VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D391/2004**

CATCHWORDS

Domestic building – denial of claim – whether a "decision".

[2005] VCAT 1102

APPLICANT	Margaret Jeanette Smith
FIRST RESPONDENT	Glenneagles Homes Pty Ltd (ACN 006 304 865)
SECOND RESPONDENT	Australian International Insurance Limited (ACN 006 544 690)
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	27 May 2005
DATE OF ORDER	14 June 2005

ORDER

1. I answer the questions:
    (a) Yes;
    (b) Yes:
    (c) Inapplicable.

2. Reserve liberty to apply.

3. Direct that this matter be listed for directions as soon as convenient.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	Mr M Campbell of Counsel
For 1st Respondent	Mr T McLean of Counsel
For 2nd Respondent	Mr S Murray, Solicitor

REASONS

1. On 20 April 2005 Deputy President Aird formulated 3 questions for decision to be heard and determined separately in this case -

   (1) Does the Tribunal have jurisdiction under s.59A and/or s.61 of the *Domestic Building Contracts Act* 1995?

   (2) Does the letter from Building Assist to the Applicant on behalf of the Second Respondent dated 19 May 2004 constitute a decision?

   (3) If the answer to (2) is 'No', should the Applicant be granted an extension of time under s.126 of the *Victorian Civil and Administrative Tribunal Act* 1998 to appeal the decision of 17 September 2002?

2. Those questions, in my view, were correctly formulated by her although the First Respondent has taken issue with this.

3. The principal issue in this case is whether the Second Respondent's decision of 19 May 2004 constitutes a "decision" such that no extension of time is required for the proceedings to have been properly commenced on 16 June 2004. If, however, that decision does not constitute a "decision", but the relevant decision is the one made on 17 September 2002, then I am required to decide whether or not such an extension of time should be given.

4. The First Respondent argues that the relevant decision is the one made on 17 September 2002 and that no extension of time should be given. Alternatively, it argues that if the decision made on 19 May 2004 is the relevant decision, then it is limited to 15 tiles and is so trifling that the proceedings should be dismissed. The Applicant argues that the decision made on 19 May 2004 is the relevant decision and that, therefore, no extension of time is necessary. If, however, I should find that the relevant decision is the earlier one, then I should extend time to enable the proceedings to be brought. The Second Respondent – the insurer – made submissions at the hearing but not decisively one way or the other.

5. The decision made on 17 September 2002 was given in response to a claim lodged by the Applicant. The claims agent (Building Assist Pty Ltd) advises that "the Insurer has directed that we advise that your claim item is formally rejected for the reasons outlined in the Report." The reference is – Claim no. 01548. The "Report" advises that following an inspection of the Applicant's premises "the number of cracked tiles falls short of the 10% requirement under the BCC's guidelines, and as such, this is not considered to be a defect warranting rectification." Apparently a count of the floor tiles in the affected areas of the premises totalled 576 whereas the cracked tiles totalled only 57.

6. The decision made on 19 May 2004 is again given by the claims agent (Building Assist Pty Ltd). The reference is the same – Claim no. 01548. Following a re-inspection, the claims agent advises that the "insurer has elected to adopt the recommendations contained in [a further] Report, and accordingly the owner's re-inspected claim item is rejected, as noted in the Report." This further Report followed a re-inspection of the premises on 5 May 2004. This Report gives as its summary: "The dwelling displays cracked floor tiling in excess of that previously existing in the owner's claim dated 5 August 2002, and rejected by the insurer. Notwithstanding this, however, the insurer's corporate legal counsel had advised that the insurer again has no liability for this matter, as the owner has failed to mitigate any loss (i.e. rectify the previously cracked floor tiles), since the original claim rejection by the insurer on 17 September 2002." Apparently on this occasion a further 15 cracked tiles were counted. The current number of cracked limestone tiles was confirmed at 72.

7. It was put to me, very forcefully, that the decision made on 19 May 2004 was not a "decision". It was submitted that it was the same as the decision made on 17 September 2002. Alternatively, it was submitted, as I have noted, that if it was a fresh decision, as it were, it was one relating only to 15 new tiles and was worthy only of derisory dismissal. Interestingly these were not submissions which were made by the decision-maker – the Second Respondent.

8. I cannot agree that the decision of 19 May was not a "decision". I think the use, internally, on the same reference is quite inconsequential. In my view, the decision of 19 May would be a "decision" even if it was exactly the same as the decision made on 17 September 2002. There is nothing in the legislation to prevent the same thing being decided twice over. I still make a decision even if I decide the same thing as before. If I am not making another decision, what, I might ask rhetorically, could I possibly be doing?

9. It is in my view nonsense to say that the decision given on 19 May 2004 was not a decision – even if it was a second one on the same facts and even if it was the same decision as before. As it happens, however, I am quite satisfied, in any event, that the two decisions are quite different even though they both relate to cracked tiles in the affected areas at the Applicant's premises. The first decision (17 September) is to the effect that the Applicant has no proper basis for claiming for defects considering guidelines. That decision relates to 57 tiles. The second decision (19 May) is to the effect that the Applicant has no proper basis for claiming considering a failure to mitigate loss following legal opinion. This decision relates to a further 15 tiles. But the decisions are quite different to one another. Not only are they grounded differently but they relate to different quantities of tiles – even though it is the same type of tiles, with some being cracked, involved in both, in the same areas (presumably) of the Applicant's premises.

10. I cannot accept the view, therefore, that the decision made on 19 May 2004 was not a "decision" sufficient to enliven jurisdiction in the Tribunal under the provisions of the *Domestic Building Contracts Act* 1995. In my view it was a "decision" for those purposes. That being so, the proceedings having been commenced on 16 June 2004, no question of a need for an extension of time arises. I am quite satisfied, therefore, that jurisdiction exists under s59A and/or s61 of the 1995 Act.

11. Nor would I be acting properly in acceding to the submission that I should forthwith proceed to dismiss such proceeding for triflingness. A complaint about 72 cracked tiles is a matter of serious concern. A complaint about even only 15 cracked tiles is still a matter of serious concern – though less so. To my mind, it is beside the point to refer to the total number of tiles involved in the affected areas – 576. The contrast does not mean that a complaint about 15 cracked tiles is absurd. For all I know, and there is a suggestion of this in the materials, there may be an underlying condition potentially affecting many more than just 57 or 72 of them.

10. I shall answer the questions as follows:
    (a) Yes:
    (b) Yes:
    (c) Inapplicable.

11. I reserve liberty to apply and I make directions accordingly.

SENIOR MEMBER D CREMEAN