VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP974/2017

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic Building Contracts Act 1995 – s.62 - whether domestic building Insurer failed to make a claim within time - when decision was final - s.61 - application to review the decision of Insurer - whether made in time - *Victorian Civil and Administrative Tribunal act 1998* – s.126 - application for extension of time to think review of Insurer's decision - principles to be applied - lengthy delay in bringing application - no sufficient explanation whether extension should be granted

APPLICANT	Boskar Investments Pty Ltd (ACN 058 494 876)
RESPONDENT	Calliden Insurance Ltd (ACN 004 125 268)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20 November 2017
DATE OF ORDER	15 December 2017
CITATION	Boskar Investments Pty Ltd v Calliden Insurance Ltd (Building and Property) [2017] VCAT 2107

REASONS FOR DECISION

In this proceeding, which came before me on 20 November 2017, the Applicant alleged that the Respondent insurer had failed to assess its insurance claim within a reasonable time and sought to have it assessed by the tribunal. In the alternative, it was sought to review the Respondent's decision to reject the claim. Insofar as the claim was out of time, application was made for an extension of time to bring the application.

After considering the material and hearing submissions, the application was dismissed for reasons that were given orally at the time. The Applicant having sought written reasons for the decision, these are now provided.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	Mr J. Levine of Counsel
For the Respondent	Mr B. Powell, Solicitor

REASONS

Background

1. The Respondent ("the Insurer") is a domestic building insurer.
2. In about 2008 a builder, Five-Star Home Group Pty Ltd ("the Builder"), constructed 3 dwelling units in Greensborough ("the Units"). The Units were constructed pursuant to an agreement or arrangement between the Builder and the Applicant, the precise terms of which are unclear. The Builder obtained a policy of domestic building insurance from the Insurer with respect to the construction ("the Policy"). The certificate of insurance for each unit states that the cost of construction was $140,000.00.
3. In 2010, two of the Units were sold by the Applicant to purchasers ("the Purchasers"). The third unit was retained by the Applicant.
4. In 2013 an agent acting for the Applicant and the Purchasers made a claim under the policy alleging defective workmanship in the construction of all three Units.
5. The Insurer sought information from the agent and subsequently, the Applicant's solicitors, with respect to the claim, some of which was not forthcoming.
6. After extensive correspondence the two claims brought on behalf of the Purchasers were accepted by the Insurer but the Applicant's claim was denied.

This application

7. This proceeding was commenced on 24 July this year seeking an order that the Applicant's claim be accepted.
8. Directions were given for the filing and service of material and submissions and the matter came before me for hearing on 20 November 2017 with one day allocated.
9. Mr J. Levine of Counsel appeared on behalf of the Applicant and Mr B. Powell, solicitor, appeared on behalf of the respondent.
10. After hearing submissions I dismissed the application for reasons given orally at the time. Written reasons are now sought.

The correspondence

11. By letter dated 9 August 2013 the Insurer's solicitor, Mr Powell, requested information concerning the claim and documents which he listed in the letter. These included a copy of the building contract between the Applicant and the Builder and a list of all payments that were made by the Applicant to the Builder. No response was received and Mr Powell sent a follow-up letter on 26 August 2013.

12. Some information was provided, and on 28 August 2013, Mr Powell sent an email to the agent asking again for a copy of the building contract and stating (inter alia):

> "Further, the evidence of payment provided thus far does not constitute a complete record of payments made to the builder in relation to the construction of the units. The documentation with respect to payments consists of 5 tax invoices only, issued on 31/8/2007 (Lock-up part two– $24,776.77), 31/8/2007 (Plastering and Plumbing – $2,640), 18/10/2007 (Lock-up part 4 - $19,834.05) 3/4/2007 (Preliminaries - $17,316.00 & Soilworks, Excavation, Foundations - $31,473) & 28/05/2007 (Frame – In progress - $42,805.24). Clearly, these amounts do not constitute a full record of all necessary payments, and nor are they evidence of payments which have actually been made. The Insurer requires a full schedule of all payments made, as to dates, amounts, and stages.
>
> The insurer has instructed me to iterate to you that it requires your client Boskar to provide the information and documentation set out in my letter to you (save for the authorities for you to act, which I now have), including authorities signed by each of your clients authorising the insurer's representative to inspect the files held by the relevant building surveyor, and the municipal authority."

13. On 18 September 2013 Mr Powell wrote again to the agent noting that the information sought had not been provided and concluding:

> "I am therefore instructed to advise you that as a result of the failure to provide the information and authorities requested:
>
> 1. Your client's claims are now denied.
> 2. My client would be willing to reopen its assessment of the claims upon receipt of the information and authorities requested."

14. Following this letter, some further information was provided, and the Insurer inspected files of the Council and the relevant building surveyor. The claims of the two Purchasers were then accepted by Mr Powell's letter of 29 November 2013. However, as to the Applicant's claim, the letter continued:

> "In relation to the Boskar claim, I advise that my client maintains its denial of liability, on the grounds that it is unable to establish from the information and documentation submitted thus far, if Boskar has suffered any loss under the policy. The information and/or documentation which my client has repeatedly sought in order to enable it to assess Boskar's loss, is as set out in my letter to you of 29 October 2013, as follows:
>
> - What was the contract value?
> - What amount was paid to the builder, and in what stages, and on what dates was it paid?

- Whether other amounts were made to third parties in respect of completion of these works?

This is information that Boskar should be able to provide, even if it has to obtain it from its accounting or taxation or banking records, and, in my view, is information which Boskar would be required to provide in order to prove its claim at VCAT in any event, if review of my client's decision is ultimately sought.

In that regard, you should note that Boskar is entitled to seek review of my client's decision contained in this letter wishes to do so, by application made to VCAT within 28 days of the date of receipt of this letter."

15. Notwithstanding the warning in the last paragraph of that letter, no application to review the decision was made by the Applicant within 28 days.

16. On 27 March 2014, in a letter to Mr Powell, the Applicant's solicitors demanded that the Insurer review its decision and threatened to commence proceedings in "a court of competent jurisdiction".

17. Mr Powell replied by a letter dated 9 April 2014, stating (inter-alia):

> "Your client has not provided a copy of the original building contract, without which my client is unable to establish the contract sum or even the scope of the insured works. Your client has not provided evidence of all payments to the builder. It asserts, in its claim form, that it has paid $140,000, but the copies of the builder's invoices provided by your client do not support that assertion, and in fact, the copy invoices which have been provided raise more questions than they answer. For a start, it is clear that the copy invoices provided represent a small sample only, of the invoices which must have been issued by the builder. The work represented in the invoices does not represent any normal or usual staged payment arrangement as one would expect in any of the standard industry contracts. Instead, they indicate that work was being paid for under some type of cost plus arrangement as between your client and the Builder [and we note, in that regard, that the director of your client, Mr Djordjevich, was also a director of the builder, for a period of 8 years, up to and inclusive of the period during which the project was in its development and planning stages]. Further, there are considerable gaps in the invoices; the invoices of themselves are not evidence of payments made in any event; and such as have been provided appear to cease somewhere at about the frame/lock-up stage. What happened after that? How much was paid by way of deposit? How much was paid for the slab stage? How much was paid, and to whom, for the fixing and completion stages?"

18. The letter concluded by saying that, should Boskar provide such information and documentation, the Insurer may reconsider its position but until then, it maintained its denial of liability.

19. The Applicant's solicitors responded on 17 July 2014, stating that the Applicant was unable to locate the original building contract but that it believed a copy had been provided to the Insurer when the insurance policy was obtained by the Builder. It also enclosed an affidavit by a director of the Builder to the effect that the Builder had received all moneys due under the contract. The enclosed affidavit, which was sworn on 1 June 2014, did not exhibit or annex the building contract or say how much the contract price was. It simply said that all monies due under the contract were paid, whatever that was.

20. On 29 October 2014, Mr Powell sent a further email to the Applicant's solicitors repeating the request for details of the payments made by the Applicant to the Builder. The Applicant's solicitors responded with a schedule of the payments made, which totalled $118,721.10. Supporting documentation that was provided in order to support those figures would suggest that the work related to all three Units. The Applicant contended in support of its claim that $140,000.00 had been paid by it to the Builder for each unit. The schedule of payments and the accompanying documents do not support that.

21. On 3 February 2015 Mr Powell wrote again to the Applicant's solicitors as follows:

> "I refer to previous correspondence culminating in your letter dated 14 November 2014 containing your schedule and further documentation submitted in support of your client's claim.
>
> My client has reviewed this matter extensively on a number of occasions over a period of more than 18 months; each time following continued correspondence received on behalf of your client during this period.
>
> Following even further review it remains of the view that the information and documents provided by your client do not disclose that any loss has been suffered by your client under the policy, and that even if such a loss had been suffered [which my client disputes] the quantum of any such loss is simply unable to be construed on the basis of the information and documents provided by your client thus far.
>
> In the circumstances, I am instructed to advise you that my client maintains its denial of liability, and that it now intends to close its file in this matter.
>
> Should your client intends to seek a review of my client's decision in this matter at VCAT, I advise I have instructions to accept service of any such application."

22. No further contact was received by the Insurer or Mr Powell from the Applicant or its solicitors until 8 December 2016. On that day, the Applicant's solicitors wrote to Mr Powell enclosing some further material, being:

(a) an estimate from a builder for rectification works to be carried out at the Applicant's unit;

(b) an invoice from the same builder for the work that had, by then, been carried out on the Applicant's unit;

(c) invoices for expenses amounting to $28,246.07 said to have been incurred by the Applicant in purchasing materials for the rectification works carried out by its builder on the Applicant's unit;

(d) a statutory declarations by a director of the Builder and a director of the Applicant concerning the building contract.

23. Since the Insurer had by then closed its file, there was no response to this letter. This proceeding was then commenced by the Applicant on 24 July 2017, eight months later.

Failure to make a decision

24. The primary allegation of the Applicant is that the Insurer has failed to assess and approve its claim within a reasonable time. The power of the tribunal to make a decision on a claim for indemnity under a policy of domestic building insurance if an insurer fails to assess and approve it in time is conferred by s.62 of the *Domestic Building Contracts Act* 1995, which provides as follows:

> "VCAT may decide any claim made by a building owner with respect to any insurance or guarantee or indemnity referred to in section 60 if the insurer fails or refuses to decide the claim within a reasonable time of the claim being made and the building owner applies to VCAT to decide the claim."

25. In order for me to decide a claim under this section, the Insurer must have failed or refused to decide the claim within a reasonable time.

26. Mr Levine submitted that, each time Mr Powell communicated a decision, it was clear that the decision was not final because the Insurer was willing to consider further material.

27. He referred me to the Tribunal's decision in *Chifuntwe v. Taxi Services Commissioner* (no. 2) [2015] VCAT 454 at para 49 in which it was decided that the decision in question must be of a final or operative nature. That is certainly true and it is what the section says. However simply because an insurer indicates that it might be prepared to reconsider its decision if the insured presents more material does not mean that the decision that has been made is not final. An insurer can always change its mind.

28. Whether a final decision has been made is a question of fact to be determined by looking objectively at the communication from the insurer. An insurer might inform the insured that it is not happy with the material supplied and suggest that further material be provided. However if, when viewed objectively, it appears that it has made a decision to reject the claim then that is its decision. The insured must then decide whether to apply to

the Tribunal to review the decision under s.60 of the Act or take the risk of later persuading the insurer to change its mind.

29. In the present case there were a number of decisions communicated to the Applicant.

30. The letter of 18 September 2013 stated that the Insurer would be willing to re-open its assessment of the claims upon receipt of the information and authorities requested. Looked at objectively, that would convey to the insured that, if it were to provide the information and authorities requested, the assessment would be reopened.

31. However the letter of 29 November 2013 is quite unequivocal. It informed the Applicant that the Insurer maintained its denial of the claim and went on to advise the Applicant of its right to seek a review of the Insurer's decision. If the decision had not been final, there would have been no decision to review.

32. Clearer still is the letter of 3 February 2015, in which the Applicant was advised that the Insurer maintained its denial of liability and intended to close its file in this matter. Mr Powell stated that, should the Applicant seek to review its decision, he had instructions to accept service of any such application. Again, no such review could have been sought if the decision had not been final.

33. For these reasons I am not satisfied that the Insurer has failed to make a decision and so no order under s.62 can be made. If the Applicant wishes to challenge the Insurer's decision, it must seek a review pursuant to s.60.

Review of an Insurer's decision

34. The relevant parts of s.60 are as follows:

> "(1) VCAT may review any decision of an insurer with respect to anything arising from any required insurance under the Building Act 1993 that a builder is covered by in relation to domestic building work.
>
> …
>
> (3) After conducting a review, VCAT may confirm, annul, vary or reverse the decision, and may make any order necessary to give effect to its decision"

35. By s.61(3), the application must be made within 28 days of the date upon which the person receives notice of the decision.

36. Since the 28 day period from each of the decisions had long since passed at the time this proceeding was commenced, the application is out of time and cannot be brought unless an extension of time is obtained.

Extensions of time

37. The power of the tribunal to extend time is conferred by s.126 of the *Victorian Civil and Administrative Tribunal Act* 1998, which provides as follows:

> "Extension or abridgment of time and waiver of compliance
>
> (1) The Tribunal, on application by any person or on its own initiative, may extend any time limit fixed by or under an enabling enactment for the commencement of a proceeding.
>
> (2) If the rules permit, the Tribunal, on application by a party or on its own initiative, may—
>
> (a) extend or abridge any time limit fixed by or under this Act, the regulations, the rules or a relevant enactment for the doing of any act in a proceeding; or
>
> (b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.
>
> (3) The Tribunal may extend time or waive compliance under this section even if the time or period for compliance had expired before an application for extension or waiver was made.
>
> (4) The Tribunal may not extend or abridge time or waive compliance if to do so would cause any prejudice or detriment to a party or potential party that cannot be remedied by an appropriate order for costs or damages.
>
> (5) In this section—
>
> "relevant enactment" means an enactment specified in the rules to be a relevant enactment for the purposes of this section."

38. In applying this section, the principles generally adopted in this Tribunal are those set out by Wilcox J in *Hunter Valley Developments Pty Ltd and Others v Minister for Home Affairs and Environment* (1984) 3FCR 344 at pp.348 to 349, which may be summarised as follows:

(a) Whether there is an "acceptable" explanation for the delay and whether it is fair and equitable in the circumstances to extend time;

(b) Whether the Applicant for extension has rested on his or her rights or has continued to make the decision-maker aware that he or she contests the finality of the decision as distinct from allowing the decision-maker to believe that the matter was finally concluded;

(c) Whether the Respondent has been prejudiced by the delay; although the mere absence of prejudice is not enough in itself to justify an extension;

(d) Whether, if the Applicant for extension is successful, the delay may result in the unsettling of other people or of established practices;

(e) The merits of the substantial application; and

(f) Considerations of fairness as between the Applicant and other persons otherwise in a like position.

39. The learned judge in that case added that it was important to bear in mind the following point made by Sheppard J in *Wedesweiller v. Cole* (1983) 47 ALR 528 relating to the diversity of decisions of which review may be sought under the Act:

> "…there may be some cases which may be decided upon considerations which affect only the immediate parties. It will be appropriate to consider whether the delay which has taken place has been satisfactorily explained, the prejudice which may be caused to an applicant by the refusal of an application, the prejudice which may be suffered by the government or a particular department if the application is granted and, generally, what the justice of the case requires. In other cases, wider considerations will be involved."

40. As I pointed out in the case of *Roberts v. Chung* [2014] VCAT 142 at para 75:

> "75. These principles, which are commonly referred to as "the Hunter Valley principles", are not a check list. They are relevant matters to be considered and one factor may be more significant in a particular case than it would be in another. Some of the considerations mentioned by his Honour are more appropriate to an appeal against an administrative decision. Any discretion must be exercised judicially and the Tribunal should not be constrained by rigid rules."

Explanation for the delay

41. Some explanation of the delay should be given. In the present case it was suggested in submissions that the delay was due to the Applicant wishing to avoid litigation and also the time that it took to obtain the information that was requested by the Insurer.

42. In the supporting affidavit of the Applicant's director, Mr Djordjevich, he referred to his poor English, his reliance upon the agent to prosecute the claim and as to his attempts to obtain bank records to prove the amounts paid. However the only amounts said to have been paid were known before either of the periods of delay in question commenced.

43. Exhibited to the affidavit was a report from an investigator dated 9 October 2017 relating to attempts to trace the present whereabouts of the director of the Builder. It would appear from this report that this person was located and interviewed in September 2014 and a statutory declaration was obtained from him on 14 October 2014. Again, that was before either of the periods of delay in question commenced.

44. The Applicant was informed by Mr Powell of the time within which an appeal needed to be brought and was represented by solicitors at the time. I do not think there is any satisfactory explanation for the delay in bringing this proceeding.

45. I accept that an explanation for the delay is only one of the matters to be considered. In *Performance Builders v Keele* [2006] VCAT 2, the Tribunal said (at para 14):

> "Usually an "acceptable" explanation for delay involved must be provided. It must be recalled, however, that s126 of the Act gives a discretion which is unfettered. It cannot be the rule that unless such an explanation is forthcoming time cannot be extended for that would be to fetter the discretion. Time may be extended under s126, in some cases, even in the absence of an "acceptable explanation"."

46. Nevertheless, it is a significant consideration (*Harris Developments Pty Ltd v. Maroonda CC* [1999] VCAT 293 at para. 20). It was the intention of Parliament that any appeal would be brought within the 28 day period specified and that was known to the Applicant. Sometimes a party will miss a time limit by mistake, oversight or for some other reason and so there is power to extend time in an appropriate case. However it cannot have been the intention of Parliament that a party with knowledge of a time limit could simply ignore it in the expectation that time will necessarily be extended.

47. Here, after having been told that the Insurer was closing its file and that Mr Powell would accept service on any appeal, the Applicant waited 22 months before sending more material and then delayed a further seven months before commencing this proceeding.

48. There has been no adequate explanation for these substantial delays. The delay from the October 2013 decision was even longer.

Making the Insurer aware that the decision was contested

49. This is a significant factor in the present case because, the Insurer, having made its decision and reminded the Applicant of its right to appeal, had closed its file.

50. The Applicant did not contact the Insurer to say that it was continuing to pursue the claim or offer to provide any further information. Instead, it sought and obtained a quotation to rectify the alleged defects in the work which was the subject of the claim and had it carried out. If the Insurer had been aware that the claim was still pursued, it would have had the opportunity of inspecting the work before it was rectified.

51. It is now in the situation where, if an extension of time were granted, it would be unable to lead any evidence as to the alleged defects or the reasonable cost of rectification. It would also be unable to elect to rectify the work itself.

The merits of the substantial application

52. It does not appear that the Applicant is able to prove its claim in any event. After four years it has still failed to prove what it paid to the Builder. The documents produced would suggest that the Applicant paid various amounts totalling less than $120,000.00, not the $520,000.00 that it claims to have paid.

53. The document that is now claimed to have been the building contract certainly does not have that appearance. It is headed "PROJECT SPECIFICATIONS" and "STANDARD QUALITY INCLUSIONS". It bears two sets of initials but there is no price specified.

54. What has been produced is more suggestive of some sort of joint venture between the Applicant and the Builder than an arms-length relationship of owner and Builder.

Whether it is fair and equitable to extend time

55. This is a critical factor because, by subsection (4), I cannot extend time if to do so would cause prejudice or detriment to the Insurer that cannot be remedied by an appropriate order for costs or damages.

56. The fact that the work which is the subject of the claim was rectified during the period of the delay and is no longer able to be assessed makes it impossible now to assess the reasonableness or otherwise of the amount sought. That is a serious prejudice to the Insurer and, quite apart from the other factors, means that an extension of time cannot be granted.

Conclusion

57. In *Dingley Village Neighbourhood Centre Inc v Kingston City Council* (1997) AATR 227 at p.285 it was said:

> "... the overriding purpose of the power granted to extend time is to enable justice to be done. Time limits are expected to be observed. They facilitate the timely conduct of the business of the court or tribunal. A party obtaining benefit from the failure of another to observe a time limit is able to retain that benefit unless the discretion to extend is exercised in favour of the defaulter. The grant of an extension is not automatic. It is generally relevant to consider the history of the case, but none of these things establish any hard and fast rule, and each case must be judged on its own merits with various considerations being given appropriate weight in the circumstances of the case. Finally however, it is a matter of doing justice, or enabling justice to be done."

58. Time cannot be extended because of sub-section (4), but even if that were not the case, for the reasons given I would not have extended time in the circumstances of this case. Where a party deliberately ignores a time limit for such a substantial period for no sensible reason, that conduct should not be rewarded by an exercise of the discretion to extend time in that party's favour.

SENIOR MEMBER R. WALKER