

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D733/2005

**CATCHWORDS**

Appeal against decision of warranty insurer – whether claim made within time - costs

<b>APPLICANT</b>	Marian Galas
<b>RESPONDENT</b>	Vero Insurance
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	23 March 2006
<b>DATE OF ORDER</b>	23 March 2006
<b>DATE OF REASONS</b>	Oral reasons given at hearing, written reasons 31 March 2006

**ORDER**

1. The application is dismissed.
2. The Respondent's decision of 16 August 2005 (claim number: 006186100 is affirmed.
3. No order as to costs.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For the Applicant	In person
For the Respondent	Mr Stuckey of Counsel

## REASONS

1. The Applicant ('Mr Galas') has applied to the tribunal for a review of the decision of the Respondent ('the insurer') dated 16 August 2005 denying his claim on the grounds that it was made after the expiry of the policy of warranty insurance. Mr Galas appeared at the hearing in person, although he indicated he had received some legal advice. The insurer was represented by Mr Stuckey of Counsel.

### Chronology

2. It is helpful to set out a chronology;

25 March 1998	Application for building permit
10 August 1998	Mr Galas entered into a contract for the purchase of the subject property.
26 October 1998	Date of final inspection and issue of the occupancy permit.
30 October 1998	Policy of Builder's Warranty Insurance issued by the insurer.
Early 1999	Mr Galas notices leaking in the garage.
December 1999	After obtaining a report from Rob Lees, building consultant, Mr Galas complains to the builder about the leaks.
February 2000	The builder carries out rectification works.
January 2005	Mr Galas notice the garage roof is leaking.
26 April 2005	The date on which the insurer alleges the policy expires.
27 July 2005	Mr Galas lodges claim with the insurer.

3. The insurer relies on Clause 6 of the insurance policy as an absolute bar to Mr Galas' claim. Clause 6 provides:

*We will not pay any claim unless it is made –*

- *after the date of the contract or issue of a building permit for the home building work, whichever is the earlier.*

- *before the day 6 years and 6 months after the completion date, or the termination of the contract whichever is the earlier.*

4. The policy provides that ‘completion date’ is as defined in the Ministerial Order which provides that ‘completion date’:

‘...shall have the same meaning as ... defined in section 137B(7) of the Building Act 1993. However, where the completion date cannot be determined under this definition it shall be the latest date that the builder attended the relevant building site for the purpose of completing or inspecting works or handing over possession to the building owner.’

Section 137B(7) of the *Building Act* 1993 provides:

(7) In this section—

**"completion date"** means—

- the date of issue of the occupancy permit in respect of the building (whether or not the occupancy permit is subsequently cancelled or varied); or
- if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work for the construction of the building;

5. Mr Galas argues that the works were not completed until February 2000, after the builder returned to site to carry out rectification works to the balcony (which as I understand it is above the garage). He submitted that the occupancy permit should not have been issued until the works were complete i.e. the rectification works completed, and that it had therefore been issued in error.

6. Mr Galas also seeks to rely on Clause 1.6 of the Contract of Sale which provides:

*... Completion will be deemed to occur on the later of:*

(i) *the Vendor and Purchaser agreeing that the building works are completed;*

*or*

(ii) *failing agreement, the Vendor producing to the Purchaser a certificate signed by a suitably qualified registered architect*

*stating that the works are satisfactorily completed in accordance with the building contract and the plans...*

## **Discussion**

7. Section 137(B) of the *Building Act* makes it quite clear ‘completion date’ means the date of the issue of the occupancy permit in respect of the building, whether or not the occupancy permit is subsequently cancelled or varied. In other words, even if it was issued incorrectly, the date that it was first issued is the relevant date for determining the completion date. Where an occupancy permit has not been issued, the completion date is the date of issue under Part 4 of the Certificate of Final Inspection of the building works for the construction of the building. Even if I accept Mr Galas’ contention that the occupancy permit should not have been issued, and that work subsequently carried out by the builder was completed in February 2000, that does not change the date from which the insurance policy runs. I am satisfied that where a certificate of occupancy has been issued, the date it was issued must be the date of commencement of the period of insurance.
8. The occupancy permit is not evidence that a house has been built without defects but rather that the property is fit for occupation. It is not uncommon after a occupancy permit has been issued for defects to become apparent and for those defective works to be rectified by the builder. However, this does not change the date of completion.
9. Mr Galas said he had contacted the builder in early 2005 in relation to the leaking garage, and after receiving no response had made this claim on the insurer. He sought to rely on clause 7 of the Policy which provides:

*We will not pay any claim unless you notify us in writing, or your builder, either orally or in writing, of any fact or circumstance which might give rise to the claim within 180 days from the time you first became aware, or you might reasonably be expected to have become aware of, that fact or circumstance*

10. I recently considered a similar situation in *Ward v Vero Insurance* [2005] VCAT 915 where I determined that clause 7 cannot be read independently of clause 6, nor to override what would seem to be its intent – that claims must be made within 6 years and 6 months after the completion date – in this case, by 26 April 2005, being 6 years and 6 months from 26 October 1998 (the date of issue of the occupancy permit). The claim was not made until 27 July 2005, some three months after the date of expiry of the policy.
11. Clause 1.6 of the Contract of Sale is an agreement between the parties as to the meaning of ‘completion’ for the purposes of the Contract of Sale and for no other reason. It does not impact on the determination of the commencement date of the policy of warranty insurance.

**Can the tribunal grant an extension of time in which to lodge an insurance claim?**

12. Although not specifically sought, it is clear that Mr Galas is also seeking an extension of time in which to lodge his insurance claim. The Tribunal does not have any power to grant an extension of time in which an owner can lodge a claim with an insurer. Its powers in relation to extensions of time are set out in s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 and only relate to extensions of time for the commencement of a proceeding or the ‘doing of any act in a proceeding’.

**Costs**

- 13 The insurer made application for costs, relying on a letter sent to Mr Galas on 16 November 2005 wherein it explained its reasons for rejecting his claim, enclosing a copy of the decision in *Ward* referred to above. It also made a *Calderbank* offer to bear its own costs if Mr Galas withdrew his application for review within 14 days. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 is quite clear – each party shall bear

their own costs unless the tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out under s109(3) of the Act. *Calderbank* offers are not contemplated by the Act, although they may be considered under s109(3)(e).

14. I repeat the observations made at paragraph 13 of my Reasons in *Ward* which are equally applicable here:

*Whilst the insurer may have written to the owners advising that their claim had been made out of time, and whilst their misunderstanding was not sufficient to enable them to succeed, this is not, of itself, a reason for me to exercise my discretion under s109(2) ... Whilst the owners clearly misunderstood their legal position they were nevertheless entitled to come to the Tribunal seeking a determination. ...*

15. In *Kaldawi v Housing Guarantee Fund Ltd* [2004] VCAT 2024 Senior Member Young said at paragraph 8:

*“I consider that an application under Section 61 of the Domestic Building Contracts Act 1995 to seek a review of an insurer's decision is a form of administrative review”.*

and:

*“I have previously found that costs in administrative reviews are less likely to be awarded than where the matter is an inter-parties commercial dispute: Australia Country Homes v Vasiliou, (unreported, 5 May 1999”.*

16. I am not persuaded that I should exercise the tribunal's discretion under s109(2) in favour of the insurer. I will therefore make no order as to costs.

**DEPUTY PRESIDENT C. AIRD**