VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST	vcat reference No. D411/2006
CATCHWORDS	
Costs – s109 *Victorian Civil and Administrative Tribunal Act* 1998 – whether appropriate to exercise Tribunal's discretion	

APPLICANTs	Saheser Tabakglou, Suleyman Tabakglou
RESPONDENT	CGU Insurance Ltd (ACN 004 478 371)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	18 June 2007
DATE OF ORDER	16 August 2007
CITATION	Tabakglou v CGU Insurance Ltd (Domestic Building) [2007] VCAT 1906

Order

1. There are no orders as to costs

DEPUTY PRESIDENT C AIRD		

APPEARANCES:	
For Applicants	Mr M C Clarke of Counsel
For Respondent 1	Mr S Stuckey of Counsel

Reasons

1 On 5 April 2007 I dismissed the Applicant owners' application for a review of the decision of the First Respondent ('the insurer') to deny them indemnity under a Policy of Warranty Insurance in circumstances where the Certificate of Warranty Insurance had been altered. The Certificate of Warranty Insurance had been issued in the name of a registered builder, but had been subsequently altered and the name of the unregistered builder, with whom the Applicant owners had entered into a building contract, substituted.

2 I reserved the question of costs with liberty to apply. The First Respondent insurer seeks its costs on a party/party basis on County Court Scale D. It relies on a letter of 24 January 2007 and in particular the offer set out in paragraph 2 viz:

> Our client denies liability to your clients and it is of the view that your clients will not succeed in the proceeding. However, in an attempt to resolve this matter and avoid incurring additional costs, we are instructed for commercial reasons, to offer the following in settlement of the proceeding:
>
> 2.1 Our client pay your clients $1,000.00 (inclusive of interest and costs).
>
> 2.2 Upon payment of the settlement sum, your clients shall release and forever discharge our client and each and all of its past and present directors, employees, officers, servants, agents, successors and assigns from any claims, causes of action, suits, demands or liability for, or entitlement to, interest, costs, compensation, damages, indemnity, contribution, or any other relief whatsoever which the applicants now have or may have against our client in respect of, arising out of, or in relation to any of the facts, matters, circumstances or claims described in or the subject of the proceeding, including any outstanding orders for costs made in the proceeding;
>
> 2.3 Payment of the settlement sum will be made to your clients within 28 days of receipt by us of acceptance by or on behalf of your clients of the offer made to them herein;
>
> 2.4 This offer remains open for acceptance until 7 February 2007.
>
> 3. In the event that the offers or any of them are not accepted, and judgement in this proceeding is no more favourable to your clients than the offer made herein, our client will refer to this letter on the question of costs in accordance with the principles set out in *Calderbank v Calderbank* [1975] 3 All ER 353 and *Cutts v Head* [1984] 1 All ER 157 subsequently applied in the unreported Supreme Court of Victoria decision of Mr Justice Byrne in *Mutual Community Limited v Lorden Holdings Pty Ltd*

(unreported 23 April 1993), and in the decision of Redlich J in the Supreme Court of Victoria in the case of *Aljade and MCIC v OCBC* [2004] VSC 351.

3 Section 109 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.

4 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.

(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".

5 The First Respondent relies on s109(3)(c), (d) and (e). Mr Stuckey of Counsel, who again appeared for the insurer, submitted that the owners' case was always weak. Further, they had unreasonably failed to accept the insurer's settlement offer which was made at a time when discovery by the insurer was complete, and when it should have been apparent that their application for review had little chance of success. Mr Stuckey referred me to Redlich J's comments in relation to Calderbank Offers in *Aljade and MKIC v OCBA* [2004] VSC 351 at [49]

> The principle in Calderbank v Calderbank …exposes a litigant to the risk of a costs order if, taking into account all relevant considerations including the facts known to the offeree at the time of the offer, the offeree unreasonably ignores a reasonable offer of compromise…

and at [92]

> The lack of substance of the offeree's case and the fact that the issues were identified in the pleadings and readily to be understood may be decisive in assessing the reasonableness of the offeree's response. A Defendant is not entitled to assume that the rejection pf the Calderbank letter would carry not cost consequences and would necessarily or even probably be ignored by the Court.

6 Mr Clarke of Counsel, who again appeared on behalf of the owners, submitted there should be no order for costs. In relation to the 'Calderbank' offer he submitted the owners were not in a position to make a proper assessment of the offer when it was made in January as they had insufficient information at that time. I reject this. The insurer had discovered all relevant documents at that time, and it seems they had been inspected by the owners' solicitor. This alone is not sufficient to persuade me that I should exercise the Tribunal's discretion under s109(2).

7 However, as Senior Member Cremean observed in *Fasham Johnson Pty Ltd v Ware and Saunders* [2004] VCAT 1708 when considering whether a Settlement Offer complied with s112 of the *VCAT Act* and which included a statement that, in the alternative, the offer was made in accordance with the principles contained in Calderbank v Calderbank

> "In light of the regime fixed by ss112, 113, 114 and 115 of the Act, I would be in doubt that there is any room for a *Calderbank v*

> *Calderbank* offer to be made in proceedings in the Tribunal. I would think that an Offer of Compromise that does not comply with that regime cannot operate as an offer of compromise at all. The existence of that regime, moreover, seems to me that *Calderbank* offers are unnecessary.
>
> …
>
> A *Calderbank* offer (if this was one) cannot fetter my discretion on costs under s109. That discretion rests with me and I cannot be compelled to exercise it one way or the other providing I proceed "judicially" as that expression is understood and I am satisfied there are discretionary considerations pointing away from an order of costs to the Applicant.

8 This was a case where the primary issue before the Tribunal was a question of law – whether the owners were entitled to indemnity under the terms of the Policy of Warranty Insurance. Whilst the owners' case may not have been strong they were nevertheless, in my view, entitled to come to the Tribunal seeking a review of the insurer's decision and, in particular, have the Tribunal interpret their rights and entitlements under the policy of warranty insurance and the relevant Ministerial Order. Under s60 of the *Domestic Building Contracts Act* 1995 the Tribunal may review any decision of a warranty insurer. There can be no presumption that when an applicant for review is unsuccessful in having the decision set aside or varied it will be ordered to pay the insurer's costs. The Tribunal in considering any application for costs must always have regard to the primary position set out in s109 – each party will bear its own costs unless the Tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3).

9 Further, as I observed at paragraph 46 of my earlier Reasons:

> It is also clear that the owners have been let down by a system of checks and balances which has failed to protect them on this occasion. Although I make no findings as to their individual culpability I note that Mr Swenson referred them to Prestige Housing Constructions as a builder known to him; Mr Albert Mitchell, the registered building surveyor, appears to have carried out few or no checks before issuing the building permit, effectively 'rubber stamping' the paperwork prepared by Mr Chu or his employees who are not registered building surveyors, and the insurer through its broker – MBA Insurance Services issued the Certificates of Warranty Insurance without requiring a copy of the relevant contract.

10 I am not persuaded that it would be fair in all the circumstances to exercise the Tribunal's discretion under s109(2) of the Act and depart from the provisions of s109(1) that each party shall bear their own costs.

11 I also note in passing the Applicants' concern and frustration that the

Respondent has not refunded the insurance premium. During the initial hearing it was indicated that the premium had been retained pending resolution of the Applicants' application. The Applicants believe that the premium was included in the moneys they paid to the 'builder'. It is of course a matter for the Respondent, but if there are no relevant policies of insurance which relate to the works one cannot help but wonder as to the basis on which these premiums have been retained.

DEPUTY PRESIDENT C AIRD		