**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D339/2003

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Certify for Counsel, Respondent seeks costs of remitter, Offer, Calderbank Offer. SS.95 reference.

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| **APPLICANTS** | Glenn Ryan, Nardia Papas |
| **RESPONDENT** | Victorian Managed Insurance Authority |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member R. Young |
| **HEARING TYPE** | Directions Hearing |
| **DATE OF HEARING** | 10 May 2007 |
| **DATE OF ORDER** | 1 June 2007 |
| **CITATION** | Ryan v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 965 |

## ORDER

1 Under s119 of the Act, I amend Order 1 of my orders of 5 March 2007; firstly, I delete the word "respondents" and substitute the word "respondent"; and, secondly, I insert the words ", including all reserved costs," after the word "proceeding".

2 Pursuant to s95 of the Act, the question of the quantum of the Applicants' costs of the proceeding and of the claim, as ordered by Order 1 of the orders of 5 March 2007, be referred to a special referee.

3 Under s95 of the Act, Senior Registrar Anthony Jacobs is appointed as the special referee to decide the question set out in Order 2 herein.

4 The special referee shall express an opinion as to each of the party's fair and reasonable costs of the special reference.

5 By 9 July 2007 the Applicants shall file and serve and deliver to the special referee a bill of costs in taxable form.

6 By 5 August 2007 the Respondent file and serve and deliver to the special referee a list of objections to the Applicants' bill of costs.

7 Direct that the assessment shall be conducted as the special referee considers fit.

8 The Respondent shall, in the first instance, pay the Applicants' party and party costs of the special reference assessed on Scale 'D' of the County Court Scale; with a right reserved to the special referee to give a contrary opinion in respect of which party should bear the costs of the special reference.

9 I certify for the fees of the Applicants' Counsel in the sum of $2,800.00 per day for appearance and $2,000.00 per half day for appearance.

10 The Applicants shall pay the Respondent's costs of the remitter from the Supreme Court ordered by Mandie J. in his orders of 23 June 2005, such costs to be on a party and party basis assessed in accordance with Scale 'D' of the County Court Scale.

**11 This hearing is adjourned to a date to be fixed, being a date after the Tribunal has been informed by Senior Registrar Jacobs that he has finalised his determination as to the Applicants' costs and his opinion as to the party's costs of the special reference, together with whether he has an opinion contrary to that of the Respondent paying the Applicants' party and party costs of the special reference.**

**SENIOR MEMBER R. YOUNG**

**APPEARANCES:**

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

## REASONS

1 This hearing has been called to consider my decision of 5 March 2007 in relation to the question of costs remitted by the Honourable Mr Justice Mandie J in his orders of 23 June 2005. In the orders accompanying my determination I set down the following questions for consideration at this hearing:

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

(b) the certification of the Applicants' Counsel's fees;

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

2 As a result of these orders the parties raised a number of other matters for the consideration of this hearing, these were:

(a) that the Respondent's name in the proceeding had been changed to the "Victorian Managed Insurance Authority" but this had not been effected on the Tribunal's database;

(b) by consent that Order 1 of my orders of 5 March 2007 be amended so that –

(i) "Respondents" be amended to "Respondent";

(ii) the phrase ", including all reserved costs," be inserted after the word "proceeding" in the order;

(c) the Respondent sought its costs of the remitted costs hearing on an indemnity basis on the ground that it had served an offer that was more favourable to the Applicants than my determination of 5 March 2007, such offer being served under Division 8, Part 4 of the *Victorian Civil and Administrative Tribunal Act (*"the Act"); and

(d) alternatively, it was fair under s109 of the Act to order that the Respondent receive its party and party costs of the remitted hearing assessed in accordance with Scale 'D' of the County Court Scale.

3 To deal with the consent matters first, I note from the appearance sheet that the database of the Tribunal has been changed, with the name of the Respondent being denoted as "Victorian Managed Insurance Authority". In relation to the amendment under the slip rule I will make orders sought by the parties.

4 In relation to the parties' agreement that I should appoint a referee under s95 of the Act to assess the reasonable costs of the Applicants, the parties have agreed that I should appoint Senior Registrar Jacobs to that role and I will so order. There is a complication that will arise in the future in relation to the costs of the reference itself and I will deal with that further on in this determination.

5 I will deal with each of the matters in issue separately as they are independent and do not reflect upon each other. I will start with the application for the certification of the fees for the Applicants' Counsel.

6 The Applicants sought an order in relation to their costs of enforcing their claim against the insurer, requesting that the Tribunal should certify for their Counsel in the sums of $280.00 per hour for paperwork and Counsel's preparation, $2,800.00 for day for appearances and $2,000.00 per half day. The Respondent opposes that there be certification for Applicants' Counsel on the basis that my order of 5 March 2007 holds that the Applicants' costs be assessed on Scale 'D' of the County Court Scale and as such this scale is the proper rate of remuneration for Applicants' Counsel. It cited in support the decision in *Wightman v Johnson* [1995] 2 VR 637 where Phillips JA in the leading judgement observed that:

> *"As an application for a "higher fee" is apparently required, one would expect that the application must be justified before it may succeed; and so it may be said that the scale fee should be allowed in the absence of any justification for a higher fee". To that extent only, and in that sense only, it may be permissible to speak of a "bias" towards the scale fees; but even if that be correct, it applies only in the case of junior counsel in the circumstances of this case".*

The Respondent submitted that no justification has been shown to justify ordering a "higher fee", and it submitted that such justification could not be made out. The Respondent pointed out that the assessment of costs was an interlocutory process for which Scale 'D' allowed an appearance fee of $389.00, regardless of the time such an application took. Further, the Tribunal was a low cost informal jurisdiction and should, therefore, be less amendable to certifying for higher fees than should the courts; presumably this translates into requiring a higher degree of justification in allowing for a similar level of higher fees.

7 Secondly, the Respondent submitted that the Applicants' request that its Counsel's fees for paperwork and preparation be certified was an application that was very rarely, if ever, granted. These items of work were either covered by specific items in Scale 'D' or were encompassed in such items; for example, time of Counsel's preparation for appearance being encompassed in the Scale 'D' item for Counsel's fee for appearance on trial. If the hourly fee was granted this would significantly increase the costs to which the Applicants were entitled above Scale 'D' and this was inappropriate given the decision of Mandie J. in this matter.

8 The Applicants agree that a Tribunal hearing in relation to costs is an interlocutory application. The Applicants observed that far from being a normal interlocutory application taking a brief appearance, the original hearing as to costs took one day and the remitted costs hearing took one and a half days. There was a great deal of preparation and the use of affidavits, both parties' cases involved detailed legal submissions. This, the Applicants submit, was sufficient to provide the justification required by

*Wightman*. In relation to the Applicants' request for an hourly fee, the paperwork and preparation, Applicants' Counsel had personal experience of being granted such a fee in the County Court for preparation of a proceeding (although somewhat unclear, I took this to be preparation for Counsel's appearance). Given the amount of preparation and paperwork required in this remitter he considered such a request for an hourly fee was justified.

9 In analysing this application, although I have ordered that the Applicants' fees be determined on Scale 'D', I do not consider that I am bound by the Civil Procedure Rules of the County Court in relation to how Scale 'D' should be applied. It should be remembered that the source of my power to award the Applicants' their costs of enforcing their claims against the Respondent does not arise from the Act but rather from the term in the insurance contract between the parties that grants the Applicants their "reasonable costs of enforcing their claim against the insurer". That being the case, the criteria which I should apply in assessing whether or not to grant this application is whether higher fees can be "reasonably" justified. I do not consider that it is reasonable to expect that $389.00 would be sufficient remuneration to the Applicants for the actual fees that they would have had to pay their Counsel for a hearing of a day or greaters duration. The Respondent's Counsel submitted that the appearance fees sought by the Applicants' Counsel were too high for the size and level of complexity of the costs issues that arose. However, I do not consider this is correct. The cost issues were vigorously disputed and debated and included complex submissions of law. I consider that the use of experienced junior counsel was required to properly and comprehensively put the Applicants' evidence and legal submissions. Therefore, I consider that the appearance fees sought are justified and I will so order. In relation to the hourly fee for paperwork and preparation I consider that these items are specifically covered or encompassed in the items set out in Scale 'D; and as that is the appropriate scale, I consider that there is insufficient justification to order higher fees for these specific items.

10 The second matter that I will now deal with is the Respondent's application that the Applicants pay its costs of and incidental to the remitter hearing following Mandie J.'s orders of 23 June 2005, where such costs have been incurred after the date of the offer of 30 January 2006 and which should be paid on an indemnity basis. The Respondents offer to the Applicants was to pay their party and party costs of the proceeding on County Court Scale 'D' and the Respondent submits that the terms of the orders in my determination of 5 March 2007 were more favourable to the Respondents than the terms they had offered to the Applicants in their offer of 30 January 2006. Therefore, under s112 of the Act they are entitled to their costs on an indemnity basis. Alternatively, it submitted I could view the offer as a normal offer made without prejudice save as to costs, and, when assessed against the recognised criteria by which such offers were assessed:

*Calderbank v Calderbank* [1995] 3 All ER 333, the Respondent was entitled to its costs on an indemnity basis. The Respondent cited in support the decision of Gillard J. in *M T Associates Pty Ltd v Aqua-Max Pty Ltd* (No 3) [2000] VSC 163, where at paragraph [66] his Honour observed:

> "But if the offer is not made in accordance with the rules when it could have, it is still a relevant matter to take into account on the question of costs".

And he concluded at paragraph [74] that:

> "In my opinion any form of offer assuming it can be adduced into evidence should be considered by the court on the question of costs and overly technical reasons given by another party for not seriously considering an offer should be rejected".

The Respondent submits further that if it is unsuccessful in it being granted its costs on an indemnity basis then in accordance with s109 of the Act and in particular the factors there set out in sub-section 109(3); it is fair for the Tribunal to grant it its party and party costs.

11 The Applicants submit that the Respondent's costs should not be granted on an indemnity basis as it considers that the Tribunal's decision as to the method of assessment of costs was not more favourable to the Respondent. In fact, the Applicants maintain that the determination was more favourable to the Applicants than the Respondent's offer of 30 January 2006 on the basis that my determination of 5 March 2007 expressly required that the assessment of costs would commence with the preparation of the Applicants' claim on the insured; whereas under the offer the costs were expressed to be in accordance with the Act and thereby such costs would commence with the lodgement of the application that commenced this proceeding. Secondly, the Tribunal's power to award costs in this proceeding arose from the contract of insurance between the parties and did not spring from Division 8, Part 4 of the Act; therefore, the provisions of that division were irrelevant in considering the issues in relation to costs in this proceeding. Thirdly, even if I consider the offer on the basis of a *Calderbank* offer, it should not be upheld as the offer is ambiguous; in that, it is not clear what "costs of this proceeding" entails as the costs here are being awarded under a term of the insurance contract; and, further, the decision is not more favourable than the offer. In relation to the Respondent's claim under s109 of the Act for party and party costs the Applicants pointed out the general rule in the Tribunal that each party bear their own and they denied that their claim had no tenable basis in fact or in law.

12 In reaching my decision I should first point that I consider that my power to award costs to the Applicants arises under the insurance contract as an express term of the insurance contract between the parties. However, that term is limited to the Applicants' costs and there is no reference in the insurance contract to the Respondent's costs. Therefore, a power to award

costs must exist if I am to award costs and that power is given by Division 8 Part 4 of the Act, the insurance contract being silent as to the costs of the Respondent. Therefore my sole source of power to award costs to the Respondent is the Act. Therefore, I consider that I should apply the provisions of Division 8, Part 4 of the Act to any application for costs by the Respondent/Insurer. When considering the Respondent's offer of 30 January 2007 I do not consider that the terms of the offer are more favourable to the Applicants than the orders in my determination of 5 March 2007; being the Applicants' party and party costs assessed on Scale 'D' of the County Court. The only difference between the offer and my determination being that such costs in the determination would commence with the preparation of the Applicants' claim on the insured. Therefore, I consider that the orders made by the Tribunal are not more favourable to the Respondent than the offer; if there is a leaning either way the statement in the determination that the costs are to commence with the preparation of the Applicants' claim on the insured would indicate that the determination is more favourable to the Applicants than the offer. Therefore, I do not consider that I should take the offer into account under s112 of the Act. Likewise, my conclusions as to the effect of the offer don't change when considering the offer from the viewpoint of a *Calderbank* offer as the effect of the terms of the offer when compared to the terms of my determination are no different when considering the offer under the Act or the common law principles governing offers which are discussed in *Aqua-Max Pty. Ltd.*; and, with which I agree.

13 That being said it was clear from the propositions put by the Respondent at the remitted costs hearing that its propositions were accepted by the Tribunal in preference to the submissions of the Applicants and when the parties positions are measured beside my determination the Respondent's case is substantially stronger than the Applicants. Further, this is an inter-parties' commercial dispute that, in its considerations of costs, has involved a number of hearings and complex submissions of law. Overall, I consider it is fair to find that the Respondent is entitled to its party and party costs of the hearings that have taken place since the remitter from the Supreme Court and such costs of the Respondent are to be assessed on Scale 'D' of the County Court Scale.

14 The parties were concerned as to the assessment of the costs of the reference before Senior Registrar Jacobs and how such costs should ultimately be borne. However, I do not consider that the Tribunal will be in a position to fix those costs or how they should be dealt with until the Senior Registrar's tasks are completed. At the parties' request I have ordered Senior Registrar Jacobs to provide his opinion as to the parties' fair and reasonable costs of the cost of the reference and whether he has an opinion that it is the Applicants that should bear the Respondent's cost of the reference, contrary to terms at first instance in Order 8 herein. The

provision of the Senior Registrar's opinion will provide me with assistance in reaching my final decision as to which party, if any, should bear the costs of the reference.

**SENIOR MEMBER R. YOUNG**