VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D49/2006

CATCHWORDS

Costs of the proceeding – costs of enforcement of claim under policy of builders' warranty insurance - s109 *Victorian Civil and Administrative Tribunal Act* 1998

APPLICANTS	Elfiye Rexhepi, Selver Rexhepi
FIRST RESPONDENT	Vero Warranty
SECOND RESPONDENT	John Belani Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	30 November 2007
DATE OF ORDER	11 December 2007
CITATION	Rexhepi v Vero Warranty (Domestic Building) [2007] VCAT 2346

ORDER

1. The applicants' application for costs as against the first respondent is dimissed.
2. The costs of this costs hearing are reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr V. Ryan, solicitor
For First Respondent	Mr S. Waldren of Counsel
For Second Respondent	No appearance

REASONS

1 The applicants ('the owners') seek an order that the first respondent ('the insurer') pay their costs of this proceeding, relying on the terms and conditions of the relevant policy of warranty insurance, which provide the insurer will pay the insured's reasonable legal costs of the successful enforcement of a claim.

2 When the matter came on for directions before me on 11 October 2007, Mr Ryan, solicitor who appeared on behalf of the owners confirmed that the application for costs was made against the insurer only. This was noted in Order 1 of the Orders made on that day:

> 1. The Owners' application for costs is set down for hearing on 30 November 2007 at 10 am at 55 King St, Melbourne – allow ½ day. The Tribunal notes the application for costs is made against the First Respondent and it is a matter for the Second Respondent whether he attends the costs hearing.

3 Mr Belani, director of the second respondent ('the builder') attended the directions hearing but did not attend the costs hearing. At the costs hearing, the owners were again represented by Mr Ryan, solicitor and the insurer was represented by Mr Waldren of Counsel. Mr Ryan confirmed that the owners were seeking their costs of this proceeding only, and that the matters set out in his affidavit sworn 2 November 2007 in relation to the owners' previous claims under the policy of warranty insurance were by way of background only.

Background

4 The owners entered into a contract with the builder on 2 February 2000 for the construction of a new home. Proceedings were commenced, by the builder, seeking payment of the outstanding balance under the contract. That proceeding was compromised, and the owners and the builder entered into Terms of Settlement dated 3 April 2001. Under those Terms the builder was required to carry out certain agreed rectification works.

5 Following the failure of the builder to complete the agreed rectification works, the owners obtained expert reports and made a claim under the relevant policy of warranty insurance ('the first claim'). This claim was denied by the insurer and the owners made application seeking a review of that decision. That application was subsequently withdrawn by consent. Mr Ryan states in his affidavit sworn 2 November 2007 this was because the owners did not have the funds to continue.

6 Further expert reports were subsequently obtained and, on 12 October 2005, following previous contact with the insurer, the owners made a second claim under the policy of warranty insurance. This claim was denied by the insurer by letter dated 28 November 2005 viz:

> We refer to your claim dated 13/10/05.

> We have inspected the above property, considered the information provided and have assessed your claim as set out in the attached Schedule.
>
> Our assessor recommends that a suitably qualified engineer be appointed to investigate the movement occurring.
>
> Vero is required to and will make the necessary arrangements for an engineer to investigate the movement.
>
> Liability for your claim is therefore denied, on receipt of the engineer's report we will review our decision. (emphasis added)
>
> You have the right to seek a review of this decision on your insurance claim by lodging an application with the Victorian Civil and Administrative Tribunal. Any such application must be made within twenty-eight (28) days of the date you receive this decision letter.

The Schedule provided that the claim was *'denied pending further investigation'* and '*Vero to engage a suitably qualified geotechnical engineer to inspect and report on the foundation movement.'*

7 Thereafter the owners lodged an application for review of the insurer's decision on 1 February 2006 (as I understand it no issue was taken by the insurer as to whether the application was made 'within time'), noting on the application that the '*insurer has not made a final decision. Please see (solicitors') letter of 27 January 2006 sent to insurer'*. Their solicitors' letter advises that the application was being lodged to protect the owners' interests because *'As you are no doubt aware, the time to bring an action is within 6 years and you will note the building contract was signed on 3 February 2000'*. I note as an aside that this ignores the provisions of *Ministerial Order* s98 of 2003 and the relevant policy of warranty insurance, under which the period of insurance is for six years from the date of completion of the building works or the date of termination of the relevant building contract.

8 Shortly after denying the claim, but consistent with the advice in its letter of 28 November 2005 and on the accompanying Inspection Summary, the insurer arranged for an engineer to inspect on 3 December 2005. Mr Ryan says that the owners have told him that the engineer, Mr Rodwell, told them he agreed with the contents of the report they had obtained from Mr Meyer.

9 By letter dated 27 April 2006, the insurer advised that it had decided to reverse its earlier decision and accept the claim. An Amended Inspection Summary was attached confirming that the cracking in the northern wall to the garage was now accepted and under the heading 'Reason' *'Up-grade the existing and/or install additional articulation joints and make good any fractured brickwork. NB The owner will need to flush clear the stormwater drainage system a couple times a year and will need to seal the downpipe to drain connections and the paving gaps.'*

10 By letter dated 4 May 2006, the insurer's solicitors advised the tribunal that the insurer had reviewed its decision and now accepted the claim, but that

they had been unable to make contact with the owners' solicitors. The proceeding was referred to an Administrative Mention on 6 June 2006 at which time the owners' solicitors advised that following acceptance of their claim by the insurer, the owners were seeking costs they had incurred in pursuing the claim. A costs hearing was scheduled and after ongoing correspondence between the parties' solicitors, copies of which were sent to the tribunal, the owners' solicitors advised on 27 June 2006:

> It has been noted the matter has been listed for a Costs Hearing on 4 July 2007. It is respectfully requested that the matter should be listed for a conference as the outcome may result in a separate action for unconscionable conduct against Vero Warranty.

and then on 29 June 2006

> It is confirmed that, whilst my clients accept the decision of Vero Warranty accepting liability for their claim, they will not proceed with the Costs Hearing set down on 4 July 2006. In other words, the Costs Hearing is not required.

This letter was construed as advice that the owners were not pursuing their claim for costs as against the insurer, the following orders were then made on 3 July 2006:

1. This proceeding is struck out with a right to apply for reinstatement.
2. No order as to costs.

11 On 5 October 2006 the builder advised the insurer that the works had been completed. In January 2007 the owners advised the insurer that an inspection by their expert indicated that further works were required and following a further inspection by its expert the insurer issued an amended schedule of works on 30 January 2007. The builder contacted the owners on 21 and 27 February 2007 asking them to advise a suitable day and time for the bricklayers to carry out their works. On 6 March 2007 following receipt of a letter from the owners' then solicitors advising the works had not been carried out in accordance with the insurer's direction of 27 April 2006, the insurer again wrote to the builder advising that if the works were not completed within 7 days the insurer would obtain quotations for the carrying out of the works.

12 On 7 March 2007 the builder advised the insurer the works had been completed with the exception of two items. The owners' solicitor, the insurer's solicitor and the builder were thereafter in regular communication until 27 March 2007 when the builder advised the insurer's solicitors that the works had been completed. On 29 March 2007 the owners' former solicitors wrote to the insurer's solicitors advising that the articulation joints had not been rectified in accordance with the 22 January 2007 amended works schedule and requesting an inspection of the works as soon as possible.

13 On 7 May 2007 the owners applied to reinstate the proceeding. On 9 May 2007 the insurer issued a further schedule of works advising the owners that the builder had been requested to contact them within 14 days to make arrangements for the carrying out of the necessary works. The scope of works in relation to the garage remained essentially unchanged. After further communication between the builder and the owners' former solicitors, the builder was advised on 18 May 2007 that the owners were seeking to have the matter reinstated and *'Accordingly, please do not attend my client*s' *premises at this stage'*.

14 The owners' application for reinstatement was listed for hearing on 21 June 2007 following which the parties entered into further negotiations. Terms of Settlement were entered into whereby the builder agreed to carry out further works and to make payment of *'an amount equal to the lowest of 3 tenders obtained by the insurer in respect of the works comprised by the further direction…'*. The parties also agreed that upon payment by the builder the owners:

> 3 (and 4) …releases the insurer (and the builder) and will not make any claim or commence any action against the insurer (and the builder) in relation to:
>
> - The claim
> - The proceeding
> - The direction
> - The further direction
>
> **Costs**
>
> 5. The parties acknowledge that:
>
> i. the insured's claim for costs of the proceeding is not compromised by these terms.
>
> ii. Both the insurer and the builder expressly deny any liability for the insured's costs of the proceeding.

The owners' application for costs

15 Following settlement of the proceeding the tribunal received correspondence dated 19 September 2007 from the solicitors now acting on behalf of the owners advising that the issue of the owners' costs and expenses *'associated with the enforcement of their claim'* remained outstanding and it is that application which is the subject of this hearing.

16 Mr Ryan, solicitor, appeared on behalf of the owners. He had filed a lengthy affidavit sworn 2 November 2007, which incorporated, as one of the exhibits, the affidavit of the owners' previous solicitor sworn 20 June 2007 which had been prepared in support of their application for reinstatement.

The owners submit they are entitled to their costs of enforcement of the claim and that those costs, are by definition one and the same as the costs of this proceeding which were expressly not compromised by the agreement set out in the undated Terms of Settlement entered into by the parties in June/July 2007

17 The owners submit it was necessary for them to make application to the tribunal in February 2006 to protect their interests because of the looming expiry of the limitation period, and in this regard I refer to my earlier comments.

18 The insurer opposes the owners' application for costs of the proceeding. It says that the application filed on 2 February 2006 was premature, that the owners' costs up to and including 3 July 2006 were dealt with by the orders made on that day, and that responsibility for any further costs in the proceeding incurred by the owners after 3 July 2006 lies with the builder, not the insurer.

Discussion

19 The insurer submits that the application was premature because it was clear that its decision in November 2005 was a preliminary decision subject to review once all relevant information and reports were obtained. However, I note that the November decision included the advice that the owners had 28 days within which to lodge any application for review with the tribunal. Even if their caution in relation to the limitation period was misguided, it was entirely appropriate that they make the application to protect their 'appeal' rights.

20 Although it was submitted on behalf of the owners that the circumstances in this case are akin to those in *Caimakamis and Pagonis v Royal and Sun Alliance Insurance Australia Limited* [2002] VCAT 895 I cannot agree. In *Caimakamis* Senior Member Walker said:

> 21 The Respondent's difficulty here is that, even accepting it had the right to make good the loss, it has not done so. There has been plenty of time for the Insurer to take reasonable steps to have the work carried out, yet all that it appears to have done is send a written direction to the Builder that has not been complied with. It never followed the matter up. Although it is clear that the Owners did not want to have the Builder return to carry out the work there is no evidence that they prevented him from doing so. The scintilla of evidence that there is would suggest that he was not willing to do so.
>
> 22 If an insurer proposes to provide indemnity by making good the loss, it must do so. If the insured objects to this course and does not cooperate the insurer should at least clearly show that it is ready and willing to do so. If the insured then refuses to permit the insured to do the necessary work then it will not be the fault of the insurer that indemnity has not been provided.

> 23 The lack of action on the part of the Respondent in this case indicates to my mind that it was prepared to have the Builder carry out the necessary work at no cost to itself but not take any steps to ensure that the work was done. This does not amount to making good the loss, nor does it show that the insurer is ready and willing to do so.

21 In this proceeding, following the insurer's revised decision in April 2006 to accept the owners' claim, it is apparent that the builder returned to site to carry out some works. The builder advised the owners and the insurer in October 2006 that the works had been completed. As soon as the owners advised the insurer in January 2007 that their expert had inspected and advised the rectification works were not complete, the insurer arranged for a further inspection and issued a further schedule of works. It seems that there were attempts by the builder to 'get it right' during the ensuing months, until finally in May 2007 the owners applied for the proceeding to be reinstated, and pending the hearing of their application refused the builder access to carry out any further works. The tribunal ordered the reinstatement but otherwise adjourned the proceeding to an administrative mention. It was submitted by Mr Ryan that the owners had no alternative other than to apply to reinstate the proceeding in May 2007 because of the looming expiry of the policy of insurance. This is a curious submission in circumstances where the owners' application for a review of the insurer's decision had clearly been made when the policy was current, and the application had been struck out by order of the tribunal, with an express right to apply for reinstatement.

22 Further whilst it was appropriate for the owners to apply for a review of the insurer's decision of 28 November 2006, to preserve their rights, the insurer revised its decision without any input or involvement from the tribunal. When the insurer revised its decision and accepted the owners' claim, although initially indicating they were seeking their costs of the enforcement of this claim the owners subsequently advised the tribunal that the scheduled costs hearing was not required resulting in the orders of 3 July 2006 which included an order there be *'no order as to costs'*.

23 The costs incurred by the owners between 3 July 2006 and 7 May 2007, the date on which they made their application for reinstatement are not costs in the proceeding. Whether they are costs of enforcement of their claim is problematic but, in any event, under the Terms of Settlement the parties expressly agreed that the owners' <u>costs of the proceeding</u> were not compromised by the terms. There was no reservation of any claim for the owners' <u>costs of enforcement of the claim</u>.

24 In considering any application for costs of a proceeding I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 starts with the premise that each party will bear their own costs in any proceeding unless the Tribunal is minded to exercise its discretion under s109(2) having regard to the matters set out in s109(3) which provides:

(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.

25 The approach to be taken by the Tribunal in considering whether to exercise its discretion under s109(2) was recently considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117 where he said at [20]:

> the Tribunal should approach the question [of costs] on a step by step basis, as follows –
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order. (emphasis added)
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in 109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other [matter] it considers relevant to the question.

26 I am not persuaded that there is any reason to depart from the provisions of s109(1). In my view the insurer responded appropriately and promptly when and as requested to do so by the owners' solicitors. The Terms of Settlement entered into between the parties, in June/July 2007, embody

what is essentially an agreement between the owners and the builder, to which the insurer has consented. There were no obligations imposed upon the insurer under the Terms of Settlement – rather the owners agreed to release the insurer upon payment by the builder of the settlement sum.

27 It is unfortunate that the owners have incurred significant costs in pursuit of their application for costs but that is not sufficient reason for me to exercise the tribunal's discretion under s109. At the directions hearing on 11 October 2007 I referred their solicitor to my earlier decision in *Brown v Allianz Australia Insurance Limited* [2004] VCAT 1748 as indicative of the approach taken by the tribunal in relation to similar applications, where parties compromise an application for review of the decision of an insurer without any adjudication on the merits, or any active involvement of the tribunal. I also emphasised the seriousness with which the tribunal approaches the possible exercise of its discretion under s109(2).

28 I will reserve the costs of this application but once again draw the parties' attention to the provisions of s109(1) of the Act.

DEPUTY PRESIDENT C. AIRD