VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D166/2005**

CATCHWORDS

Appeal against decision of warranty insurer – whether claim made within time - costs

[2005] VCAT 915

FIRST APPLICANT	Ray Ward
SECOND APPLICANT	Elisabeth Ward
FIRST RESPONDENT	Vero Insurance
SECOND RESPONDENT	Tuna Homes
THIRD RESPONDENT	Tuna Developments
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	13 May 2005
DATE OF ORDER	Oral reasons given at hearing, written reasons 17 May 2005

ORDER

1. The proceeding as against the First Respondent is dismissed

2. The proceeding as against the Second and Third Respondents is struck out

3. No order as to costs

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For First Applicant	In person
For Second Applicant	In person
For First Respondent	Mr Cawthorn of Counsel
For Second Respondent	Ms Helen Theunissen
For Third Respondent	Mr Frank Theunissen, Director

REASONS

1. The Applicants ('the owners') are seeking to appeal the decision of the First Respondent ('the insurer') of 2 March 2005 denying their claim on the grounds that it was made outside the period of insurance. It is common ground that their home was completed by the Second Respondent ('the builder') on or about 17 October 1997. Mr Cawthorn of Counsel appeared on behalf of the insurer and submitted that Clause 6 of the Policy of Insurance was an absolute bar to the owners' claim. Clause 6 provides:

> *We will not pay any claim unless it is made –*
>
> - *after the date of the contract or issue of a building permit for the home building work, whichever is the earlier.*
> - *before the day 6 years and 6 months after the completion date, or the termination of the contract whichever is the earlier.*

2. The owners seek to rely on clause 7 of the Policy which provides:

> *We will not pay any claim unless you notify us in writing, or your builder, either orally or in writing, of any fact or circumstance which might give rise to the claim within 180 days from the time you first became aware, or you might reasonably be expected to have become aware of, that fact or circumstance.*

3. I am of the view that clause 7 cannot be read independently of clause 6 nor to override what would seem to be its intent – that claims must be made within 6 years and 6 months after the completion date, in this instance, which I calculate to be 17 April 2004. In any event the owners did not notify the builder, either orally or in writing, within 180 days of first becoming aware of the water leaking and damage to the balcony. Mr Ward confirmed they first became aware of the problems in mid 2001, as noted on the claim form, and that he applied some sealant which did not solve the problem. No attempt was made to contact the builder until January 2004, and a claim was not made under the policy until February 2005.

4. Mr Ward gave evidence that he was particularly concerned the insurer had not advised him of the need to lodge a claim within the six years and six months

period when he first made telephone enquiries but rather had told him he should contact the builder in the first instance. Although he acknowledged that he had not given the insurer any information about the completion date of the house at the time of the initial enquiry, he said he believed the insurer had misled him and had contributed to the owners' not making the claim within time. There is no evidence to support this allegation and it is rejected. I note that Clause 34 of the policy provides that 'claims are to be made in writing and delivered to the agent' and that Clause 7, referred to above, confirms that where claims are notified to the insurer within 180 days of the owners becoming aware of them such notification must be in writing – a mere telephone enquiry is not sufficient. Mr Ward confirmed that he had a copy of the policy although he had apparently not taken any steps to locate it or check its terms until after the claim was denied. It is not the insurer's responsibility to ensure that owners are aware of their rights.

The claim against the builder

5. Unfortunately for the owners the builder is in liquidation, as confirmed by letter dated 12 May 2005 from Veale Partners, accountants, confirming that PPB Chartered Accountants have been appointed liquidators. Whilst the owners may have a cause of action against the builder in negligence they are unable to proceed against the builder without leave of the Supreme Court. However, I will strike out their claim as against the builder to give them the opportunity to proceed against the builder in the event they decide to seek and are granted leave.

The claim against the Third Respondent

6. The owners have also included Tuna Developments Pty Ltd as a party to this proceeding although the company was not a party to the original building contract. Mr Frank Theunissen, who is director of this company, is a son of Bill Theunissen a director of the builder. I accept that he handled the initial enquiry, made by letter dated 29 January 2004 addressed to the builder, on behalf of his late father and his mother and therefore effectively on behalf of the builder. On

20 February 2004, Mr Theunissen wrote to the owners on Tuna Developments Pty Ltd's letterhead advising:

> *In reply to your letter of 29 January 2004, in regard to the above matter, I advise that I am unable to assist you with an inspection of the Balcony at the front of your home, which you believe to have faulty workmanship, which should be covered by your H.O.W. insurance.*
>
> *I am informed in relation to Tuna Homes Pty Ltd that all claims for maintenance are now being handled by the solicitor for Tuna Homes Pty Ltd and as such the letter which you forwarded to my mother should have been passed on to him.*
>
> *All maintenance issues in regard to Tuna Homes Pty Ltd do not have e anything at all to do with myself, or my company, however I wish you well in getting the issues that concerns you resolved.*

7. The owners did not take any steps to formally make a claim on the insurer at this time. Had they done so their claim would have been within time. I am satisfied that Tuna Developments Pty Ltd has no liability in relation to the alleged defective works, nor the failure of the owners to make a claim under the insurance policy within time.

8. It is also perhaps unfortunate that the solicitors for the builder did not write to the owners until 1 October 2004 advising them:

> …
>
> *We confirm that you should check the statutory insurer associated with your project. We understand from current files that claims are either made in connection with HIH … or with the House Owners Warranty in which case the claim foes to VERO …*

9. However, some four and a half months passed before the owners lodged their claim with the insurer. The Tribunal cannot assist owners in such circumstances. It is incumbent upon owners to inform themselves of their rights and obligations, and to take timely steps to protect their interests. They cannot rely on others to do this for them on their behalf.

Can the Tribunal grant the owners an extension of time in which to lodge the insurance claim?

10. The Tribunal does not have any power to grant an extension of time in which an owner can lodge a claim with an insurer. Its powers in relation to extensions of time are set out in s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 and only relate to extensions of time for the commencement of a proceeding or the 'doing of any act in a proceeding'.

Costs

11. Mr Cawthorn applied for costs on behalf of the insurer alleging the Applicants' conduct of this proceeding should be considered vexatious. Costs are also sought by Tuna Developments Pty Ltd as it considers it has been incorrectly named as a party.

12. In determining whether to make an order for costs I must have regard to the provisions on s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides that each party is to bear their own costs unless the Tribunal is satisfied it should exercise its discretion pursuant to s109(2) being satisfied it is fair to do so and having regard to the provisions of s109(3) which provide:

> "The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to--
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as--
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
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> (v) attempting to deceive another party or the Tribunal;
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> (vi) vexatiously conducting the proceeding;
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> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
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> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant.

13. Whilst the insurer may have written to the owners advising that their claim had been made out of time, and whilst their misunderstanding was not sufficient to enable them to succeed, this is not, of itself, a reason for me to exercise my discretion under s109(2), nor do I consider their application to have been vexatious. The owners are not legally represented and in any event this is a small claim. Whilst the owners clearly misunderstood their legal position they were nevertheless entitled to come to the Tribunal seeking a determination. The mere fact that an applicant is unsuccessful is not a reason to depart from the provisions of s109(1). Further, I am not be satisfied on the material before me that there is any reason to exercise my discretion under s109(2) in favour of the insurer or Tuna Developments Pty Ltd. I will therefore make no order as to costs

DEPUTY PRESIDENT C AIRD