VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D302/2005

CATCHWORDS

Domestic Building List – compulsory warranty insurance – HIH extent of liability of 1st respondent – whether 1st respondent's liability differs from original insurer (HIH) – whether "90 day" deeming provision applicable – *House Contracts Guarantee Act* ss 37, 38 – Ministerial Orders 30 October 1998 cl 8.1, 8.5

APPLICANTS	Thomas R W Roe and Sarah M Roe
1ST RESPONDENT	Housing Guarantee Fund Limited
2ND RESPONDENT	Burranbok Pty Ltd t/as Peter J Russell Master Builder
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATES OF HEARING	2 and 3 February 2006
DATE OF ORDER	3 February 2006
CITATION	[2006] VCAT 103

ORDERS

1 By consent the name of the 1st respondent is amended to read "Victorian Managed Insurance Authority" (VMIA).

Not By Consent

2 The "90 day" deeming provisions in the relevant policy and ministerial orders are applicable to this proceeding.

3 **Adjourned to 7 February 2006 at 10:00 am.**

Robert Davis
Senior Member

APPEARANCES:

For Applicants	Mr P Duggan of counsel
For 1st Respondent	Mr J M Forrest of counsel
For 2nd Respondent	Mr P Russell

REASONS FOR DECISION

1 Yesterday morning this proceeding was called on before me. At the outset of the proceeding, Mr Forrest, who appeared for the 1st respondent, informed me that the 1st respondent was no longer known as the "Housing Guarantee Fund Limited" but was known as "VMIA" which are the initials for "Victorian Managed Insurance Authority" on behalf of the State of Victoria. It has been agreed by all parties that the amendment to the name should be made in the appropriate form.

2 After the proceeding was called on before me, I invited all parties, as there had been no formal pleading, to make an opening before me.

3 Mr Duggan, on behalf of the applicants, when opening his case, submitted the claim of the applicants would, inter alia, be based on the fact that the 1st respondent had failed to process the claim within the 90 days referred to in the policy and, as such, the claim was deemed accepted and liability should be determined on that point alone. As a result, after hearing Mr Forrest, I decided that the proceeding should be adjourned and the application in relation to that matter should be heard this morning. I have since heard the parties in relation to that matter.

4 The relevant facts are that the substantive application that has been made for indemnity in relation to the applicants' residential property was made by a claim form which was signed by the applicants on 6 December 2004. On 14 December 2004, the then Housing Guarantee Fund (HGF) received the claim form and on 17 January 2005, HGF wrote to the applicants acknowledging receipt of the claim form on 14 December. Mr Duggan calculated that 90 days from 14 December was 26 March 2005. There was no dispute about that calculation. However, on 21 April 2005, HGF wrote to the applicants rejecting the claim which is some 127 days after it was made.

5 The background to part of the insurance industry in Australia is important to this mater which was before me. That is, in about 2000 or 2001 a large insurer by the name of HIH went into liquidation. HIH featured as one of the largest, if not the largest, insurers for compulsory home warranty insurance in the State of Victoria. As such, emergency legislation was passed by the State of Victoria so that people, who had their properties which were constructed insured by HIH, would not lose out on their right of indemnity. As a result, s 37 of the *House Contracts Guarantee Act* 1987 (the Act) came into being. That section reads as follows :

37. Indemnity

(1) Subject to this Part, the State must indemnify any person who is entitled to an indemnity under a HIH policy to the extent of the indemnity under that policy.

(2) Despite any provision of a HIH policy which limits the liability of HIH if it ceases to trade, a person is deemed for the purposes of this section to be entitled to an indemnity under a HIH policy if that person would have been entitled to that indemnity if HIH had not ceased to trade.

6 Subsequent to the enactment of Part 6 of the *House Contracts Guarantee Act* in June 2002, further legislation was assented to and it was deemed to have come into operation on 8 June 2001. That legislation is now primarily contained in s 38 of the *House Contracts Guarantee Act*. It is sections 38(3) and (4) to which I am concerned with here, which state as follows :

(3) Section 37 does not apply to indemnify a loss if the indemnity for that loss under the HIH policy arises solely because—

(a) a claim for the loss has been made on the HIH policy on or after 16 December 2000; and

(b) the claim is deemed to have been accepted under the HIH policy because it was not dealt with by HIH within the period specified by the policy.

(4) Nothing in sub-section (3) prevents section 37 from applying to indemnify a loss to the extent that the loss is indemnified under the HIH policy otherwise than in the circumstances set out in sub-section (3).

7 Mr Forrest, on behalf of the 1st respondent, whose arguments were adopted by the 2nd respondent, has submitted that the applicants are not entitled to rely on the clause in the policy which appears to require the respondent to reject the claim within 90 days otherwise there is a deemed acceptance of liability. I might say here that the building permit in relation to the applicants' property was issued on 9 November 1999 and there was a certificate of occupancy issued in December 2001. Subsequent to the issue of the certificate of occupancy, the then owner, a Ms Pizzey, moved into the property. However, unfortunately, she died and her estate sold the property on 25 January 2003 to the applicants. The applicants moved in approximately one month later.

8 The policy of insurance which was compulsory which was issued in relation to this matter contained the following clause (6.7) :

> Unless otherwise agreed any claim submitted by the Building owner which has not been accepted by the Insurer giving the Building Owner written notice within 90 days of the receipt by the Insurer of a written Claim notification is deemed to be accepted.

9 Mr Duggan, while replying to the long submissions which had been made by Mr Forrest, obtained a copy of the relevant Ministerial Order for this period. Clause 8.1 of the Ministerial Order states:

> Where a policy is issued in compliance with this Order and if any term of the policy conflicts or is inconsistent with this Order then the policy shall be read and be enforceable as if it complies with this Order.

10 Clause 8.5 of the Ministerial Order states as follows :

> Where a written claim is not determined as to liability by the insurer within ninety (90) days of receipt then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer shall be deemed to have accepted liability for the claim.

11 It is in these circumstances that I now determine only whether the failure by the 1st respondent to determine the claim within 90 days amounts to a deemed acceptance of the claim. This determination will in no way prejudice the respondents in making an application before me for an extension of time which both Mr Forrest and Mr Russell have foreshadowed will be made should this current application be determined against their clients.

12 In *Kleeven v Housing Guarantee Fund Ltd* [2002] VCAT 380 (4 June 2002) Cremean DP (as he then was) at para 11 set out a summary of the relevant provisions of the Act. I mention here that at the time this case was determined, s 38 had not come into being and thus it is not mentioned in the Deputy President's reasons. In paragraph 11 the Deputy President states :

> To be able to rely upon s 37 a person must be one "who is entitled to an indemnity under a HIH policy". Then, the State has an obligation to indemnify ("must indemnify") that person "to the extent of the indemnity under that policy". It goes without saying that a person is not entitled to an indemnity under a HIH policy if they are not entitled to an indemnity under that policy. Equally, though a person is entitled to indemnity if they are entitled to be indemnified. But under a HIH policy a person was entitled to be indemnified if the 90 day rule operated in their favour. They could then call upon the insurer to pay over the amount of their claim. This was provided for so as to avoid dilatoriness on the part of the insurer. But if a person is to have the same indemnity via s 37, one of the same "extent", then it must follow that the 90 day rule in clause 3.5.2 applies. It cannot be an indemnity of the same "extent" in my view, if, when it applies, the benefit of that rule is not transferred over. The rule, in my view, is no mere post-claims procedural provision. It is a rule which, when it applies, creates a substantive right to be indemnified, if no extension of time has been sought or granted. I am unable to see how, in such circumstances that "right" to be indemnified is not properly able to be described as an "entitlement" to be indemnified. If it may properly be so described then a person having that entitlement is, in my view, a person within s 37 "who is entitled to an indemnity under a HIH

> policy". But, if so, then the State has an obligation under that provision to indemnify that person to the same "extent".

13 Mr Forrest has spent some considerable time basing a large part of his argument on the basis that the 90 day provision in both the Ministerial Order and in the policy itself is no more than a procedure. I cannot agree with that submission. For the reasons stated by the Deputy President, in my view, it is a substantive provision and is as much a part of the indemnity as the monetary liability.

14 Section 37(1) of the Act states that the person is entitled to be indemnified to the extent of the indemnity under the policy. In my view, not only is the money sum part of the extent of the indemnity under the policy but also an advantage which an insured may have. That is, being able to make a claim and have it promptly dealt under s 37 of the Act. If s 37 of the Act was to be read in any other way, in my view, the claimants would have a lesser right than what they would have had under the policy. The deeming provision as a result of the time limit is part of the substantive right given by the policy. There is support for this view by the passing of the provisions of s 38 of the Act which, indeed, relate specifically to the provisions for where a claim had been made directly to HIH but the liquidator of HIH had not had time to process the claim before the 90 day period had expired. It was under these circumstances that s 38 of the Act came into being. The Minister, Ms Kosky, in her speech to Parliament in introducing this amendment on 1 November 2001, stated as follows :

> Understandably such claims do not rank high on the liquidator's current priorities as he will most probably not be making any payments to creditors for at least two years. It is quite likely therefore that the claim made direct to HIH will not be determined within 90 days of its receipt. Should the home owner subsequently lodge a claim with HGFL the Act requires the State to provide the same indemnity that HIH does under the policy. However, if 90 days have elapsed since the claim was received by HIH, HIH may have deemed to have accepted the claim and therefore to have provided an indemnity to the home owner. Consequently the State may also have automatically provided an indemnity before the merits of the claim have been established and in all likelihood before HGFL has even received the claim. To avoid any unnecessary cost to the taxpayer and a risk of litigation on purely technical points, the Bill provides that an indemnity from the State is not created solely through 90 days having elapsed since the claim was received by HIH.

15 If the Minister had intended the 90 day provision in the Ministerial Order and in the policy to which I have referred not to apply to the State through the auspices of HGF, in my view, it is probable and quite likely that s 38 of the Act would have been worded in different terms and, indeed, her speech would have been worded in different terms. It was not. In my view, it is clear to me liability of HGF, as its agent for the State Government, is incurred in relation to both indemnity and the 90 day deeming provision by

the combined effect of the policy and/or Ministerial Orders and s 37 of the Act. This is in spite of the submission by Mr Forrest that the State had not entered into any agreement and no cause of action arises against the State save for causes of action that stem from Part 6 of the Act. In my view, Part 6 of the Act does in fact create this potential liability. Mr Forrest suggested that HGF were not standing in the shoes of HIH. I do not agree with that submission. It stands in the shoes of HIH save and except for procedural requirements and save and except to that referred to in s 38(3) and (4) of the Act. I do not accept Mr Forrest's submission that because there is no express provision in the Act that requires HGF to determine the claim within 90 days that the deemed provision cannot apply. The words of s 37(1) of the Act, in my view, are sufficiently clear on their face to show all substantive liability of HIH in relation to Home Warranty Insurance in Victoria, is bestowed upon HGF.

16 Mr Forrest further submitted, pursuant to what the Deputy President said in *Kleeven's* case, that, in any event, this provision of the 90 days did not apply in these circumstances. Paragraph 12 of the DP's decision in *Kleeven* sets out why he decided that the 90 day provision should not apply in this case. He there stated :

> It seems to me though that this right – described by Counsel as a right "sui generis" – is one which is created solely by s 37. It does not derive its force out of anything done or not done by the Respondent. When the benefit of the rule can be claimed, that benefit occurs because HIH has failed to determine a claim within 90 days and has not sought or been granted an extension of that time. It is not a benefit that occurs because the Respondent itself has failed to determine a claim within 90 days. The 90 day rule arises out of what was the contract of insurance between HIH and the insured party. In this particular case, the Applicant and the Respondent clearly have not been in contractual relations. No bargaining process has ever taken place between them. Had one taken place, possibly a clause like that in clause 3.5.2 would have been included in their arrangements or possibly not.

17 With respect to the Deputy President, I do not agree with what he has said in paragraph 12. The various policies over the years that have been issued in relation to home warranty insurance have been issued not as a result of bargains which have been made or a bargaining process which has taken place between the building owner who gets the benefit of the policy and the insurer. Such policies come about by means of government action requiring the builder to take out such policy and not only does the government's action require the builder to take out such policy, but the policy must, as a minimum, be in the terms of the Ministerial Order (see paragraph 9 hereof). As such, in my view, the Deputy President is mistaken when he refers to a bargaining position in the case which was before him. In my view, there was no bargaining position in the case which was before the Deputy President and there has been no bargaining position in this case.

It is a policy that is largely created by legislation and by a Ministerial Order. Therefore, with respect, I will deviate from the view expressed by the learned Deputy President in that case.

18 In my view, as I have stated, s 37(1) of the Act does create an indemnity and as the section states a person "who is entitled to an indemnity under a HIH policy to the extent of the indemnity under that policy", I disagree with Mr Forrest that the words "to the extent of the indemnity under that policy" mean in fact that indemnity pursuant to the policy is limited to only the monetary sum. It extends to all substantive benefits which accrue under that policy and one of those benefits is prompt action which is something that the 90 day period is designed to give.

19 Mr Forrest submitted further that to give s 37(1) of the Act the meaning which I have given it would mean that s 37(2) of the Act would not have effect. That section, he says, requires that the applicant makes a claim on HIH or its liquidator first. In my view, it is common knowledge in the community that the HIH liquidator is not paying any money pursuant to claims. It would be an utter waste of time for such a claim to be made. To suggest that a home owner be not entitled to the benefit of the 90 day period because no claim has been made on HIH would, in my view, be denying the reality of the situation. In any event, it is clear from s 38(3) and (4) that that was what the Minister seemed to have in mind when she introduced those provisions into Parliament and, as I have previously said, no similar provision was introduced limiting the 90 days period to HGF or the State itself.

20 Mr Forrest submitted that the deeming provision in the policy of insurance was uncertain and should not be given any weight or meaning. In my view, that submission is incorrect and on reading the provision the only meaning that could sensibly be given to it is that which has been suggested by Mr Duggan. In any event, now that the words of the Ministerial Order are clear, it seems to me to be quite clear that the 90 day deeming provision would work in that case in any event.

21 Accordingly, I make a finding that the fact that the 1st respondent has failed to reject the claim within the 90 day period means that the deeming provision takes effect and subject to gaining an extension of time, liability would be determined against it. However, as Mr Forrest and Mr Russell said that they intend, on behalf of their clients, to make an application for extension of time, it would, in my view, be improper to make any finding that liability does exist at this stage. However, the only finding that I will make is that the deeming provision in both the contract of insurance and the applicable Ministerial Order does apply to this situation and works against HGF as the agent for the State of Victoria.

Robert Davis
Senior Member