**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D831/2005

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Date on which claim made under Builder's Warranty Insurance Policy – 90 day period – whether there is deemed acceptance of claim – estoppel

[2006] VCAT 447

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| **APPLICANTS** | Yuri Worontscback, Anne Carrick |
| **RESPONDENT** | Allianz Australia Insurance Limited |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Deputy President C. Aird |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 14 March 2006 |
| **DATE OF ORDER** | 27 March 2006 |

## ORDER

1. I direct the principal registrar to amend the record to correctly spell the first named Applicant's surname as 'Worontschak'

2. I answer each of the preliminary questions as follows:

   (i) Yes

   (ii) 6 May 2005

   (iii) Yes, as to liability

3. Costs reserved – liberty to apply.

4. **The proceeding is referred to a directions hearing before Deputy President Aird on 4 May 2006 at 2.15 p.m. – allow 2 hours - at which time any application for costs will be heard and directions made for the further conduct of the proceeding.**

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

| | |
|---|---|
| For the Applicants | Mr K Howden of Counsel |
| For the Respondent | Mr P Cawthorn of Counsel |

## REASONS

1. The Applicants ('the owners') by application lodged on 8 November 2005 seek, inter alia, a declaration that the Respondent ('the insurer') is deemed to have accepted what they contend is a claim for indemnity under the Policy of Builder's Warranty Insurance. They rely on Clause 29 of the *Domestic Building Insurance Ministerial Order No S98* dated 23 May 2003 which provides that an insurer is deemed to have accepted a claim for indemnity, if it fails to determine it within the prescribed 90 days.

2. On 20 December 2005 I set down for preliminary hearing the following questions:

   (i) whether a claim has been made on the Respondents by the Applicants

   (ii) if a claim has been made the date on which such claim is made

   (iii) whether the Respondent is deemed to have accepted such claim

**Background:**

3. The owners' solicitors wrote to the insurer on 4 May 2005 advising them of the owners' claim for incomplete and defective work and providing them with copies of the contract, drawings and specifications, and a detailed expert report including an estimate of the cost of rectification and completion works. In that letter the owners' solicitors advised:

> *"We inform you that our clients are making a claim under the Builder's home warranty insurance policy for the defective and incomplete work and liquidated damages".*

4. The insurer responded by letter dated 10 May 2005 in the following terms:

> *"We refer to your letter of defect submitted to our office.*

*To enable us to proceed further with your complaint could you please submit to our office a copy of your Warranty Insurance Certificate.*

*Please provide copy of any correspondence between the owners and the builder, and advise if the contract has been terminated.*

*The Builders Warranty policy does not extend to cover liquidated damages.*

*Upon receipt of the above, your complaint will receive our urgent attention".*

5. By letter dated 10 June 2005 the owners' solicitors responded advising that the contract had not been terminated and declining to provide copies of the correspondence between the owners and the builder being of the view that it was irrelevant to the consideration of the owners' claim. They also sought a statement in writing setting out the provisions of the contract of insurance applicable to the certificates.

6. Mr Tsirogiannis of the owners' solicitors in an Affidavit dated 27 January 2006 deposes to an initial telephone conversation with a female customer service employee of the insurer on 6 April 2005 in relation to the requirement that to make a claim it was necessary to send a copy of an expert report and the Certificate of Insurance to the insurer. He also deposes to two telephone conversations he had with Mr Lillywhite of the insurer on 11 and 12 July 2005 and exhibits to his affidavit file notes of those conversations. In the conversation of 11 July 2005 he records that Mr Lillywhite after asking whether a claim form had been completed advised that the file had been referred to underwriting, and he was 'unsure of the progress of the claim'. On 12 July 2005 Mr Tsirogiannis records that Mr Lillywhite advised him that the insurer would make contact with the builder, and that the insurer 'would accept the claim in relation to the residential works, but probably not to the studio works and definitely not the liquidated damages'. Mr Lillywhite in his answering affidavit of 22 February 2006, confirms the letter of 4 May 2005 was received by the

insurer on 6 May 2005, which if I am satisfied the letter of 4 May 2005 constitutes a claim, is the date on which the claim is made. He also deposes to his general procedure in relation to the processing of what he describes as 'complaints' and 'claims'. Although he deposes that he recalls having telephone conversations with the owners' solicitors he has no recollection of the details, as unlike Mr Tsirogiannis he does not appear to have kept any file notes. I note that the insurer did not seek leave to cross examine Mr Tsirogiannis.

7. Nothing further appears to have happened until 31 August 2005 when the owners' solicitors wrote to the insurer noting that the insurer was deemed to have accepted the owners' claim by reference to the so-called 90 day rule, and demanding payment of the sum of $106,520.00 being the maximum amount covered by the policy plus the owner's reasonable legal costs.

8. Still there was no action by the insurer, and on 12 September 2005 the owners' solicitors wrote to the insurer again noting that a response to their letter of 31 August 2005 had not been received, and restating the demand for payment of the sum of $106,520.00. Once again, the insurer failed to respond, and the owners' solicitors wrote to them again on 27 September 2005 noting that there had been no response to the two earlier letters and advising they had instructions to commence proceedings.

9. Finally, on 10 October 2005 the insurer sent to the owners' solicitors what appears to be a standard letter which fails to acknowledge or respond to any of the matters raised in their letters of 31 August, 12 and 27 September 2005, advising:

> "*Further to your correspondence of 27th September 2005, please find enclosed a claim form.*

*In the event you wish to proceed with your claim, please fully complete and return this to our Melbourne office, together with the items listed on the form and a copy of the Warranty Insurance Certificate".*

…
*"It is important that you provide all relevant information as required in order for your claim to be considered. We will notify you further upon receipt of your claim".*
…

**The insurer's position**

10. The insurer contends that its letter of 10 May 2006 was not an acknowledgement of receipt of a claim from the owners, but rather a request for further information so that it could consider the owners' 'complaint', and further, that a claim is not made until a completed claim form is lodged.

**Discussion**

11. I have previously considered the question as to what constitutes a claim in *Tamburro v Home Owners Warranty* [1999] VCAT 38 where I held that *'A claim is not made until a claim form has been completed and lodged. The claim is made on the day it is received by the insurer.'* However, this finding must be read in conjunction with the Reasons given for decision in that case. *Tamburro* was decided on its facts but without reference to the relevant policy or the Ministerial Order. The owner had sent a facsimile to the insurer setting out details of alleged defects which he requested the insurer to rectify. The insurer responded by letter advising him to contact the builder, and if he was unable to resolve his concerns that he should contact the insurer again and lodge a claim form. The owner subsequently contacted the insurer again advising that he had not heard from the builder and submitted a claim form, and it was the completed claim form which I found constituted a claim in that case.

12. This question was again considered in *Rosalion v Allianz Australia Insurance Limited* [2005] VCAT 138 where I determined that a claim was made when the partially completed claim form was lodged by the owner. However, once again the facts in that case were quite different to those in this matter. In *Rosalion* I found that the initial letter to the insurer from the owner's solicitor, whereby they requested a copy of the policy, a claim form and details of the insurer's requirements for making a claim, did not constitute a claim under the terms of the policy. In *Rosalion* the insurer responded to the owner's initial letter and sent him a claim form for completion and return and also set out the additional information it required to enable it to consider any claim that might be made and, tellingly, included the following sentence at the end of the letter *'We will notify you further upon receipt of your claim'*. A partially completed claim form was forwarded to the insurer and it was this which I found to be the claim in that proceeding.

13. In this matter, the owners' solicitors wrote a detailed letter to the insurer on 4 May 2005 setting out details of their clients' claim, enclosing copies of documents which they believed to be relevant together with a copy of a very detailed report from a building consultant in relation to the alleged defective and incomplete works. They also advised that their clients were making a claim under the policy. The primary distinction between *Tamburro* and *Rosalion* and this proceeding is that in both of the former cases the insurer advised the owners, immediately it was advised they were intending to make a claim, of its requirement that a claim form be completed and lodged. In this proceeding, there was no such advice, even though there appears to have been ample opportunity for the insurer to have so advised either by letter, or at the very lease during the July telephone conversations to do so. The insurer proceeded to process what, in the absence of any advice to the contrary, the owners believed, quite reasonably in my view, was a valid claim. There was no indication from

the insurer until after the expiry of the 90 day period and repeated demands for payment on behalf of the owners, that a claim form was required. Notwithstanding in its letter of 10 May 2006 the insurer had indicated that '*Upon receipt of the above, your complaint will receive our urgent attention'*. I reject any suggestion that the use of the word 'complaint' was sufficient to indicate to the owners that what they believed was a claim was not considered by the insurer to be a claim for the purposes of the Policy or the Ministerial Order. This seems to me to be no more than an attempt to avoid liability by ascribing a a meaning to the term 'complaint' which does not fit with the purposes of the statutory scheme of builder's warranty insurance. It is not a term to be found anywhere in the Policy or the Ministerial Order. Further, to describe the correspondent from the owners' solicitors as a complaint is to misunderstand and misuse the word. 'Complaint' is defined in the The Macquarie Dictionary, 2nd Revised Edition, as:

> 'an expression of grief, regret, pain, censure, resentment, or discontent; lament, fault-finding'.

'Claim' is defined in the same dictionary as:

> 'to demand by or as a virtue of a right; demands as a right or as a due…a payment demanded in accordance with an insurance policy.

and in the Oxford English Dictionary, 2nd Ed, to which I was referred by the insurer, as:

> '*spec* in insurance, an application for the compensation guaranteed by an insurance company, esp. for loss or damage to property etc, insured;

The owners were clearly not complaining, they were claiming indemnity under the policy.

14. Further, the term 'claim' is not defined in either the Ministerial Order or the Policy of Insurance. The policy is not prescriptive as to the form of any claim other than for the purposes of Clause 8.5 on which the owners seek to rely, that it be *'in writing'*. Although Clause 7.1 of the Ministerial

Order relating to the excesses which may be applied by an insurer has the following proviso:

> *C. The date when a claim is made for the purpose of this clause in the earlier of:*
>
> *a) the date when a claimant first notifies the insurer of a circumstance which may give rise to a claim; and*
>
> *b) the date a claim is made.*

15. This is little assistance in determining when a claim is actually made. This proviso determines the date at which any applicable excess is to be calculated. It does not, in my view, assist in determining the date on which a claim is made, as (b) specifically refers to *'the date a claim is made'*. It clearly contemplates a distinction between the date on which notification of circumstance which may give rise to a claim, and a claim (*FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641).

16. Clause 8.5 of the Ministerial Order provides:

> *'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.'*

17. Whether the owners have breached their duty of utmost good faith to the insurer by failing to provide additional information to the insurer, is not, in my view relevant to my consideration of the questions before me.

18. The difficulty the insurer faces here comes about by its own making. It has failed to take the necessary steps to protect itself, first by immediately notifying the owners of the requirement that a completed claim form be lodged, but more particularly by failing to process the claim within the 90

day period. They could have taken the prudent step of issuing a denial of liability as protection from the deeming provisions.

**Estoppel**

19. At the hearing the owners contended that even if I found that the letter of 4 May 2005 or alternatively 10 June 2005 did not constitute a claim, the insurer was estopped from denying that a claim had been made and insisting that a claim form be lodged. The owners rely on the conduct of the insurer in support of this contention. The insurer objected to the consideration of this further 'question' because it was not included in those formulated on 20 December 2005. However, being mindful of the tribunal's obligations s97 of the *Victorian Civil and Administrative Tribunal Act* 1998 to *'…act fairly and according to the substantial merits of the case'* I formed the view that it was appropriate for all arguments to be considered rather than leaving the potential for a further hearing with the associated costs implications for the parties. I was satisfied the insurer would not be disadvantaged in any way and it had notice the owners intended relying on the 'estoppel argument' when the owners filed and served their submissions on 7 March 2006 – a week prior to the hearing.

20. Even if I had found that the letter of 4 May 2005 did not constitute a claim for the purposes of the Policy of warranty insurance, I would have had no difficulty in finding that the insurer was estopped from denying the owners had made a claim and insisting that they complete and lodge a claim form.. The following extract from *Law of Contract Cheshire & Fifoot (2002*) which sets out the elements of estoppel:

> *1. a party makes a statement, representation, promise or fosters an assumption;*
>
> *2. the other party relies to his or her detriment on the statement, representation, promise or assumption; and*

3. *the first party wishes to act contrary to the statement, representation, promise or assumption and this would be unconscionable in the circumstances*

21. Considering each of the elements in turn, they clearly encompass the conduct of the insurer in this case. The insurer has clearly fostered an assumption that the letters of 4 May and/or 10 June 2005 constitute a claim. It has for all intent and purposes seemingly processed it as if it were a claim. In the absence of any advice that a completed claim form was required, the owners relied on the conduct of the insurer, potentially to their detriment, in that the processing of their claim in a timely fashion was impeded by the insurer's conduct. It is clearly unconscionable for the insurer to require the lodgement of a completed claim form after it was advised by the owners they believed their claim was deemed to have been accepted under the so-called 90 day rule. It is not necessary in the context of the findings I have made to consider the alleged conversation between the owners' solicitors and an employee of the insurer in April 2006.

22. The answers to the questions are therefore as follows:

(i) Yes

(ii) 6 May 2005

(iii) Yes, as to liability

23. As discussed above, even had the answer to (i) been 'no' I would have no difficulty in answering the 'estoppel question' in the affirmative.

24. I will reserve the question of costs and list the matter for a further directions hearing.

**DEPUTY PRESIDENT C. AIRD**