VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D738/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building insurance – review of insurer's decision – rectification work to comply with current standards

APPLICANT	Melborough Pty Ltd
RESPONDENT	Vero Insurance Limited
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	21 January 2008
DATE OF ORDER	18 February 2008
CITATION	Melborough Pty Ltd v Vero Insurance Ltd (Domestic Building) [2008] VCAT 266

ORDER

1. The application for a review is dismissed.

2. Costs are reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr W. Alstergren of Counsel
For the Respondent	Mr M. Farrelly, Solicitor

REASONS

The proceeding

1 The Applicant ("the Builder") seeks to review a decision of the Respondent ("the Insurer") made on 10 September 2007 that it carry out certain rectification work to a residential unit at 53 High Street, Glen Iris ("the Unit").

2 The Builder received the decision on 19 September 2007 but the application to review it was not made to the Tribunal until 31 October 2007. It is therefore 14 days out of time. I did not understand the Insurer to suggest that an extension of time should not be granted although on the evidence of the Builder's director, Mr McDonald, the explanation given for the delay was not particularly satisfactory. Nevertheless, it is only 14 days and no prejudice is said to have arisen from the delay. I will grant the extension.

Background

3 The Unit was constructed by the Builder between October 1999 and May 2001. The property was sold to the existing owners by a company associated with the Builder on 26 June 2001.

4 The Unit has a tiled first floor balcony area which forms the roof of part of the Unit beneath it, including the entrance foyer. The balcony has been leaking for some time, has become spongy and some of the tiles have come loose. In heavy rain a substantial quantity of water leaks through the balcony into the ceiling adjacent to the entrance door and runs through a light fitting and down the walls..

5 The decision requires the Builder to remove the existing floor tiles including any remnant adhesive, remove the existing waterproof membrane and make good any water damaged or unserviceable substrate sheeting or framing, provide a new membrane and, effectively, reconstruct the balcony.

Grounds of appeal

6 There are two grounds for the appeal. The first is that the owners did not make a claim on the policy within 180 days of becoming aware of the defect and therefore the claim should have been rejected by reason of clause 22 of the policy. That clause provides:

> "We will not pay any claim unless made within 180 days of when you first became aware, or might reasonably be expected to have become aware, of some fact or circumstance which might give rise to the claim".

7 The second ground is that the damage was not caused by defective workmanship but rather, by the installation of part of an air conditioning system on the balcony. The Builder argues that condensation from the air conditioner has had a corrosive effect upon the grout of the tiled surface and caused the damage about which the owners now complain.

The hearing

8 The matter came before me for hearing on 21 January 2008. Mr Alstergren of Counsel appeared for the Builder and the Insurer was represented by its solicitor, Mr Farrelly. I heard evidence from the Builder's director Mr McDonald and was also handed an affidavit by a tenant of the Unit, Mr Caddy. For the Insurer I heard from its expert Mr Rodney Steer.

Conclusion

9 I am not satisfied that the Insurer ought to have rejected the claim because it was not made within 180 days and I am satisfied that the problem with the balcony arises as a result of defective materials or workmanship by the Builder. The application is therefore dismissed. The reasons for this decision follow.

Should the claim have been rejected as having been out of time?

10 According to Mr Caddy's affidavit he first noticed a leak in the light fitting near the entrance door in May 2005. At the time that he noticed the leak he also noticed that the tiling on the balcony had cracks in the grouting and appeared to be "spongy" when walked on.

11 He says that he advised the letting agents on several occasions of the leak. They sent someone around to the Unit to inspect and confirmed the existence of the leak but it was not repaired. The existence of the leak was noted on at least two condition reports they submitted to the agents during the term of the lease. He does not say precisely when the agent was first advised but he says that the first tradesman to attend the property to address the matter was a dishwasher repairman in about December 2005. The man took photographs but carried out no repairs. The same man returned early in 2006.

12 Thereafter, after another complaint to the agent they sent a plumber who inspected the balcony and he took further photographs but no work was done. Between January and June 2006 Mr Caddy and his co-tenant contacted the agent on at least 3 times and eventually the Builder was sent to attend to the problem.

13 The claim was submitted to the Insurer on 8 August 2007. In the claim form the owners said that they first became aware of the defect on 10 October 2006. They said that they attempted to get in touch with the Builder but were unable to do so but that the Builder finally attended the Unit in December 2006.

14 On the basis of this evidence it is clear that the owners made the claim well beyond 180 days from when they first became aware of the defect. The clause in the policy referred to is inserted pursuant to paragraph 7.11 of the Ministerial order S122 (30 October 1998) which applies to the relevant policy. That provides that a policy issued pursuant to the Ministerial order may:

> "… include a provision whereby the insurer may refuse to accept any claim which is not made within 180 days of when the claimant first became aware or might reasonably be expected to have become aware or some fact or circumstance which may give rise to the claim".

15 By clause 9 of the Ministerial Order, a policy issued pursuant to it must not be inconsistent with the Order. Hence I should read clause 22 as if the second word "will" was "may" which is what the Order provided.

16 Mr Farrelly referred to s54 of the *Insurance Contracts Act* 1984 (CW) which provides as follows:

> **Insurer may not refuse to pay claims in certain circumstances**
>
> (1) Subject to this section, where the effect of the contract would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which sub-section (2) applies, the insurer may not refuse to pay the claim by reason only of the act, but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interest were prejudiced as a result of that act.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarding as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract the insurer may refuse to pay the claim".

17 Mr Farrelly said that the Insurer was of the opinion that it would not have been able to show prejudice within the meaning of sub-section (1) by reason only of the delay by the owners in submitting the claim and that therefore, if it had refused to pay the claim there would have been a successful appeal against its decision.

18 Mr Alstergren pointed to the long delay between when the leak was first notice by the tenant and when the claim was submitted. He said that I should infer that the owners came to know about the leak shortly afterwards since they would have been informed of it by the agent. During that period, he said, the condition of the property deteriorated. The delay was therefore contributing to the loss which was the subject of the claim.

19 I do not accept that that is the case. There is no evidence as to when precisely the owners became aware. It is dangerous to assume that agents always tell their owners everything that happens but I will proceed, without deciding, on the basis that the owners "might reasonably been expected to have become aware" of the leak sometime before December 2005.

20 Since the evidence of Mr Caddy was that when he first noticed the leak in May 2005, the tiles on the balcony were already spongy, it seems to me that the balcony would have had to be replaced anyway at that time. I therefore

accept Mr Farrelly's submission that, had the Insurer rejected the claim on the basis of clause 22 of the policy, it is highly likely that an appeal against that decision would have succeeded. This ground of the appeal therefore fails.

Was it a defect?

21 Mr McDonald said that the substrate of the balcony was chipboard but it had been sealed with an appropriate membrane. He acknowledged that there was an area in the deck above the entry of some 600mm x 800mm which was spongy and where the grout between the deck tiles had, to use his word, corroded. He said that sections of the interior plaster of the room under the deck showed evidence of water ingress where the paint had lifted off the plaster underneath due to water penetration.

22 Mr McDonald said that the air conditioner had been positioned by the owners above the area of the leak. He suggested that this unit would have generated corrosive waste water which would have effected the cementitious grout between the tiles and that this was the likely cause of the problem. There was no evidence from an expert to support this view. He says that this was suggested to him by someone else in the industry.

23 Photographs tendered on behalf of the Insurer show that effected area is some distance away from the air conditioner and it does not seem to me that water flowing from the air conditioner would have been able to reach the area where the surface has broken down. There is also no indication in the photographs that I saw of any corrosion to the tiles or grout downhill of the air conditioner.

24 Further, Mr Steer disagreed with Mr McDonald's hypothesis, saying that the air conditioner was in the wrong position and that the area subject to condensation from such a unit is usually the support fittings. The grout in the area of the air conditioner was intact.

25 I do not accept Mr McDonald's hypothesis as to the cause of the damage to the balcony.

26 In addition, Mr Steer said that the areas was inadequately drained in that the appropriate Australian Standard required it to have a 90mm drain whereas it only had a 50mm drain which is insufficient. He also pointed out that it had no overflow facility. He said that he examined the membrane in the area of the leak and it appears to have failed in the position of a join although he acknowledged it was very difficult to tell.

27 Mr Steer said that the problem was likely to be due to a defect at the time of construction. I accept Mr Steer's evidence and find that the cause of the leak was a defectively constructed balcony.

28 At the time this balcony was constructed, it was not contrary to the appropriate standards to use chipboard as a substrate for an external balcony. However it was and is known that such a material will break down if exposed to water for any length of time and so even at that time,

when any builder elected to use chipboard instead of compressed fibro cement sheet as a substrate for such a balcony, it was essential that a fail safe sealing system be adopted in order to prevent water ever coming into contact with the substrate. In this instance the Builder has failed to do that.

Rectification

29 I was concerned at Mr McDonald's suggestion as to the rectification method namely, to drive nails into the chipboard to see what had broken down and what had not and then simply replace the effected section. It seems to me that it is essential to replace the whole substrate according to current standards, ie, with compressed fibro cement sheet, and with the appropriate drainage in place namely, a 90 mm drain and provision for overflow drainage. The tiles will all have to be replaced but it is not a solution to simply put an additional layer of tiles over the additional ones as Mr McDonald suggested.

Currency of policy

30 In a written submission apparently prepared by the Builder, it was suggested that the claim was made outside the period of the policy. Mr Alstergren, sensibly, did not press this argument. Paragraph 21 provides that the policy only covers loss happening (inter alia) in the period before 6 years and 6 months after the completion date or the termination of the contract, which ever is the earlier. There is no evidence as to any termination of the contract and by clause 2 of the policy the term completion date means, in the circumstances of this case, the date of the issue of an occupancy permit. The occupancy permit was issued on 7 May 2001 and the loss occurred only 4 years later. The loss was suffered, and even the claim was made, within 6 years and 6 months of the date of the issue of the certificate of occupancy so there is no substance in this argument. The case relied upon namely, *Ward v Vero Insurance* [2005] VCAT 915 concerned a different fact situation, a different policy and a different Ministerial order.

Order

31 The application for a review of the Insurer's decision is therefore dismissed with the addition that, in carrying out the schedule of works the Builder must use compressed fibro cement sheet as a substrate and not chipboard and must replace the whole of the chipboard. I heard no argument as to costs and so they will be reserved although I note that the matter was listed for hearing as a small claim.

SENIOR MEMBER R. WALKER