

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D511/2005

CATCHWORDS

Domestic Building List, application under s126 of the VCAT Act for extension of time to appeal insurer's decision under s61(3) of the DBC Act, length of delay, reasons for delay, the delay in context of relationship between the parties, merits of the substantive case, potential prejudice to respondent or a third party, fairness between the parties.

APPLICANT: Camille Lovering

RESPONDENT: Suncorp Metway Insurance Ltd (ACN 075 695 966)

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Directions Hearing

DATE OF HEARING: 27 September 2005

DATE OF ORDER: 6 October 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2086

ORDERS

1. The time for making the appeal against the decision of the Respondent of 16 March 2005, is extended to 25 July 2005.
2. Costs are reserved and there is leave to either party to apply regarding costs.
3. The Respondent's application to join Langan Constructions Pty Ltd as a party to these proceedings is adjourned to 28 October 2005 at 10.30 AM for two hours.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant: Mr John Bolton, Counsel

For the Respondent: Mr Andrew Archer, Counsel

REASONS

1. This is an application by the Applicant home owners under section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”) to extend the time under s61(3) of the *Domestic Building Contracts Act 1995* during which an appeal against a decision of the Respondent insurer may be commenced.
2. The history is that a major domestic building contract dated 15 May 2001 was entered between J & M Langan Contractors Pty Ltd and Anthony Shiavo for construction of a domestic dwelling at 48 Duke Street, Richmond. The Respondent issued a warranty policy on 18 May 2001.
3. Although the Respondent is Suncorp Metway Insurance Ltd, Dexta Corporation Ltd (“Dexta”) acted as its agent until at least 30 June 2003 and Allianz Australia Insurance Ltd acted as its agent from at least 16 July 2003. They are all treated as “the Respondent”.
4. The Certificate of Occupancy was issued, dated 21 June 2002 and eight days later, the Applicant signed a contract of sale dated 29 June 2002. The contract settled on 29 August 2002. It would appear that the house was sold at auction. The Tribunal must exercise its discretion without fetter, but in doing so I have had regard to previous decisions of the Tribunal.

Length of Delay

5. The decision to which the claim relates was communicated to the Applicant’s solicitors, Varrasso & Associates in a letter dated 16 March 2005. Accordingly to a letter from Varrasso & Associates of 25 July 2005 to the Victorian Civil and Administrative Tribunal Registrar, was received on or about 18 March 2005. Four items were accepted and forty were rejected. The

proceeding was filed on 25 July 2005.

6. The appeal should have been lodged within 28 days of receipt of the decision, that is, by 15 April 2005. It was 100 days late.
7. The letter communicating the decision included the following paragraph:

“You may request in writing a review of your decision to the State Manager Claims, Allianz Australia Insurance Limited, setting out your reasons for your request. *Alternatively*¹ you may appeal the decision to the Victorian Civil and Administrative Tribunal. The appeal must be lodged within 28 days of receipt of this letter or any subsequent letter following a review”.
8. According to the Respondent’s submission, the first communication on behalf of the Applicant was dated 3 May 2005; 47 days after the decision.

Reasons for delay

9. Mr Dominic Varrasso, of the Applicant’s solicitors, made an affidavit on 29 August 2005. At paragraph 28 and following, he said that his firm commenced moving offices on 22 March 2005 and in mid April discovered the letters containing the Respondent’s decision had not been attached to the file, and then the Applicant was overseas until late April. As in *World Link Assets Pty Ltd v James Kay t/a JBK Builders* [1999] VCAT DB 5, the failure is a sin of the Applicant’s solicitors. In that case the sins of the solicitors were visited upon the client, and that is a course which is open in this proceeding. The reasons for delay do not add weight to the application for extension of the date to appeal. Further, the Applicant and her solicitor did not react promptly when the delay became known.

The delay in context

10. The only ameliorating factor relating to the delay and response time is that

¹ Emphasis added

there has been a long history. A claim was made by the Applicant on 31 January 2003. Only one item was complained of: “membrane to bath on first floor leaking”. That claim was denied on the basis that there was no warranty insurance for the period during which the building contract was entered, and the Applicant was given the options of seeking a review or appealing to the Victorian Civil and Administrative Tribunal. There was an issue about whether money was owed to the builder, which might be set off against any liability the builder, and hence the Respondent, might have. The Applicant asked the Respondent to review the decision, and after more correspondence between the parties, the claim was admitted by the Respondent (at that stage, Dexta) on 30 June 2003.

11. Most surprisingly, the signatory of Dexta’s letter was the same Mr Dominic Varrasso who now acts for the Applicant, but at that stage he was a director and employee of Dexta. The issue of a potential conflict of interest has not been taken into account to determine if it is reasonable to extend time, but it is noted that it makes the Applicant’s delay in appealing even less explicable than it would be if the Applicant had sought advice from a solicitor without experience in warranty matters.
12. The fault that was admitted in the letter of 30 June 2003 was a leaking bath tub. After more correspondence, and signature of terms of settlement, Master Menders were engaged by the Respondent to rectify the defect and consequent damage. The Applicant was to pay the excess of \$500.00 to Master Menders, and the remainder was to be paid to them by the Respondent.
13. On 23 January 2004 the Applicant complained to Master Menders of a number of alleged defects arising out of their work. There was further correspondence between the Applicant and Master Menders, with copies to Mr Kempton of the Respondent during January 2004. On 23 December 2004

Messrs Vassarro & Associates wrote to the Respondent on behalf of the Applicant, setting out a history of her claims.

14. The delay is substantial, and in some circumstances would be more than enough to justify refusing to allow extension of time.

Merits of the substantive claim

15. The Respondent asserts the merits of the Applicant's claim and her chances of success are poor. In the absence of any supporting affidavits, it is hard for the Respondent to say so. It is noted that in accordance with the Directions of 11 August 2005, the Respondent was to file and serve any affidavit material in reply by 8 September 2005. It has not done so.
16. There are certainly some matters listed in paragraph 7 of the Points of Claim which should, in all likelihood, have been discovered with reasonable inspection prior to purchase. This does not apply to all items in paragraph 7, nor are they all apparently the subject of the earlier settlement.

Potential prejudice to the Respondent or a Third Party

17. Failing to appeal on time is a serious matter that should not be lightly ignored. In *World Link Assets Pty Ltd v James Kay*, Deputy President Cremean said, in respect of another matter where an insurer resisted an application for extension of time:

“There is a "prejudice or detriment", it seems to me, in the insurers, if time was extended, no longer having a vested right of being free from the prospect of appeal. But this might be able to be remedied by an order for costs or damages.”

He went on to point out that in that case there was a permanent prejudice because the builder had become insolvent and was no longer in a position to rectify the defects.

18. However the Respondent has not demonstrated any particular prejudice to itself or a third party, and in circumstances where there had already been a long history between them and the Respondent had offered the alternatives of review by insurer, or appeal to the Victorian Civil and Administrative Tribunal, no prejudice is found.

Consideration of fairness between the parties

19. This is a matter where the Applicant's legal advisor has caused or substantially contributed to the delay. As mentioned above, one possibility is to refuse to extend time and to leave the Applicant to any rights she might have against her solicitor. Nevertheless, the Respondent is in the business of providing warranty insurance and although the delay is almost four times the period for appeal, it is minor in the context of the time during which the Applicant has been trying to obtain solutions to her problems from the Respondent.
20. Taking into account all the above matters, the time for making the appeal against the decision of the Respondent of 16 March 2005, is extended to 25 July 2005.
21. Costs are reserved and there is leave to either party to apply regarding costs.

SENIOR MEMBER M. LOTHIAN