VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D74/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – Extension of time – relevant principles.

FIRST APPLICANT	Melinda Gray
SECOND APPLICANT	Matthew Judkins
RESPONDENT	Vero Insurance Limited (ABN: 48 005 297 807)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	6 April 2009
DATE OF ORDER	9 April 2009
CITATION	Gray & Anor v Vero Insurance Limited (Domestic Building) [2009] VCAT 619

ORDER

1. Application to extend time dismissed.
2. **Directions (if any are to be sought) adjourned over to a date to be fixed by the Principal Registrar.**
3. Reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr D. Aghion of Counsel
For the Respondent	Mr S. Waldren of Counsel

REASONS

1 The issue in this case is a relatively straightforward one of whether time should be extended under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

> (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.

2 Despite the issue being a relatively straightforward one, it has managed to generate multiple affidavits, accompanied by numerous exhibits, and lengthy submissions. The submissions of the Applicants are 13 pages long: those of the Respondent (described as an "Outline of Argument") are 24 pages long. A hearing in the matter went for the better part of a day.

3 I must indicate I have considered all the submissions of the parties. I have also paid due regard to the various affidavits.

4 The Applicants seek an order that time to appeal the Respondent's decision, made on 9 December 2005, be extended to 14 November 2008.

5 It is perfectly clear that the discretion to extend time under s126(1) of the Act is, except as qualified by s126(4), an unfettered one. See *World Link Assets Pty Ltd v James Kay t/as JBK Builders* [1999] VCAT DB 5.

6 Considerations relevant to the exercise of that discretion are set out in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 58 ALR 305 at 310-11. They are:

(a) Whether the applicant can show an acceptable explanation for delay;

(b) Whether it is fair and equitable in the circumstances to extend time;

(c) The nature of the actions taken by the applicant;

(d) Whether the respondent has been prejudiced by delay;

(e) Whether the delay may result, should the application succeed, in the unsettling of other people or of established practices;

(f) The merits of the substantial application; and

(g) Considerations of fairness.

7 I can accept that the discretion in s126(1) is not fettered by a requirement that an applicant for relief must show an acceptable explanation for delay.

8 Leaving aside the effect of s126(4) and factor (d), I am prepared to find in favour of the Applicants considering all the factors mentioned by Wilcox J in the *Hunter Valley* decision. I can accept that no challenge was made to the Respondent's decision regarding Unit 1 because it was believed that that decision was correct. It was only subsequently realized that the damage involved was much more severe. The Croucher report estimates rectification costs to all three units (Unit 1, 1A and 1B) at $441,882.00 including the slab. In light of what was thought to be so, this is an astonishing conclusion.

9 I consider that the matters set out in the Applicants' submissions, and the matters recited in the affidavit of Mr Judkins sworn 6 January 2009, justify me in finding in favour of the Applicants under s126(1) – leaving aside s126(4) and factor (d).

10 In my view, however, the effect of s126(4) in this case is decisive. Section 126(4) clearly has an operation that thwarts the unfettered nature of the discretion given by s126(1). I may not extend time if I am satisfied that 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".

11 It is contended that the prejudice lies in the inability to retrieve documents that once or once may have existed. I do not find this compelling. What I do find compelling, however, is that works have been undertaken (a "complete internal makeover") to Unit 1 such that it is not now possible for the Respondent to ascertain t he level of damage arising during the policy period – that is, to 26 April 2006. The Respondent now has no hope of being able to establish whether this is so or not. As is pointed out to me, the Respondent cannot now call evidence as to the state of the damage prior to that date. Nor can it satisfactorily test any evidence of the Applicants as to the state of such damage. In other words, it cannot now – after this passage of time and with works having been undertaken – effectively defend itself against a claim.

12 I consider this to be the critical consideration. It is a prejudice, in my view, which cannot possibly be compensated for by an order for costs or damages. Neither costs nor damages can undo what has been done. The Respondent, in my view, is irretrievably prejudiced. Of course, this bears upon one of the considerations mentioned by Wilcox J but I put that to one side, namely, factor (d).

13 I do not believe I am in a position to extend time under s126(1) considering the terms of s126(4).

14 The application for an extension of time must fail.

15 The parties specifically asked me to reserve costs and I do so.

16 I adjourn over the applications being made for directions.

SENIOR MEMBER D. CREMEAN