VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D302/2005

CATCHWORDS

Domestic Building List – warranty insurance – deemed acceptance of claim – extent of liability – whether Tribunal should remit claim for assessment of damage - costs – Ministerial Orders 30 October 1998 clause 7.2 – *Victorian Civil and Administrative Tribunal Act* 1998 Division 8 Part 4

APPLICANTS	Thomas R W Roe and Sarah M Roe
1ST RESPONDENT	Victorian Managed Insurance Authority
2ND RESPONDENT	Burranbok Pty Ltd t/as Peter J Russell Master Builder
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	7 February 2006
DATE OF ORDER	7 February 2006
CITATION	[2006] VCAT 104

ORDERS

1. Decision of 1st respondent is set aside.

2. The 1st respondent has deemed to have accepted liability of the applicant's claim made to the 1st respondent on 6 December 2004.

3. Matter remitted to 1st respondent to consider questions of damage and/or repairs.

4. Respondents pay applicants' costs of the application from 7 November 2005 to this day inclusive, such costs to be taxed in default of agreement on County Court Scale "C".

5. The 1st respondent's application for costs is dismissed.

6. I certify for 3 days appearance for counsel for the applicants.

Robert Davis
Senior Member

APPEARANCES:

For Applicants	Mr P Duggan of counsel
For 1st Respondent	Mr J M Forrest of counsel
For 2nd Respondent	Mr P Russell

REASONS FOR DECISION

1 Last Friday I made certain rulings in this matter and the important ruling I made was that the 90 day deemed provision in the relevant insurance policy and Ministerial Orders are applicable to this proceeding. After making that ruling, it became clear that there was going to be a dispute as to whether or not I should extend time to the respondents to consider this matter. This morning the respondents conceded that I had no jurisdiction to extend time which was in line with the decision which I gave in *Caimakamis and Pagonis v Royal Sun Alliance Insurance* [2002] VCAT 94 (29 November 2001).

2 It is important for me to mention that, at the outset of this proceeding which commenced on 2 February 2006, during Mr Duggan's (Mr Duggan appeared for the applicants) opening, he mentioned the problem with the 90 day time limit and the fact that the 1st respondent had not made a decision within the 90 days and therefore pursuant to the policy and the Ministerial Orders, there was a deemed acceptance of liability.

3 Mr Forrest, who appeared for the 1st respondent, opened his case, after hearing from Mr Duggan, (I mention that there was no pleadings in the true sense from the applicants and none were ordered). Mr Forrest complained that the question of the 90 day time limit had only been raised for the first time during Mr Duggan's opening and, as a result, it was agreed by all, including myself, that he should have until the next morning (being early afternoon at that stage) to prepare a submission on the matter. I then gave Mr Forrest the option of whether he wished to leave the Tribunal at that stage to prepare the submission or he wished to continue his opening. He said that he wished to continue his opening which went on for 15 to 20 minutes after that time.

4 During his opening, Mr Forrest correctly informed me that this was a review jurisdiction of the Tribunal which was different from the normal civil jurisdiction that happens in the Domestic Building List. In making that statement, I have got no doubt that Mr Forrest was correct. He said I must look at the claim and the decision and that if I find for the applicants, I should set aside the decision, grant indemnity pursuant to the policy and remit all further determination of the damage. That seemed like the sensible course of orders that I should make. This was particularly so in light of the fact that no party had submitted any costings for the works the applicants were requesting and neither party had filed a detailed schedule of works. It is noted that there were directions requiring each party to file all expert reports upon which they intended to rely.

5 However, this morning upon resumption, after Mr Forrest conceded that the Tribunal had no jurisdiction to extend time, I was presented with an outline of written submissions by Mr Forrest to the extent that the hearing should proceed and I should determine the question of the extent of the liability. Mr Forrest submitted that if I did not determine the extent of liability, it may be thought at a later time that the 1st respondent was bound to accept 100% of liability. He said that I should look at all the defences of the 1st respondent, including what the applicants knew at the time they purchased the relevant property and whether the cracking of the render which was the main subject of this proceeding had occurred at the time. He also referred to s 40 of the *House Contracts Guarantee Act* 1987 and said irrespective of whether liability is established by a hearing on the merits or a deemed acceptance, the applicants have to suffer loss in order to claim and he said that for reasons which the 1st respondent will submit, the applicants had not suffered any loss. He also referred to some policy exclusions and said that unless the Tribunal determines at a hearing the question of quantum and the extent of the liability at this stage, his client will be denied natural justice.

6 The problem with the submissions by Mr Forrest is that, as Mr Forrest correctly said in the opening on 2 February 2006, this is an administrative review based on the decision of the 1st respondent. The 1st respondent has made no decision as to the extent of liability. Without a decision of the 1st respondent, this tribunal has no review jurisdiction pursuant to s 16 of the *House Contracts Guarantee Act*. That section is only enlivened once a decision has been made and that is indeed what Mr Forrest told me in his opening that the proper course was, after setting the decision aside, and granting indemnity, to remit the matter for further determination on the question of damages, that is what all parties agreed at the time. Now, the 1st respondent surprisingly seems to be taking a different view altogether.

7 The situation is without a decision as to the extent of damage, this Tribunal does not have jurisdiction to determine the same. Therefore, I do not agree with the submissions made by Mr Forrest. On the question of natural justice, the statute in the Ministerial Orders provide the time limit and the 1st respondent did not respond within that time limit. Therefore, as a result, the deeming provisions are applicable. As to the extent of liability, that will be a matter for the 1st respondent to determine and after it has determined it, if either the applicants or the 2nd respondent in this proceeding is not happy with that determination, they may bring proceedings pursuant to s 16 of the *House Contracts Guarantee Act* and until that happens no proceedings may be brought.

8 Under those circumstances, I intend to make the orders that Mr Forrest said on 2 February 2006 that I should make in the event that I found for the applicants in this proceeding. I will thus be remitting the matter to the 1st respondent to make a determination on the question of damages for which it is liable and I will make the orders accordingly.

COSTS

9 Subsequent to me making the decisions on Friday and making subsequent orders and indicating that I would be making orders this morning, which in fact deemed the 1st respondent to have accepted liability in relation to this matter, I have had two applications for costs. One application from the applicants seeking indemnity costs, the other from the 1st respondent seeking its costs be paid for preparation and hearing from 7 November 2005 to 2 February 2006, which is the first day of hearing.

10 Mr Duggan, in the application for costs on behalf of the applicants, based his application on alternative bases. His first application was pursuant to clause 7.2 of the Ministerial Orders of 30 October 1998. That clause reads :

> Limit the liability of the insurer under the policy to not less than the aggregate amount of One Hundred Thousand Dollars ($100,000) for all claims in respect of any one home plus reasonable legal costs and expenses incurred by the insured (not being the builder or owner builder) associated with the successful enforcement of a claim against the insurer.

11 Mr Duggan said that that clause means in fact that there should be an indemnity order and he cited some cases.

12 Mr Forrest, on behalf of the 1st respondent, said that I have no jurisdiction to award costs under clause 7.2 because there is no decision of the 1st respondent in relation to that matter and therefore I have no jurisdiction to award costs pursuant to the Ministerial Orders. I asked Mr Forrest for authority on this matter because the proposition in relation to that clause, which is only a clause would come into operation after a claim has been dealt with, in my view, sounded extraordinary. He was unable to produce any authority on the matter. However, on consideration of what I intend to do, it seems that I will not have to consider that point.

13 Mr Duggan's second point was that he referred me to an offer of compromise which was made the day that his instructors received instructions from the applicants in this matter. I pause here to state that prior to that time, the applicants had been acting on their own behalf.

14 On 7 November 2005, Noble Lawyers, made an offer pursuant to Division 8 Part 4 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) and that offer is that if indemnity is granted to the applicants by the 1st respondent and each party would bear their own costs. That offer seems to be in the form contemplated by s 114 of the VCAT Act.

15 Mr Duggan said that his clients have done better or as well as the offer that was made and, under those circumstances, his clients should have indemnity costs. This really goes perhaps to the heart of the matter because the problem is that the question upon which this matter was ultimately determined was raised by the applicants for the first time at the

commencement of this hearing which was 2 February. Towards the end of Mr Duggan's opening address, he raised the point that there had been a deemed acceptance of the claim pursuant to the policy and, as such, the matter could be determined on that point.

16 It was then for Mr Forrest to give his opening address in which he informed me that that was the first time that this matter had been raised with the 1st respondent and I have got no doubt that that information was correct. Mr Forrest requested time to prepare his submissions on the preliminary point that had just been raised. In my view, it was entirely reasonable that Mr Forrest made that application. As a result, the matter was adjourned to the next day (being the early afternoon when that happened).

17 The next day the matter was argued as to whether the 90 day deeming provision was relevant to this policy and the Ministerial Orders in this proceeding in light of the fact that the original insurer in this matter was HIH Insurance and by reason of Government legislation his client had taken over the responsibility for the policy. After hearing argument, I ruled on that matter in favour of the applicants. The issue was raised late in the argument as to whether the 90 day provision may be extended. Unfortunately, Mr Duggan did not have a copy of the relevant ministerial orders until very late in his argument and Mr Forrest did not have a copy at all, which was somewhat surprising. However, as a result of that, the matter was further adjourned to today (Mr Forrest being unavailable on Monday).

18 When the matter came on for hearing today, Mr Forrest conceded the issue that there was no jurisdiction to extend time and made further submissions as to whether I should hear evidence as to the extent of the liability and I ruled against Mr Forrest on that matter. It is in those circumstances that both parties have made the application for costs.

19 In my view, Mr Forrest had correctly said that indemnity costs should only be awarded where there has been conduct which is of a nature that is improper by the party whom costs would be ordered against. Apart from one instance of a letter, I do not believe that there has been any conduct by the 1st respondent in this matter that would suggest that it has acted improperly. Perhaps it could be said that the 90 day point could have been raised by it and it should have been known, but on the other hand the applicants could have notified that point to the 1st respondent a lot sooner than what happened. The instance where I say the 1st respondent's conduct leaves some room for criticism is that by a letter of 30 September, the solicitors for the 1st respondent wrote to the applicants, who were then acting on their own behalf, saying that they estimate their client's legal costs to be at least $25,000 plus GST. The letter stated : The reasons why we are confident that VCAT will find in favour of our client are, in substance, set out in our client's defence". In the penultimate paragraph of that letter, it is stated :

> If this offer is not accepted by 14 October 2005 and you achieve a less favourable result at a hearing or lose your appeal, then our client reserves the right to produce this letter to the Court and will apply for an order for costs against you on a solicitor and client basis in accordance with the principles in *Calderbank v Calderbank* and *Cutts v Head* and also adopted in the decision of His Honour Justice Gillard in the Supreme Court of Victoria in *M T Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No 3)* [2000] VSC 163.

20 In my view, that letter was clearly written to intimidate the applicants knowing the applicants did not have legal representation at that time and did not put the other side of the case. As the respondent is a Government agency, I accept what Mr Duggan said that they should be a model litigant. A model litigant, particularly when a party does not have solicitors, should put the other side of the case and they failed to do that. But that is the only criticism I make of their conduct. However, that leaves the question as to what should happen with the costs of this proceeding.

21 The fact is that there was no obligation on the applicants to announce that it was going to pursue the 90 day point earlier than what it did. There were no pleadings ordered or requested of the applicants. As such, it cannot be said that they were in breach of any orders. Mr Duggan has said that the 1st respondent was in breach of the order by not having served its report in October 2005, it was only served in January 2006. However, in my view, that does not take this application for costs any further.

22 I agree basically that there has been no wanton or malicious conduct by the 1st respondent. Under those circumstances, I do not believe it is appropriate for me to exercise my discretion under s 114 of the VCAT Act to order indemnity costs. I might say at this stage that whether I were to order costs pursuant to clause 7.2 of the Ministerial Orders or pursuant to Division 8 Part 4 of the VCAT Act in this instance, the same result is likely to apply, as I do not think it would be reasonable to order indemnity costs. In this particular matter, there would be no different result and that is why I am saying the argument by Mr Duggan does not take the matter any further in relation to clause 7.2. However, I do believe I can take into account all matters when coming to the conclusion of what costs should be awarded and I agree with Mr Forrest that the Tribunal does have, pursuant to Part 4 Division 8 of the VCAT Act, an unfettered discretion in this matter, a discretion which has to be exercised properly.

23 In coming to a conclusion, I take into account –

- the offer of compromise that was made by the applicants, which in the circumstances is sufficient to enliven a costs jurisdiction in the Tribunal pursuant to the VCAT Act
- the matters that were referred to in clause 7.2
- the letter to which I have referred written on 3 September 2005

- that the applicants have been successful in this proceeding
- the fact that the applicants could have been in a position to raise the 90 day point earlier than what they did but they failed to do so
- the fact that the proceeding raised complex and difficult issues of law
- the fact that the 1st respondent (even though Mr Forrest's explanation was quite proper, and I accept what Mr Forrest had to say that he did not receive instructions about the abandonment of the extension of time argument until this morning) should have been able to notify the applicants somewhat earlier than what it did, that it was not going to take the point in relation to the extension of time. I noticed that Mr Forrest, even though I accept the fact he did not have instructions on this matter, was able to come this morning with an outline of written submissions in the event that that point was not successful.

I take all these matters into account and I also note, as a result, Mr Duggan did work yesterday on this matter which was wasted.

24 Having taken all these matters into account, in my view, it is appropriate that the application for costs by the respondents be dismissed but an order for costs against both respondents (I noticed that Mr Russell had nothing to say on these matters).

25 It then comes to the question of what costs should be awarded. I have said that indemnity costs would not be appropriate in these circumstances. Under the circumstances I have referred to, in my view, the appropriate order for costs is that from 7 November 2005 the respondents pay the applicants' costs, such costs to be taxed in default of agreement on County Court scale "C", noting that had there been no fault on behalf of the applicants, I would have ordered County Court scale "D", or perhaps even Supreme Court scale. By that I mean it would have been desirable for the applicants to inform the respondents about the 90 day point at an earlier time. I will make that order accordingly.

Robert Davis
Senior Member