VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D831/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – costs – Policy of Warranty Insurance – s109 *Victorian Civil and Administrative Tribunal Act* 1998

[2006] VCAT 1056

FIRST APPLICANT	Yuri Worontschak
SECOND APPLICANT	Anne Carrick
RESPONDENT	Allianz Australia Insurance Limited
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 May 2006
DATE OF ORDER	5 June 2006

ORDER

1. The Respondent shall pay the Applicants' party/party costs of and incidental to the preliminary hearing on 14 March 2006 and the directions hearing on 18 May 2006, in default of agreement to be assessed by the principal registrar on County Court Scale 'D'.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the First Applicant:	Mr B. Carr of Counsel
For the Second Applicant:	Mr B. Carr of Counsel
For the Respondent:	Mr B. Powell of Counsel

REASONS

1. On 27 March 2006, following a preliminary hearing on 14 March 2006, I determined that the Respondent was deemed to have accepted the Applicants' claim for indemnity under the Policy of Warranty Insurance ('the Policy'), as to liability only. The question of quantum is yet to be determined. I reserved the question of costs with liberty to apply. The Applicants' application for costs is in the alternative: first under the terms of the Policy as the costs of the enforcement of their claim for indemnity, and alternatively, under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the *VCAT Act').*

2. It became apparent during the hearing that the application under the Policy was made under the expectation that, if successful, this would give rise to an order for solicitor/client or indemnity costs. However, in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 it is clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. Nettle JA said, when considering the meaning of 'reasonable legal costs':

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

3. In any event, whilst I have determined that the Respondent is deemed to have accepted the Applicants' claim, as to liability, their claim under the policy has not been finalised. As noted above, quantum has yet to be determined, and on 18 May 2006 orders were made whereby the proceeding was referred to an Administrative Mention on 26 June 2006 *'at which time the Respondent shall advise whether an assessment of quantum has been completed and if not the anticipated date of such assessment…'*. Any orders

for costs under the Policy would appear to be premature whilst the question of quantum remains outstanding.

4. As noted above, the Applicants' alternative application is for an order for costs under s109 of the *Victorian Civil and Administrative Tribunal Act* 1998. Whilst s109 starts with the premise that each party should bear its own costs, I am persuaded this is an appropriate case for me to exercise the Tribunal's discretion under s109(2) having regard to the matters set out in s109(3).

5. From my Reasons for decision dated 27 March 2006, it is apparent that the preliminary questions required the consideration and determination of complex legal issues (s109(3)(d)). Notwithstanding the Respondent's position that it was not obliged to consider any claim until a completed claim form was lodged in respect of which it sought to rely on previous decisions of the Tribunal in *Tamburro v Home Owners Warranty* [1999] VCAT 38 and *Rosalion v Allianz Australia Insurance Limited* [2005] VCAT 138, I found the Respondent's position was unreasonable and unsustainable. The facts in this case were quite different to those in *Tamburro* and *Rosalion.* It is perhaps helpful to set out paragraph 13 of my Reasons of 27 March 2006:

> 'In this matter, the owners' solicitors wrote a detailed letter to the insurer on 4 May 2005 setting out details of their clients' claim, enclosing copies of documents which they believed to be relevant together with a copy of a very detailed report from a building consultant in relation to the alleged defective and incomplete works. They also advised that their clients were making a claim under the policy. The primary distinction between *Tamburro* and *Rosalion* and this proceeding is that in both of the former cases the insurer advised the owners, immediately it was advised they were intending to make a claim, of its requirement that a claim form be completed and lodged. In this proceeding, there was no such advice, even though there appears to have been ample opportunity for the insurer to have so advised either by letter, or at the very lease during the July telephone conversations to do so. The insurer proceeded to process what, in the absence of any advice to the contrary, the owners believed, quite reasonably in my view, was a valid claim. There was no indication from the insurer until after the expiry of the

> 90 day period and repeated demands for payment on behalf of the owners, that a claim form was required. Notwithstanding in its letter of 10 May 2006 the insurer had indicated that *'Upon receipt of the above, your complaint will receive our urgent attention'*. I reject any suggestion that the use of the word 'complaint' was sufficient to indicate to the owners that what they believed was a claim was not considered by the insurer to be a claim for the purposes of the Policy or the Ministerial Order. This seems to me to be no more than an attempt to avoid liability by ascribing a meaning to the term 'complaint' which does not fit with the purposes of the statutory scheme of builder's warranty insurance. It is not a term to be found anywhere in the Policy or the Ministerial Order. Further, to describe the correspondent from the owners' solicitors as a complaint is to misunderstand and misuse the word.
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> …
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> The owners were clearly not complaining, they were claiming indemnity under the policy.'

6. Further, as is apparent from my Reasons and as was obvious during the preliminary hearing, the Respondent sought to avoid a liability that arose because of its failure to process the owners' claim in a timely manner, or advise them of the requirement to lodge a claim form until after the expiry of the 90 day period, and after the demand for payment by the Applicants. I am satisfied that in such circumstances the Applicants' claim was significantly stronger than that of the Respondent (s109(3)(c)).

7. I will order that the Respondent pay the Applicants' party/party costs of and incidental to the Preliminary Hearing on 14 March 2006. In default of agreement I will refer the assessment of costs to the principal registrar in accordance with County Court Scale 'D' which I am satisfied is the appropriate scale.

8. The Applicants also seek their costs of the directions hearing on 18 May 2006. Although the directions hearing was convened by order of the Tribunal following the determination of the preliminary questions, it was not possible to make meaningful directions for the further conduct of the proceeding at that time. Although the Preliminary Questions were answered

on 27 March 2006, some six weeks prior to the directions hearing, inexplicably the Respondent appears to have taken little if any steps towards assessing quantum. Although there was no evidence that access had been denied or was otherwise likely to be a problem, in the interests of progressing matters, orders were made in relation to an inspection of the subject property by 9 June 2006, to enable the Respondent to make an assessment of quantum. Notwithstanding this directions hearing was ordered by the Tribunal it is clear from my orders of 27 March 2006, that any application for costs would be heard at that time. I am satisfied that, in all the circumstances, it is also appropriate to order the Respondent to pay the Applicants' costs of the directions hearing of 18 May 2006.

DEPUTY PRESIDENT C. AIRD