VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D339/2003

CATCHWORDS

Costs, remitter, basis of costs assessment, scale by which assessed, offers to settled, assessed by Tribunal, appointment of special referee

1ST APPLICANT	Glenn Ryan
2ND APPLICANT	Nardia Papas
RESPONDENT	Housing Guarantee Fund Ltd
WHERE HELD	Melbourne
BEFORE	R.J. Young, Senior Member
HEARING TYPE	Costs Hearing
DATE OF HEARING	21 March 2006
DATE OF ORDER	5 March 2007
CITATION	Ryan v Housing Guarantee Fund Ltd (Domestic Building) [2007] VCAT 331

ORDER

1 The respondents are to pay the applicants' costs of this proceeding on the basis that such costs are the reasonable costs and expenses incurred by the insured associated with the successful enforcement of the claim against the insured and such costs will commence with the preparation of the applicants' claim on the insured; such costs will be on a party and party basis and are to be assessed on Scale *'D'* of the County Court Scale.

2 This proceeding is set down for a directions hearing at 2.15 pm on 29 March 2007 at 55 King Street Melbourne before Senior Member Young to address:-

(a) how the applicants' costs are practically to be assessed and fixed;

(b) the certification of Counsel's fees; and,

(c) any other matters the parties consider should be put before the Tribunal.

R.J. Young

Senior Member

APPEARANCES:

For Applicants	Mr D. Aghion of Counsel
For Respondent	Mr S. Stuckey of Counsel

REASONS

A. INTRODUCTION

1 This hearing arises out of the order of the Honourable Justice Mandie of the Supreme Court of Victoria in proceeding No. 8747 of 2004 which was an appeal against my decision in *Ryan v Housing Guarantee Fund Limited* [2004] VCAT 1883 of 27 September 2004. In the orders made on 23 June 2005 in *Housing Guarantee Fund ltd v V. Ryan and Anor* [2005] VCAT 213 His Honour at Order 4 ordered as follows:-

> 'The order of the Victorian Civil and Administrative Tribunal, constituted by Senior Member R. Young, made on 9 August 2004 is set aside and in lieu thereof it is ordered that Glenn Ryan and Nardia Papas are entitled to have their reasonable legal costs and expenses of enforcing the claim against the Housing Guarantee Fund Limited paid by Housing Guarantee Fund Limited, such costs to be agreed or, failing agreement, to be assessed by the Senior Member of the Victorian Civil and Administrative Tribunal.'

2 By way of background, this proceeding arose out of an application made by the home owners, Glenn Ryan and Nardia Papas ('*the applicants'*), for a review of a decision of the Housing Guarantee Fund ('*the respondent'*). This application was settled between the parties prior to any hearing of the matters in dispute, with the exception of the applicants' entitlement to interest and costs. The substantive application settled on the basis that the respondent would pay the applicants the sum of $100,000 plus their reasonable legal costs and expenses on 29 July 2004. Prior to that settlement the applicants had made an offer of compromise of 30 October 2003 whereby they signified their willingness to accept payment from the respondent of $90,000 in full and final settlement of their claim. On 9 August 2004 I heard the parties in relation to these matters still in dispute and handed down my decision on 27 September 2004. It is in relation to the matter of costs that this matter has been remitted to the Tribunal.

3 In my decision upon costs I had found that the applicants were entitled to their costs under a contractual obligation on the respondent under the contract of insurance between them and the words of that entitlement in the contract of *'reasonable costs and expenses'* entitled the applicants to have their costs assessed on an indemnity basis, to be agreed; and, failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act* (*the Act*). His Honour found that my decision was incorrect, firstly, as to the basis of the costs award and, secondly, that the assessment of such costs came within the jurisdiction of the *Act*.

4 Under the remitter from His Honour I am required, taking into account His Honour's findings, to assess the basis upon which the applicants' costs are to be assessed and the method by which they are to be assessed.

B. APPLICANTS' SUBMISSIONS

5 The applicants submitted that the remitter to the Tribunal was to assess the applicants' costs. The applicants' primary submission was that they were entitled to their costs on an indemnity basis. If that was not accepted by the Tribunal, they submitted that they were entitled to their party and party costs until the date of the service of the offer to settle of 30 October 2003 and because of the fact that this offer was less than the settlement sum, thereafter on an indemnity basis. If neither of these submissions was accepted their final submission was that they were entitled to their costs on a party and party basis to be assessed in accordance with Scale *'D'* of the County Court Scale. The applicants submitted that the assessment of fixing of the costs should be carried out by myself or, alternatively, a special referee appointed by the Tribunal. The applicants recommend that I appoint Senior Registrar Jacobs, who is the costing specialist at this Tribunal.

6 The applicants agree that their entitlement to costs arises under an express obligation in the contract of domestic building insurance that the respondent insurer pay their *'reasonable legal costs and expenses incurred by the insured associated with the successful enforcement of a claim against the insurer'*. The applicants submitted that such costs should be assessed on an indemnity basis, notwithstanding that Mandie J found at paragraph [22] of his decision that *'the order of VCAT is clearly incorrect to the extent that it requires that costs are to be paid on an indemnity basis. An order in those terms is not supported by the language of the HIH policy.'* The applicants submit that the decision of the Court of Appeal in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No. 651 Pty Ltd* [205] VSCA 165 which holds that such costs under a domestic building contract are to be assessed on a party and party basis can be distinguished. The applicants' basis for this submission was that in *Maclaw (supra)* the insurance policy under consideration was issued in the name of the builder as the insured whereas the policy in this proceeding was naming the home owner as the insured. Therefore, the applicants submit that *Maclaw* (supra) may be distinguished on its facts.

7 Alternatively, the applicants acknowledge that the assessment of the effect of the offer of compromise cannot be made under Part 4 Division 8 of the Act, because their entitlement to costs arises under their rights under the domestic insurance contract with the respondent. However, the applicants submit that the normally recognised factors are to be taken into account by the Tribunal in assessing whether to exercise its discretion in deciding whether costs are to be on an indemnity basis. For costs to be awarded on an indemnity basis under the normal common law principles, the basis of awarding such costs must be due to *'special circumstances'* arising in the case: *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 and one of those special circumstances that has been identified in the authorities on this point is *'an*

imprudent refusal to accept an offer of compromise': *Colgate Palmolive Coy v Cussons Pty Ltd* (1993) 46 FCR 225 at 233.

8 In the circumstances of this proceeding the applicants submit these special factors are that:-

(a) the respondent unnecessarily prolonged the litigation by failing to accept their offer that was for a sum less than the parties ultimately settled for, which settlement took place some nine months after the offer had been made and not accepted; and,

(b) the applicants were put to additional legal expense over this period

Therefore, the applicants say, after an offer more favourable than the final settlement is made, their actual legal costs incurred must, *ipso facto*, be *'reasonably'* incurred.

9 As the applicants' costs are to be assessed under their contractual entitlement, they submit that such costs should include matters that take place prior to the filing of an application in the Tribunal and they cite the authority of *Trajkovski v Tasevski* [2001] VCAT 1897. They submit that this should include the costs associated with the first claim which was made on the HGF on 19 February 2002.

10 The applicants submit that the appropriate procedure for the practical assessment of their costs is for the Tribunal to use its power to appoint a referee under Section 95(1)(a) of the Act to appoint Senior Registrar Jacobs as such special referee.

C. RESPONDENT'S SUBMISSIONS

11 The respondent submitted that the only task before the Tribunal is to decide the question posed by Order 4 of Mandie J of 23 June 2005, which is the legal costs to which the applicants are entitled. Such entitlement arises under the contract of domestic insurance between the parties and not under Section 109 of the Act. The contractual entitlement of their *'reasonable legal costs and expenses'* was interpreted in the Court of Appeal decision of *Maclaw* (supra) to mean party and party costs. The decision relied upon by the applicants to ground their claim for costs on an indemnity basis, *Reid v FAI General Insurance* [1999] VCAT 1773 was overruled by the Court of Appeal in *Maclaw* (supra).

12 The respondent submitted that the applicants cannot temporally split the basis on which the costs are assessed, as between the period of time over which costs may be assessed on one basis and a further period of time when costs are assessed on a different basis. Further, the offer to settle is not relevant to the consideration of the assessment of costs in this case by reason of the fact that the parties settled the substantive dispute and all that remained for the Tribunal to decide in its original decision was to construe the effect of the words *'reasonable costs and expenses'* under the contract.

13 The respondent submitted that the Tribunal is required to find that the applicants' costs should be assessed on a party and party basis as Mandie J had found in his decision that my previous order as to the applicants being entitled to have their costs assessed on an indemnity basis was *'clearly incorrect'*. Therefore, the respondent submits, I am bound by the decision of Mandie J. Further, the Court of Appeal in *Maclaw* (supra) has found that the appropriate basis of assessment under the applicants' contractual entitlement of *'reasonable costs and expenses'* is on a party and party basis.

14 As to the actual method of assessment by which the applicants' costs are to be fixed the respondent submits that:-

(a) assessment cannot be referred to the Senior Registrar as a referee; as observed by Mandie J at paragraph [23] of his decision *'In my opinion the Principal Registrar has no power to assess costs of a kind involved in this case because the VCAT Act does not empower the Principal Registrar to do so, nor does it enable such power to be delegated to the Principal Registrar. The power to assess costs under Section 111 of the VCAT Act in my view relates only to an order for costs under Section 109 of the VCAT Act. I will substitute for the order as to costs made by VCAT and order that the defendants are entitled to have their reasonable legal costs and expenses in enforcing the claim paid by HGFL, such costs to be agreed, and failing agreement to be assessed by a member of VCAT.'*; and

(b) the respondent submits that the proper course is to appoint as a special referee a person who is an expert in the assessment of costs.

D ANALYSIS

15 In relation to the applicants' submission that they are entitled to have their legal costs assessed on an indemnity basis, I am not sure this is correct. I consider that I am bound by the reasoning of Mandie J in his decision of 23 June 2005; the only exception would be if it could be established to me that on the basis of binding decisions of higher authority, directly applicable to the circumstances of this matter, His Honour's decision was incorrect. Given the decision in *Maclaw* (supra) I do not consider that his decision is incorrect. Therefore, I consider that the applicants are not entitled to have their costs assessed on an indemnity basis under the contractual obligation of the respondent to pay their *'reasonable costs and expenses'*.

16 In relation to the applicants' submission that the decision in *Maclaw* (supra) can be distinguished on the basis that Ormiston J with whom Nettle JA agreed had founded the reasoning of his decision upon the basis that the insured in the domestic building contract of insurance under consideration in that case was the builder; whereas, in this proceeding the insured is the owner. I consider this submission to be incorrect on two basis. First, although I accept that one of the facts that Ormiston JA considered that costs should be on a party and party basis was that the builder was the

insured, I consider that the same analysis applied to a case where the insured was the home owner would result in the same decision. The predominant tenor of Ormiston JA's decision was that when analysed there was no reason that the contractual term, *'reasonable costs and expenses'* should be taken to mean such costs and expenses were on an indemnity basis.

17 Secondly, the fully reasoned decision of Hansen AJA was not bound upon the fact that the builder was the insured and His Honour held that the appropriate basis was on a party and party basis. At paragraph [118] he found:-

> 'Regarding the matter for myself, the phrase 'legal costs and expenses' refers to costs on a party/party basis. If anything, the introduction of the word *'reasonable'* reinforces this understanding of the phrase, rather than indicating some greater right to costs. As the judge said, the parties used the phrase in the policy but there is nothing in the policy or the ministerial order which carries the meaning in the settlement terms that costs are to be on a basis other than party/party.'

Based on the general tenor of Ormiston JA's decision and the decision of Hansen AJA, I find that *Maclaw* (supra) stands for the proposition that the words *'reasonable costs and expenses'* as used in the insurance contract mean that costs should be assessed on the basis of party and party costs.

18 Nettle J in *Maclaw* (supra) also agreed on the findings in the decisions of Ormiston JA and Hansen AJA in the following terms:

> '90 I agree with their Honours that the expression means the costs and expenses of Maclaw No. 651 Pty Ltd assessed on the basis which would properly have applied if orders for costs had been made in favour of Maclaw No. 651 Pty Ltd as the successful party in the Domestic Building List proceedings.
>
> 91 I also agree with their Honours that where an order for costs is made in favour of a successful party in Domestic Building List proceedings, the costs should ordinarily be assessed on a party/party basis. If and to the extent that *Reid v FAI* suggests otherwise, I agree with Ormiston JA that it is wrong and should not be allowed.'

19 The applicants' alternative submission is that their costs should be assessed on a party and party basis up until the date of the offer to settle of 30 October 2003 and thereafter on an indemnity basis as a result of that offer. The applicants accept that the effect of their offer cannot be assessed under the statutory scheme set out in Section 112 of the Act as their entitlement to costs dos not arise under the Act but from the contract of insurance. The applicant say that the Tribunal is entitled to take the offer into account under the principles of *Calderbank v Calderbank* [1995] 3 All ER 333 and *Cutts v Head* [1994] 1 All ER 597 on the basis that on its face the offer is a reasonable offer which the respondents refused and this resulted in

increasing the length of the proceeding until the terms of settlement were entered into on 29 July 2004. I accept the applicants' proposition that the offer cannot be assessed under Section 112 of the Act nor does the applicants' right to costs arise under Section 109, but rather as a contractual right under the terms of the domestic building insurance.

20 Whether and how I can take the offer into account under the principles of *Calderbank* and *Cutts* depends to a large extent on the terms of the offer. The relevant part of the offer dealing with those principles is the sixth paragraph of the offer of 30 October 2003, which states as follows:-

> 'Further or alternatively, the offer herein is made without prejudice and under reservation of the applicants rights to rely upon the offer on a question of costs if in all the circumstances it is appropriate to do so, and is made in accordance with the principles contained in *Calderbank v Calderbank* [1995] 3 All ER 333 and *Cutts v Head* [1994] 1 All ER 597.'

21 As I read the cited cases, the central tenet of the principles underlying such offers are that *'it can be said that the offer is clear, precise and certain for the purposes of the common law principles governing the construction of Calderbank offers of settlement'*; *Perry v Comcar* [2006] FCA 33. In that decision Greenwood J held that:

> 'The respondent's letter of offer was not sufficiently clear so as to convey without any room for ambiguity that the applicant as a term of the proposed settlement would obtain his tax costs of the proceeding to the date of the offer. Accordingly, the letter of offer did not satisfy the central requirement of a Calderbank letter.'

22 The respondent attacks the offer to settle on the basis that it cannot be used to compare against the terms of a settlement as it was not a valid offer because *Calderbank* offers only apply where the adjudicator makes a substantive determination in the proceeding and such offers are not applicable where the parties settle. I am inclined to agree.

23 However, I consider the most important aspect is the nature and terms of the offer. For an offer to have effect it must be sufficiently clear and precise: *Dr Martens v Figgins Holdings Pty Ltd (No. 2)* [2000] FCA 602 per Goldberg J at paragraph [24], *Fyna Foods Australia Ltd v Cobannah Holdings Pty Ltd* [2004] FCA 1212 a decision of Kenny J. The need for precision and clarity is to allow the offeree to make an informed comparison between what it sees as its overall position, factually and legally, in the litigation and the position that is delineated in the offer. If the offer contains any real ambiguity as to the settlement position it proposes then the offeree cannot make a valid comparison. I consider that the words giving rise to an ambiguity in the offer to settle are that if successful the offeror would rely on the offer in relation to costs *'if in all the circumstances it is appropriate to do so'*. I consider that to allow the offeree to make an informed decision such circumstances need to be made

explicit. Therefore, I do not consider the offer to settle is sufficiently clear and precise to be effective under the principles cited.

24 The parties agree that if I did not accept that there was some portion of the applicants' costs that would be on an indemnity basis, that the applicants' costs should be on a party and party basis assessed in accordance with Scale *'D'* of the County Court Scale, and, I so find.

25 During the submissions the applicant made a further submission that it was entitled to its costs under Section 109 of the Act; however, after a reply by the respondent and some discussion that submission was withdrawn

26 In relation to Mandie J's decision that the costs should be assessed by the Tribunal, I consider that I am not properly qualified to fix the applicants' costs on a party and party basis, either as to quantum or to complete the task within a satisfactory time given the Tribunal's workload. The respondents have submitted that they do not wish to have Senior Registrar Jacobs assess the costs but would prefer the appointment of a costs consultant. The applicants consider that Senior Registrar Jacobs would be appropriate. I would ask the parties to discuss this matter between themselves and if possible agree on a recognised costs consultant with which they are both willing to entrust the assessment of the costs and I would appoint such costs consultant as a referee. I personally prefer the appointment of Senior Registrar Jacobs as I do not anticipate that this should involve the parties in any costs; and, secondly, the party and party costs will be assessed in accordance with the costing practice of the Tribunal. As to the respondent's concern that Senior Registrar Jacobs cannot be appointed as this would mean that the costs were being fixed by the Principal Registrar, in breach of Mandie J's ruling; I consider that if the Senior Registrar is appointed as a special referee under Section 95 of the Act then he is not deputised under Section 111 of the Act; then he is not being ordered by the Tribunal to assess the costs; but rather to investigate and decide the question of costs in accordance with Section 95 of the Act which is within Division 6 of Part 4: *'Referral to Experts'*. He is not operating as the Tribunal, but rather in his own capacity as an independent expert. I will leave the final decision on this matter to the parties unless they cannot agree.

27 These matters will be finalised at a directions hearing that I will fix some short time after this determination on costs is published. I also consider that certification for Counsel may need to be addressed.

R.J. Young
Senior Member

RJY:RB