VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D164/2005**

CATCHWORDS

Application for extension of time to appeal insurer's decision or liability – appeal on quantum within time – reasonable costs to carry out rectification works

[2005] VCAT 1052

APPLICANT	Seventy Eighth Evolution Pty Ltd
FIRST RESPONDENT	Vero Insurance Ltd
SECOND RESPONDENT	Robert Hudson
THIRD RESPONDENT	Marie Meggitt
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	11 May 2005
DATE OF ORDER	1 June 2005

ORDER

1. The application for an extension of time in which to appeal the insurer's decision dated 4 August 2004 in relation to liability is dismissed.

2. The application insofar as it relates to an appeal of the insurer's decision dated 14 February 2005 in relation to quantum is dismissed.

3. The insurer's decision of 14 February 2005, that $8,800.00 is the reasonable cost to carry out the rectification works, is affirmed.

4. Costs reserved – liberty to apply. Any costs hearing to be listed before Deputy President Aird.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr C Moshidis of Counsel
For 1st Respondent	Mr M Farrelly, Solicitor
For the 2nd and 3rd Respondent	Mr R Hudson, in person

REASONS

1. This is an application by the builder to review the insurer's decisions. Although the application, filed on 15 March 2005, refers to the insurer's decision dated 14 February 2005 which was a decision on quantum, the builder is also seeking an extension of time (if necessary) in which to appeal the decision of the insurer dated 4 August 2004 in relation to liability.

2. This application was listed for a small claim hearing, with an estimated hearing time of half a day which was ultimately extended to one day. In the interests of ensuring the parties did not incur unnecessary costs, I indicated that having heard the application for an extension of time, I would reserve my decision and hear evidence in relation to liability and quantum.

3. Mr Moshidis of Counsel appeared on behalf of the builder, and Mr Farrelly, solicitor, appeared on behalf of the insurer. Mr Shaw, director, gave evidence on behalf of the builder and all references to the builder include references to him. Mr Hudson, the owner, gave evidence on behalf of the insurer as to the nature and extent of the alleged defects. The insurer, having accepted liability and made a decision on quantum has entered into Terms of Settlement with the owners based on the approved sum of $8,800.00.

4. Mr Moshidis and Mr Farrelly said they had agreed that the application for an extension of time would proceed on the basis of submissions. This is generally unsatisfactory and not to be encouraged. In *Clifton Properties Pty Ltd v Litewaite Constructions Pty Ltd* [1999] VCAT 49, Deputy President Cremean (as he then was) indicated the importance of evidence to support an application being provided "in the formal sense" – either by oral evidence or by affidavit.

Is an extension of time necessary to appeal the decision on liability?

5. Although the correspondence from the insurer was apparently not sent to the builder at its registered office, but rather to its director, Mr Shaw, I am satisfied the company was aware of the claim, particularly as the builder has sought to rely on communications between Mr Shaw and the insurer in support of its claim for an extension of time. It is helpful to set out a chronology including the correspondence between the builder and the insurer with observations where appropriate.

6. On 2 November 1997 the builder and the Second and Third Respondents ("the owners") entered into a building contract for renovations and improvements. Painting was specifically excluded from the contract, and, on 1 May 1998, a variation was signed by the Architect, on behalf of the owners, whereby the following items were deleted:
   - the supply and installation of the shower screens for which the owners were given a credit of $1000, and
   - the installation of floor vinyl including to the bathroom floors for which the owners were given a credit of $400.

7. These works were completed sometime in 1999. In 2001 the owners advised the builder of a problem with the shower recesses. The builder asserts that the shower screen suppliers indicated there was a problem with the seals. However, no evidence was called to support this. The builder advised the owners at this time that any problems with the shower screen were not his responsibility. However, he did apply some silicone in the shower recesses.

8. On 5 March 2003 the owners wrote to the builder advising of continuing problems with the shower recesses. It is helpful to set out that letter in full:

> *As you are aware we have had a continuing problem with the two shower recesses that were installed as part of the renovation undertaken at our house by your between November 1997 and May 1998. In particular the shower recess upstairs leaks in a way that has caused the wood on the adjoining door frame to rot and has wet the carpet in the adjoining bedroom.*

In the downstairs bathroom the shower screen and bath are obviously not sealed properly, causing the adjoining plaster wall to become mouldy and rot.

I appreciate the attempts that you have made to rectify this problem in the past but the problem still persists.

I therefore request that you now take more substantial steps to rectify these defects.

9. On 31 March 2003 the builder received a letter from the insurer advising it had received a complaint from the owners and requesting that he meet with them to try to achieve a resolution. A formal claim was lodged by the owners on 15 June 2004. The builder was notified of this claim on 30 June 2004 when the insurer requested copies of certain documents.

10. On 14 July 2004 a report was prepared for the insurer by Building Assist, which recommended that liability be accepted because moisture was migrating through the wall tiles on the back wall. By letter dated 4 August 2004 the insurer advised the builder it had accepted the claim and directed it to carry out the works in the attached works schedule. Again it is helpful to set out extracts from this letter:

…

A failure to comply with our direction will result in the insurer seeking tenders from alternate builders. We will then seek recovery of all costs associated with the claim from you. We will be required to notify the relevant regulatory body of a successful claim. This may affect your eligibility for insurance and/or your building licence.

You have a right to seek a review of this decision on your insurance claim by lodging an application with the Victorian Civil and Administrative Tribunal. Any such application must be made within twenty-eight days of the date you receive this decision letter.

…

11. On 23 September 2004 a report was prepared for the builder by Collodetti Williams which concluded that the builder was not liable for the alleged defects and:

<u>Ground floor bathroom</u> – 'It is most probable that the water leak is due to the cracked tile as the water damage is highest immediately adjacent to the cracked tile on the other side of the shower screen. It is probably that the tile was cracked when the shower screen was installed.

Mr Collodetti resiled from this opinion when giving evidence at the hearing, and conceded under cross examination that the cracked tile was of no relevance to the leaks. The report also concluded:

> *First floor bathroom – 'There are a number of causes. The main cause is the shower screen door as it opens out which accentuates the amount of water leaking onto the floor.*

12. On 28 September 2004 the builder requested the insurer to review its decision – I note, in passing, this request was made more than twenty-eight days after the initial decision of the insurer dated 4 August 2004. By letter dated 11 November 2004 the insurer affirmed its decision of 4 August 2004. I reject Mr Moshidis' submissions that this letter should properly be regarded as constituting a 'new' decision.

13. Upon receipt of this letter the builder again wrote to the insurer on 14 December 2004 advising:

> *Further to our telephone conversation with you and Ian McNiece and with reference to our earlier correspondence, I write to reiterate that the water damage at the above address (and therefore any breach of BCA P24.1) in both cases, is entirely due to works undertaken by the owner subsequent to the completion of the works done by us.*
>
> *Consequently we deny any responsibility whatsoever.*

14. On 23 December 2004 the insurer again wrote to the builder confirming the decision of 4 August 2004 and also noting it had been advised by the owner that the works had not been carried out by the builder. Of particular relevance are the following paragraphs:

> …
>
> *Accordingly, we are seeking quotations for the rectification of the works accepted in our decision letter dated 04.08.04.*
>
> *Your refusal to carry out the requested work may affect your ability to obtain insurance with Vero in the future. This file will not be referred to our internal recoveries unit for assessment. We will exercise our rights of subrogation to recover all costs associated with the claim from you. Furthermore, we are obliged to notify the relevant regulatory body of the outcome of this claim.*
>
> …

15. Although this letter sets out quite clearly that the insurer is confirming its decision of 4 August 2004, that it is seeking quotations for the rectification works and that it will take steps to 'recover all costs associated with the claim from you' the builder took no steps to apply to the Tribunal for a review of the insurer's decision or for an extension of time in which to do so.

16. On 14 February 2005, the insurer again wrote to the builder advising:

> *We refer to previous correspondence in relation to the above claim which was submitted by the owner on 28.06.04…*
>
> *Details of the owners claim was forwarded to you in our letters dated 31.03.04, 30.06.04, 04.08.04, 30.09.04 & 23.12.04.*
>
> *As a result of our investigations of the merits of the owners claim, their claim was accepted to the extent detailed in our letters to you.*
>
> *Due to your failure to comply with our instruction to rectify the works arrangements were made to obtain tenders to quantify the owners claim.*
>
> *The tenders have been received for the rectification works outlined in the accepted items of claim and we now intend the settle the owners claim based on the tender received from Exelle Home Improvements for the amount of $8,800.*
>
> *We reserve the right to vary the settlement amount should the necessity arise.*
>
> *Naturally recovery proceedings will be initiated against you for the settlement amount and all associated claim costs.*
>
> *You have the right to seek a review of this decision on your insurance claim by lodging an application with the Victorian Civil and Administrative Tribunal. Any such application must be made within twenty-eight (28) days of the date you receive this decision letter.*
>
> …

17. On 23 February 2005, some nine days after notifying the builder of its decision on quantum, the insurer entered into Terms of Settlement with the owners based on the approved sum of $8,800.00. Unusually this agreement was made prior to the expiration of the 28 day appeal period, but any prejudice to the insurer occasioned by entering into the Terms of Settlement, is of the insurer's own making and cannot have any impact on this proceeding.

18. On 10 March 2005, the builder lodged this application with the Tribunal and on 29 April 2005, the insurer advised the builder that its appeal in relation to liability was out of time, and that it would need to seek an extension of time under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998.

19. I reject Mr Moshidis' submission that the letter of 11 November 2004 constituted a new decision and that the insurer was under an obligation to advise the builder of its appeal rights. In my view this letter was no more than an affirmation of the decision of 4 August 2004. Mr Moshidis was unable to refer me to any section in the *Domestic Building Contracts Act* 1995 which imposes an obligation on the insurer to advise the builder of its appeal rights, nor any authorities supporting this submission. The provisions relating to appeals against a decision of an insurer are found in s61 of the *Domestic Building Contracts Act* which provides:

> *(1) Any person whose interests are affected by a decision of an insurer with respect to anything arising from any required insurance under the Building Act 1993 that covers a builder in relation to domestic building work or from a guarantee under the House Contracts Guarantee Act 1987 or from an indemnity under Part 6 of the House Contracts Guarantee Act 1987 may apply to the Tribunal for a review of the decision.*
>
> *(2) If the decision contains a direction that must be complied with within 27 days of the date the person receives notice of the decision, the application must be made before the date the decision must be complied with.*
>
> *(3) In all other cases, the application must be made within 28 days of the date the person receives notice of the decision.*

20. I also reject the submission that the final paragraph of the letter of 14 February 2005 (set out in para 16 above) should be construed as advising the builder it was entitled to appeal the decisions on liability and quantum. It is clear that the advice refers to 'this decision', and the only decision contained in the letter of 14 February 2005 is the decision on quantum. I am therefore satisfied the builder is required to apply for an extension of time in which to appeal the decision of the insurer on liability.

The extension of time application

21. Section 126 of the Victorian *Civil and Administrative Tribunal Act* 1998 enables the Tribunal to grant a party an extension of time in which to commence a proceeding. It provides:

> ***126. Extension or abridgment of time and waiver of compliance***
>
> *(1) The Tribunal, on application by any person or on its own initiative, may extend any time limit fixed by or under an enabling enactment for the commencement of a proceeding.*
>
> *(2) If the rules permit, the Tribunal, on application by a party or on its own initiative, may—*
>
> *(a) extend or abridge any time limit fixed by or under this Act, the regulations, the rules or a relevant enactment for the doing of any act in a proceeding; or*
>
> *(b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.*
>
> *(3) The Tribunal may extend time or waive compliance under this section even if the time or period for compliance had expired before an application for extension or waiver was made.*
>
> *(4) The Tribunal may not extend or abridge time or waive compliance if to do so would cause any prejudice or detriment to a party or potential party that cannot be remedied by an appropriate order for costs or damages.*
>
> *(5) In this section—*
>
> *"**relevant enactment**" means an enactment specified in the rules to be a relevant enactment for the purposes of this section.*

The discretion to grant an extension of time under s126 is unfettered. In considering whether to grant an extension of time I am assisted by the well-known Hunter Valley Principles as set out in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305 and adopted by the Supreme Court of Victoria in *Dix v Crimes Compensation Tribunal* [1993] 1 VR 297.

22. It is difficult to find that the insurer has suffered any prejudice by reason of the builder's failure to appeal the decision on liability to indemnify the owners within time. Whilst it made a decision on quantum which it might otherwise not have made, had the appeal been lodged within time, any prejudice it may have suffered by entering into Terms of Settlement prematurely is of its own making.

23. However, the absence of prejudice to the insurer is not sufficient to persuade me that I should extend time. This is a clear case where the builder has sat on its hands in relation to its appeal rights, whilst continuing to deny liability to the insurer. It was not until the insurer made a decision on quantum that the builder seemed to appreciate that a mere denial was not sufficient, although it had been warned of the consequences of failing to rectify the problem on a number of occasions. I reject any suggestion that it was incumbent upon the insurer to constantly remind the builder of its appeal rights. It brought them to the builder's attention, as a matter of courtesy, when the decision on liability was made, and again when the decision on quantum was made. In my view, the insurer took painstaking steps to ensure the builder understood the consequences of failing to carry out the works and, yet, the builder still failed to lodge any appeal until a decision on quantum was made. The other correspondence, during the period between the two decisions, do not of themselves constitute new decisions. There is simply no reasonable explanation for the builder's conduct in ignoring the insurer's advices about its rights of appeal, or its delay in making this application. Similarly the advice by the insurer's solicitors to the builder's solicitors that an application for an extension of time would be necessary was a courtesy only. The builder should have informed itself of its rights and obligations.

24. I am assisted by the observations in *Grandville Homes Pty Ltd v HGF & Anor* [2001] VCAT 40 by Judge Davey where, in a similar situation, the builder sought to persuade the Fund that its decision was wrong, where he said:

> *In my view there is substantial merit in the submission in this case that the Builder sat on his rights. He was made aware of the decision and he was also made aware of his rights to seek a review of that decision and the fact that any application to seek a review before VCAT would involve compliance with time limits.*
>
> *In these circumstances the evidence in particular the correspondence shows that rather than seek to review the decision the Builder decided to attempt to persuade HGF to change its mind. (paras 28 and 29).*

25. Having regard to the conduct of the builder I am not satisfied this is a situation where I should exercise my discretion under s126. Time limits for the making of any application to appeal an insurer's decision are not to be ignored and should not be waived lightly by the Tribunal particularly where the builder, although notified of its rights of appeal failed to take any steps to protect its interests. The application for an extension of time in which to appeal the decision on liability is therefore dismissed.

The Appeal

26. Before considering the merits of the appeal on quantum, which is clearly made within time, I will make some passing comments in relation to the question of liability. Even had the builder's application for an extension of time been successful, it is unlikely that it would have been successful in any appeal on liability. It is difficult to definitely determine the cause of the leaking, but taking into account the evidence of Mr Ryde on behalf of the insurer and Mr Colodetti on behalf of the builder, it is difficult to conclude it is primarily caused by the failure of the shower screens. I generally preferred the evidence of Mr Ryde. I have reservations about Mr Colodetti's evidence particularly as he resiled from the contents of his written reports in relation to the effect of the cracked tile in the downstairs bathroom. This gave me little confidence in the reliability of his conclusions as set out in his report. It may be that the cause of the water damage is due to a combination of factors but there is insufficient evidence to determine the exact cause. However, on the balance of probabilities, in the absence of any other persuasive evidence, I would have found in favour of the insurer on liability, particularly when taking into account the extent of the damage.

27. Ms Marendaz of the insurer gave evidence in relation to the decision on quantum. She said that two quotations for the rectification works were obtained – one from Excelcon Pty Ld for $15,950 and a second, from Exelle Home Improvements, for $8,800, which was accepted. The builder has obtained two quotations in relation to the required rectification works. The first, from Central Home Constructions

Pty Ltd is for $3,443 and the second from Kloester Building Maintenance is for $3,880. Mr Shaw said he gave each of them a copy of the Schedule of Works received from the insurer, Mr Colodetti's report and the original specifications. Mr Shaw confirmed under cross examination that he has had a commercial relationship with each of the quoting builders. He is currently a sub-contractor to Central Homes and he confirmed that Kloester Building Maintenance carried out some of the works on the bathrooms the subject of this proceeding. He also confirmed that neither of them carried out an inspection before giving their quotations to carry out the works. Mr Shaw said he considered the quotation from Exelle to be excessive particularly in circumstances where no breakdown of costs was provided which he said made it difficult to evaluate.

28. Mr Moshidis submitted that 'we all know builders load up quotes for insurers. Whilst I agree that it is preferable for all quotations submitted in support of or challenging quantum to be fully itemised, I note the quotation rejected by the insurer was nearly double the Exelle quotation which was accepted. However, I am not persuaded on the evidence before me that the accepted quotation is excessive especially as Exelle inspected the property before preparing their quotation. The quotations tendered on behalf of the builder cannot be regarded as independent and, further, have been prepared without an inspection.

29. Although it was submitted by Mr Moshidis that the owners failed to take all necessary steps to mitigate their loss, there is no evidence that the scope of the necessary rectification works would have been significantly less had they been carried out when the owners first became aware of the leaking. In any event, they contacted the builder soon after becoming aware of the problem, and he applied some silicone. In my view it was reasonable for the owners to wait for a period of time to see if that had rectified the leaking.

30. I am therefore satisfied on the evidence before me that the decision to approve quantum in the sum of $8,800 was reasonable.

31. I will therefore order that the builder's application be dismissed and affirm the insurer's decision. I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD