VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D148/2009

CATCHWORDS

Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 – application for review of insurer's decision on second claim for same property – whether applicant estopped from maintaining this claim

APPLICANT	Matthew Judkins
RESPONDENT	Vero Insurance Ltd. (ABN 48 005 297 807)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	2 November 2009
DATE OF ORDER	3 December 2009
CITATION	Judkins v Vero Insurance Ltd (Domestic Building) [2009] VCAT 2505

ORDER

1. The application by the respondent under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 is dismissed.
2. By 18 December 2009 the applicant must file and serve any application under s77 of the *Victorian Civil and Administrative Tribunal Act* 1998. If such application is received it is to be listed for hearing before a judicial member together with D74/2008. The orders of 13 August 2009 in D74/2008 apply in relation to the conduct of the hearing of any s77 application.
3. The proceeding is referred to an administrative mention on 31 March 2010 at which time the parties must make recommendations for its further conduct. There is liberty to the parties to apply by consent for the proceeding to be referred to a directions hearing.
4. Costs reserved with liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for one hour.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr D. Aghion of Counsel
For Respondent	Mr S. Waldren of Counsel

REASONS

1 This proceeding concerns one of three townhouses in Wertheim Street, Richmond which share a common slab. They were built in or about 1998 and 1999 and the certificate of occupancy was issued on 26 October 1999.

2 In November 2005, the applicant who owns units 1 and 1B made a claim under the relevant policy of warranty insurance in respect of both units. The owner of unit 1A also made a claim. The claim for unit 1 ('the first unit 1 decision') was rejected because the respondent insurer was not satisfied that the cause of the damage was the builder's responsibility, and considered the cost of rectification to be less than the standard excess of $1,000. The applicant did not seek a review of that decision.

3 The respondent continued to investigate the cause of the distress to units 1A and 1B. The claims in relation to units 1A and 1B were rejected in early January 2008 on the grounds that the cause of distress to the units was not the builder's responsibility.

4 Applications for review of the insurer's decisions in relation to units 1A and 1B were lodged (by the applicant and the owner of unit 1A) within the prescribed period, in related proceeding D74/2008. The owners of the three units obtained an expert report from Tony Croucher of Buildspect, dated 30 June 2008, who says that extensive rectification works to the common slab are required. There has been significant movement in the slab causing extensive consequential damage to each of the units which must also be rectified. Mr Croucher estimates the total cost of rectification works for the three units will be $441,882.

5 The applicant also applied for an extension of time under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 in which to seek a review of the first unit 1 decision ('the EOT application'). That application was dismissed on 9 April 2009 by Senior Member Cremean who found the prejudice suffered by the respondent, because of the extensive renovation works carried out to Unit 1, was such that it would be unfair for him to exercise the tribunal's discretion and grant an extension of time. Relevantly, he said:

> 10. In my view, however, the effect of s126(4) in this case is decisive. Section 126(4) clearly has an operation that thwarts the unfettered nature of the discretion given by s126(1). I may not extend time if I am satisfied that 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".
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> 11. It is contended that the prejudice lies in the inability to retrieve documents that once or once may have existed. I do not find this compelling. What I do find compelling, however, is that works have been undertaken (a "complete internal makeover") to Unit 1 such that it is not now possible for the Respondent to ascertain the level of damage arising during the policy period

– that is, to 26 April 2006. The Respondent now has no hope of being able to establish whether this is so or not. As is pointed out to me, the Respondent cannot now call evidence as to the state of the damage prior to that date. Nor can it satisfactorily test any evidence of the Applicants as to the state of such damage. In other words, it cannot now – after this passage of time and with works having been undertaken – effectively defend itself against a claim.

12. I consider this to be the critical consideration. It is a prejudice, in my view, which cannot possibly be compensated for by an order for costs or damages. Neither costs nor damages can undo what has been done. The Respondent, in my view, is irretrievably prejudiced

6 On 17 November 2008 the applicant made a further claim under the relevant policy ('the second unit 1 claim'). This claim was rejected by the respondent on 11 February 2009 on the following grounds:

(a) the claim was made out of time;

(b) the applicant had failed to notify the insurer within 180 days of becoming aware, or when he ought to have become aware, of any matter which might give rise to a claim;

(c) the applicant's claim was not caused by the faulty workmanship of the builder, but rather was a result of soil moisture changes caused by re-occurring blockages to the sewer main in Wertheim Street, and trees located opposite the property in and around the channel nine carpark.

(d) the applicant had failed to take any steps during 2003 and 2008 to minimise his loss.

7 The applicant has applied for a review of that decision ('the application for review'). In his Points of Claim dated 27 May 2009 the applicant asserts:

13. The second unit 1 decision is wrong, in that:

a) if the applicant failed to make the second unit 1 claim within the time provided by the insurance policy, then:

i) during the period from November 2005 to January 2008, the insurer was investigating the cause of the movement of the footings at the site, for the purposes of assessing claims in respect of units 1A and 1B (the unit 1A and unit 1B claims);

ii) each of the first unit 1 claim, the unit 1A and unit 1B claims, put the insurer on notice of a defect directly or indirectly related to the defect the subject of the second unit 1 claim;

iii) the alleged failure of the applicant to give make the second unit 1 claim within the time limited specified by the policy constitutes an omission within the meaning of s54 of the *Insurance Contracts Act 1984;* (sic) and

iv) pursuant to s54, Vero may not refuse to pay the claim by reason only of that omission.

b) as to the asserted failure to notify the builder within 180 days of the date on which the applicant first became aware, or might have been expected to become aware, of some fact or circumstance which might give rise to the claim;

i) each of the first unit claims, the unit 1A and unit 1B claims, put the insurer on notice of a defect directly or indirectly related to the defect the subject of the second unit 1 claim; and

ii) as a consequence of the operation of clause 37 of the insurance policy and section 54 of the *Insurance Contracts Act 1984*, Vero may not refuse to pay the claim by reason only of the alleged failure to notify the builder of the defect the subject of the second unit 1 claim.

…

d) The applicant has in fact acted reasonably to attempt to minimise his loss in respect of unit 1 by the following acts:

…

ii) in November 2005, the applicant lodged claims in respect of units 1 and 1B with Vero;

iii) in respect of unit 1, on 9 December 2005 Vero rejected the unit 1 claim as set out above on the found that the damage at that time was less than $1,000;

iv) in respect of unit 1B, Vero did not finally reject the unit 1B claim until 2 January 2008; and

v) on 29 January 2008, the applicant commenced proceeding no D74/2008 in this Tribunal, seeking a review of the decision in respect of the Unit 1B claim.

8 At a directions hearing on 13 August 2009 the respondent foreshadowed an application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 for the summary dismissal of the application for review, and directions were made for the hearing of that application ('the s75 application'). The insurer contends that the tribunal's decision of 9 April 2009 founds an issue estoppel against the applicant and accordingly the application for review is an abuse of process.

9 In considering the s75 application I am not required to determine the merits of the application for review. I am simply required to consider whether the Points of Claim dated 27 May 2009 disclose an open and arguable case and whether the applicant is estopped from maintaining his application for review by reason of the tribunal's decision of 9 April 2009.

10 Section 75 relevantly provides:

> (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
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> (a) is frivolous, vexatious, misconceived or lacking in substance; or
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> (b) is otherwise an abuse of process.
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> …
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> (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

11 It is well established that caution must be exercised in determining whether a proceeding should be struck out pursuant to the provisions of s75. In *Norman v Australian Red Cross Society* 1998 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. p.102 Deputy President McKenzie said:

> (a) The application is for the summary termination of the proceedings. It is not the full hearing of the proceeding.
>
> (b) The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.
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> (c) If the Complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a Complainant indicates to the Tribunal that there is other evidence that he or she can call to support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the Complainant's material contains the whole of his or her case.
>
> (d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. <u>However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.</u>

(e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding. (emphasis added)

…

12 The respondent contends that the application for review concerns the same claim as the unit 1 claim. In his reasons for dismissing the EOT applicaton, SM Cremean found that the policy only responded to loss and damage which occurred during the policy period which expired on 26 April 2006.

13 In considering the application for review the tribunal will have to determine whether the loss and damage identified by Mr Croucher occurred during the policy period. The insurer contends that much of the damage occurred outside the policy period. Whilst the difficulties in ascertaining the level of damage was a relevant factor in the tribunal's consideration of EOT application, the tribunal did not determine whether they were matters which could be properly taken into account by the respondent in considering whether the applicant is entitled to indemnity under the policy.

14 The applicant submits that there are two questions which arise from the second unit 1 decision both of which will require an interpretation of the policy and the Ministerial Order[1]:

- if a claim is made outside the policy period, but relating to loss or damage occurring within the policy period, is cover still provided by the policy?
- if a decision is made on a claim, and the damage the subject of that claim subsequently gets worse, does the insurance policy permit the insured to lodge a second claim in respect of that subsequent damage?

15 The relevant clauses of the Ministerial Order are clauses 54, 7.12 and 8.6. Clause 5.4 sets out the period of insurance, clause 7.12 permits a term in the policy of insurance whereby *'an insurer may refuse to accept any claims after the expiration of 180 days from the end of the period of insurance…'* and clause 8.6 provides:

> If a person gives notice of a defect, that person is to be taken for the purposes of the policy to have given notice of every defect of which the defect notified is directly or indirectly related, whether or not the claim in respect of the defect that was actually notified has been settled.

[1] S22 of 1998

16 So, the applicant contends that the interpretation of clause 8.6, insofar as it relates to the applicant's second unit 1 claim, is an issue which should be determined by the tribunal. I agree with this. Some of the questions to be determined might include: what constitutes 'notice of a defect'? Does the first unit 1 claim constitute 'notice', or does the investigative work carried out by the insurer in respect of the unit 1A and 1B claims concerning the common slab, constitute 'notice'?. Does clause 8.6 mean that where a defect is notified during the term of the policy that such notice includes all related and associated defects which subsequently become apparent, whether during or after the expiration of the period of insurance? Do the claims concern the same loss and damage?

17 These are all questions which can only be determined after hearing the evidence, and considering the legal contentions of each of the parties. They cannot be determined summarily without hearing and considering the expert evidence, and legal contentions of the parties in relation to the proper interpretation of the relevant clauses of the policy and the Ministerial Order.

18 As I recently observed in *Wood v Calliden Insurance Ltd & Ors* [2008] VCAT 1339 at [15]:

> It must be remembered that in considering an application under s75 I am not required to consider or be satisfied as to the likely success of the Woods' claim. I am required to consider whether the allegations are *'frivolous, vexatious, misconceived or lacking in substance'*, in other words, whether they are doomed to fail. This does not contemplate a detailed consideration of the evidence. As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority* [2008] VCAT 402 at [15-17]:
>
> 15. …. I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course, and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.
> 16. There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. <u>There should not be a trial before a trial</u>. (emphasis added)

19 It must be remembered that the application in this proceeding is an application for review of the insurer's decision to refuse indemnity under the policy. This is a distinct and separate issue from those raised in the EOT application. Accordingly, there can be no issue estoppel.

20 I will therefore dismiss the respondent's application under s75 and reserve the question of costs with liberty to apply. I note that there is an application by the applicants in the related proceeding under s77 of the VCAT Act for that proceeding to be transferred to the County Court, where proceedings have been commenced, but not yet served, against Telstra Corporation Ltd

and General Television Corporation Limited, which is to be heard by a judicial member in the New Year. The application to join them as parties to the tribunal proceedings are adjourned pending determination of the s77 application.

21 My understanding is that if this application was dismissed, a similar application would be made to transfer this proceeding. Accordingly, I will not list this proceeding for a further directions hearing at this time, rather I will list it for an administrative mention with liberty to the parties to apply for the matter to be listed for a directions hearing.

DEPUTY PRESIDENT C. AIRD