearing on 26 October 2001 did in fact proceed. These Summonses were subsequently dismissed on 14 December 2001.

19 I was referred, by counsel for PIU, to Judge Bowman's decision in *Sherman v Watson* [2004] VCAT 1093 where he found:

> …This proceeding was conducted in a very litigious fashion. It was commercial litigation. It was complex, involving issues of fact and law. [13]

However, I note that in *Sherman*, Judge Bowman also commented that

> …In my opinion Sherman's case was of very dubious merit.

and that an appeal alleging a denial of natural justice had been dismissed with the Court of Appeal indicating the case had little merit. This situation is quite different.

Discussion

20 Having considered the material before me, and the Tribunal's Reasons dated 14 December 2001 it seems to me that the 22 May Summons was issued because the parties failed to clarify the meaning of the term 'reasonable legal costs and expenses' and the basis on which those costs were to be paid, at the time settlement was reached in each of the proceedings. It is, perhaps, unfortunate that the parties found themselves before the Tribunal to effectively sort out their settlement terms because they failed to make sure they had a mutual understanding of those terms. Although it is fair to say that this can be identified as a common denominator in many proceedings before courts and tribunals.

21 With the exception of any costs which may have been incurred by the Applicants in relation to the insurers' contention that there should be an apportionment of liability to pay the settlement costs, and the costs of and incidental to the 4 October directions hearing, I am not persuaded that the usual rule in s109(1) should not apply. I have not considered the costs of the directions hearings on 14 December 2001 and 13 February 2002 separately. These are inextricably linked with the hearing and I am not persuaded that there was anything about either of those directions hearings which would justify a separate order for costs. Similarly, the provisions of s109(1) apply to this costs hearing

22 I am not satisfied that there should be any order apportioning the Applicants' costs to be paid by PIU. It was determined on 14 December 2001 that the insurers had a joint liability to pay the settlement costs, and the 22 May Summons relates directly to the basis upon which such costs were to be assessed.

The Settlement Costs

23 The parties have agreed that the Principal Registrar should assess these costs. However, as noted at the hearing, he is unable to do so in the absence of an order from the Tribunal (s111 of the *VCAT Act*).

24 As discussed at the hearing, I will order that the parties file proposed Minutes of Consent Orders in relation to the Settlement Costs and to give effect to these Reasons. In relation to A507/1998 where I understand the parties have agreed costs are to be assessed on County Court Scale 'D' it will be necessary for any orders to include certification of Counsel's fees for both Senior and Junior Counsel at a nominated fee.

DEPUTY PRESIDENT C. AIRD