

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D290/2009

CATCHWORDS

Deeming provision arising from Ministerial Order and warranty insurance – s59A Domestic Building Contracts Act 1995 – application to VCAT to extend time prior to 90 day period expiry – subsequent consent agreement to extend withdrawn – application lodged within a limitation period not being determined until after the limitation period expired.

APPLICANT	Great Lakes Reinsurance (UK) Plc
FIRST RESPONDENT	Alfred Branicki
SECOND RESPONDENT	Leeron Branicki
THIRD RESPONDENT	Alwyne Maclean
FOURTH RESPONDENT	W Wearne
FIFTH RESPONDENT	Owners Corporation No. 524555F
WHERE HELD	Melbourne
BEFORE	Senior Member M.Levine
HEARING TYPE	Directions Hearing
DATE OF HEARING	26 May 2009
DATE OF ORDER	29 May 2009
CITATION	Great Lakes Reinsurance (UK) Plc v Branicki & Ors (Domestic Building) [2009] VCAT 906

ORDER

The time for determination of the written claim for liability of the Applicant to the Respondents is extended by 30 days.

SENIOR MEMBER M. LEVINE

APPEARANCES:

For the Applicant	Mr S. George, Solicitor
For the Respondents	Mr T. Cogley of Counsel

REASONS

HISTORY

- 1 On 1 May 2009 the Applicant applied to the Tribunal for an extension by 30 days of the 90 day period for determination of claims prescribed by clause 29 of Ministerial Order S98 of 23 May 2003 in respect of the claim of the Respondents claim made to it on 2 February 2009.
- 2 On 22 May 2009 by facsimile the solicitors for the parties proposed minutes of consent orders to extend the time to 1 June 2009.
- 3 On 25 May 2009 the Tribunal informed the parties by facsimile that it required submissions about its power to extend having regard to the decision by Balmford J in *Australia International Insurance V Graham* (2005) VSC 183 (AIG).

MINISTERIAL ORDERS.

- 4 Balmford J sets out the relationships of the *Domestic Building Contracts Act* 1995, and other Acts, Rules and Ministerial Orders and there is no need to repeat them here.
- 5 In the *AIG* case the relevant Ministerial Order was S122 of 30 October 1998 and the relevant clause was 8.5 which provides

Where a written claim is not determined as to liability by the insurer within ninety (90) days of receipt then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer shall be deemed to have accepted liability for the claim.
- 6 In this case the relevant Ministerial Order is S98 of 23 May 2003 and the relevant clause is 29 which provides

The policy must contain a provision to the effect that if the insurer has not determined a written claim as to liability within 90 days of receipt of the claim, then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer is to be deemed to have accepted liability for the claim.
- 7 Neither party produced the Ministerial Orders or raised any argument that the contents of the clauses differ materially or that the renumbering has any impact in this application.
- 8 I find that there is no material difference in the clauses for the purposes of determining the issues before me.

SUBMISSIONS BY APPLICANT

- 9 Mr George for the Applicant sought to distinguish AIG on the basis that the decision of the insurer to deny the claim in that case was made on the 91st day and that there was no application to the Tribunal to extend time until after the deemed decision at the expiration of the 90 day period.

10 In the present case an application has been made within the 90 day period and there is no decision yet made by the insurer.

11 Balmford J found the sole source of jurisdiction in relation to builder's warranty insurance claims was s59A(1) of the *Domestic Building Contracts Act 1995*, which states:

The Tribunal has jurisdiction to hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim.

12 The Applicant submits that an application to VCAT suspends the deemed acceptance so the period does not continue to run or expire.

13 The contract of insurance was not tendered in the directions hearing, but it was submitted that it provides that after 90 days a claim is deemed as accepted

unless we obtain an extension of time from either you or the Victorian Civil and Administrative Tribunal.

and that wording was "temporally neutral" and to be contrasted with the AIG insurance.

14 The AIG contract of insurance provided:

that the insurer will be deemed to have accepted liability unless the Insurer has obtained an extension of time from the Insured or VCAT

which it was submitted was materially different (by the use of "has obtained" rather than "unless we obtain" I surmise).

SUBMISSIONS BY RESPONDENT

15 Mr Cogley on behalf of the Respondents submitted that the Tribunal did not have power to extend the 90 day period and did not consent to any orders.

16 He did not enlighten the Tribunal as to the reasons for the change in his clients' consent to the orders sought but I note the Tribunal's intervening reference to the AIG case.

17 Mr Cogley did indicate that the Respondents would accept the Tribunal's decision if jurisdiction was found.

REASONS OF TRIBUNAL

Jurisdiction

18 Whilst clause 29 of Ministerial Order S98 states that the deeming provision applies unless the insurer obtains an extension of time from the insured or the Tribunal, it confers no jurisdiction on the Tribunal.

19 Section 59A(1) of the *Domestic Building Contracts Act 1995* does confer jurisdiction to determine a dispute concerning an insurance claim; domestic building work or an insurer's decision on such a claim.

- 20 Section 59A(2) allows the Tribunal to make any order it considers fair to resolve a dispute under s59A(1).
- 21 In my view when submitting an application to the Tribunal the Applicant brought a dispute to the Tribunal and enlivened the Tribunal's jurisdiction to resolve it under s59A.
- 22 Jurisdiction was enlivened during the 90 day period after the written claim was received by the Applicant.
- 23 This application could have been determined by the Tribunal after lodgement and within the 90 day period (just - it is 89 days from date of claim 2 February 2009 to the date of lodgement at VCAT on 1 May 2009, end date included).
- 24 It seems unlikely that it was intended that any delay in a hearing at the Tribunal or a failure (for any reason) to enter consent orders should remove jurisdiction under s59A to determine a valid application and deprive the Insurer of the right to argue a case for extension.
- 25 To suggest otherwise would result in the Tribunal being unable to hear any matter lodged within a limitation period that expires before the Tribunal has determined the dispute.
- 26 I find that the Tribunal has jurisdiction to extend the time in the circumstance of this application.

The Consent Agreement

- 27 Balmford J in AIG referred to possible agreement to extend made between the parties as contemplated in the Ministerial Order. On its face the Respondents agreement to the extension in the proposed orders submitted by facsimile (notwithstanding its apparent withdrawal at the directions hearing) may of itself be argued as an agreement that falls within that contemplated in AIG and the Ministerial Order.
- 28 The Tribunal has jurisdiction under the *Fair Trading Act* 1999 if not the *Domestic Building Contracts Act* 1995 to deal with such an agreement if that were necessary.
- 29 However, the consent, whilst a relevant factor in determining whether to grant the extension, does not of itself advance the question of jurisdiction to make an order as it was given after the period expired.

The Policy

- 30 The policy wording is different from that in AIG but in light of the foregoing there is no need to determine if that has any impact on the jurisdiction of the Tribunal on the facts and timing of the application in this case.

CONCLUSION

- 31 As stated the Tribunal has the requisite jurisdiction and whilst I recognise that the Respondents have a valuable right in the operation of the deeming provision, in all the circumstances (including the consent agreement now withdrawn by the Respondents) I am of the view that it would be fair to extend the time for determination of the claim by 30 days.

SENIOR MEMBER M. LEVINE