VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT Reference: BP1211/2019**

CATCHWORDS

DOMESTIC BUILDING – Application to extend time under s 126 of the *Victorian Civil and Administrative Tribunal Act 1998* – appeal period of 28 days – factors to consider – whether acceptable explanation for delay.

FIRST APPLICANT:	Frank Grocl
SECOND APPLICANT:	Patricia Grocl
RESPONDENT:	Victorian Managed Insurance Authority (ABN: 39 682 497 841)
WHERE HELD:	Melbourne
BEFORE:	Deputy President E. Riegler
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	22 November 2019
DATE OF ORDER:	27 November 2019
CITATION	Grocl v Victorian Managed Insurance Authority (Building and Property) [2019] VCAT 1877

ORDERS

1. The Applicants' application under s 126 of the *Victorian Civil and Administrative Tribunal Act 1998* to extend the time for making an application under s 61 of the *Domestic Building Contracts Act 1995* is dismissed.
2. Costs reserved with liberty to apply, such liberty to be exercised by 13 December 2019, failing which orders will be made without further notice that the proceeding is struck out with no order as to costs.

DEPUTY PRESIDENT E. RIEGLER

APPEARANCES:

For the Applicants:	Mr A. Morrison, solicitor
For the Respondent:	Ms N Feeney, solicitor

REASONS

BACKGROUND

1. The Applicants (**'the Owners'**) are the owners of a residential property located in Mount Martha, Victoria (**'the Property'**). They purchased the Property in January 2014.

2. The Property contains a residential dwelling which had been renovated by the former owner of the Property during 2005 to 2010, as an owner-builder (**'the Builder'**). Pursuant to s 135 of the *Building Act 1993*, warranty insurance was procured by the Builder prior to sale, evidenced by a *Certificate of Insurance* issued by the Respondent on 26 August 2013 (**'the Warranty Insurance'**).

3. According to the Owners, they became aware of defects within the Property in or around May 2016, after water leaks were detected emanating from the balcony above the kitchen. The Owners say that after several unsuccessful attempts were made to rectify the water leaks, they contacted a building consultant in late 2017, who prepared a building inspection report dated 29 November 2017. That report identified several defects in the building works undertaken by the Builder. The building inspection report estimated the cost to rectify the defects to be $40,777.

4. After obtaining legal advice, the Owners instructed their solicitors to forward a letter of demand to the Builder. To that end, by letter dated 15 March 2018, the Owners demanded that the Builder undertake rectification work. In response to that letter, the Owners' lawyer received a reply email from the Builder stating, in part:

> I received your email dated 15 March 2018 recently whilst living in Thailand. I contacted your client on Friday 23 March and discussed that I am no longer trading as an owner builder. I am also an Age Pensioner as of December 2015 with total assets of less than $3000. I live in Thailand in rented premises. When in Australia I live in a rented caravan…

5. In early April 2018, the Owners sought further advice from their lawyer in relation to the Warranty Insurance. However, at that time no claim was made against that Warranty Insurance. Rather, on 12 April 2018, the Owners filed a complaint with *Domestic Building Disputes Resolution Victoria* (**'DBDRV'**) against the Builder.

6. The complaint filed with DBDRV did not resolve the dispute with the Builder. In fact, there was little or no contact from either the Builder or DBDRV in the months that followed the making of that complaint. Consequently, on 19 July 2018, the Owners made a claim under the Warranty Insurance (**'the Insurance Claim'**).

7. By letter dated 25 July 2018, the Respondent advised the Owners that the Insurance Claim was rejected. According to the Respondent, the Insurance Claim was *out of time*.

8. On 13 September 2018, the Owners received a *Certificate of Conciliation* from DBDRV stating that the dispute had been assessed as not being suitable for conciliation.

9. On 27 June 2019, the Owners filed their application with the Tribunal, seeking a review of the Respondent's decision to reject the Insurance Claim. According to the Owners, the quantum of their claim was approximately $127,000, which included $40,000 which they had already spent on rectifying defects up until that time.

LEGISLATION

10. Section 60 of the *Domestic Building Contracts Act 1995* states:

> **60 VCAT may review and change an insurer's decision**
>
> (1) VCAT may review any decision of an insurer with respect to anything arising from any required insurance under the Building Act 1993 that a builder is covered by in relation to domestic building work.

11. Section 61 of the *Domestic Building Contracts Act 1995* further states, in part::

> 61 (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 may apply to VCAT for a review of the decision.
>
> (2) …
>
> (3) In all other cases, the application must be made within 28 days of the date the person receives notice of the decision.

12. It is common ground that the Owners' application to the Tribunal seeking a review of the Respondent's decision is more than 10 months after the time specified in s 61(3) of the *Domestic Building Contracts Act 1995*. Nevertheless, the Tribunal has power to extend or abridge the time fixed under that Act. Section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**) states, in part:

> **126 Extension or abridgement 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 the proceeding.
>
> …
>
> (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.

13. The Owners seek an order under s 126 of the VCAT Act extending time in which to file their application for a review of the Respondent's decision to reject the Insurance Claim.

14. The Owners contend that there are a number of mitigating factors which provide some explanation as to why they failed to lodge their application for review within the 28 day period specified under s61(3) of the *Domestic Building Contracts Act 1995*. Those factors are set out in the supporting affidavit of Frank Grocl, the First Applicant. Mr Grocl deposes, in part:

> 23. I acknowledge that my wife and I were approximately 10 months and 6 days late to commence proceedings against VMIA for the following reasons:
>
> a. During this time, we remain hopeful that the Complaint filed with the DBDRV on 12 April 2018 would resolve the issue. However, the Builder informed the DBDRV that he did not reside in Australia and that he disputed any responsibility and/or liability for the defective building works at the Property. Thus, the DBDRV decided that there was no reasonable likelihood of settlement by conciliation due to our opposing positions. The Certificate was only received by me on 13 September 2018. I wanted to exhaust all avenues with the Builder before progressing a review or repeal of the Refusal of Indemnity.
>
> b. On or before 31 August 2018, my wife and I sought further advice from and re-engaged Cornwalls in relation to the VMIA's decision to reject my Claim. (Again, I do not wish to go into the substance of that advice for reasons of legal professional privilege). We were unaware that we had 28 days from 25 July 2018, being 22 August 2019, to lodge my application with VCAT.
>
> c. I had only received the Certificate from DBDRV on 13 September 2018, and this was outside the 28-day time limitation period ending 22 August 2019.
>
> d. I attempted to contact the Builder at numerous times to resolve the matter without any success.

e. In October 2018 the health of my wife's father Kevin Matthew Maroney deteriorated. He was living alone at the time and it became apparent that he could not look after himself. He was admitted to hospital on or around 7th November 2018 and we had to spend a significant amount of time looking for supported accommodation for him. As part of that process we required (and it was left to us alone) to arrange the sale of his home to raise the necessary funds for the accommodation bond. We therefore had to clean his house and remove a large amount of personal items from his house prior to the sale of the house and deal with the agents and conveyancer appointed to manage the sale. The process and attending to my wife's father, kept my wife and I busy from approximately October 2018 until around March 2019. We then took a holiday as we were burnt out and exhausted from this process. We were overseas in the period of May and June 2019. It was shortly after our return from our holidays in June 2019 that we filed this proceeding in VCAT.

f. In February 2019, my wife's father changed his Will after the sale of his home. This caused a great number of issues between members of her family and extended family. The issues were only somewhat resolved by mid-June 2019. During this time, I was unable to pursue this matter and file my application with VCAT due to the stress and anxiety this had caused me.

THE PARTIES' SUBMISSIONS

15. It is common ground that, subject to s 126(4) of the VCAT Act, the Tribunal's discretion to extend or abridge time under s 126 of the VCAT Act is otherwise unfettered. Nevertheless, both parties point to the principles laid down by Wilcox J in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment*,[1] as providing guidance in the exercise of that discretion. Those principles are:[2]

    (a) whether the applicant for extension can show an *acceptable explanation for the delay*;

    (b) whether the person has *continued to make the decision make aware that he contests the finality of the decision*, as distinct from allowing the decision-maker to believe that the matter was finally concluded;

    (c) *any prejudice to the respondent*;

[1] (1984) 58 ALR 305.
[2] Ibid, 310-11.

(d) whether the delay may result, if the applicant for the extension of time is successful, *in the unsettling of other people or established practices*;

(e) *the merits of the substantial application*; and

(f) *considerations of fairness as between the applicant and other persons otherwise in a like position*.

16. The parties have framed their written submissions by reference to those guidelines. What follows is a summary of their submissions (adopting the same format).

Acceptable explanation for delay

Owners' submission

17. The Owners submit that there is an acceptable explanation for their delay. They contend that it was reasonable for them to have explored all avenues of dispute resolution, which included waiting for a response from DBDRV before commencing a review of the Respondent's decision.

18. Moreover, the Owners contend that they were not aware of the strict 28-day limitation period, although they conceded during the course of the hearing that they became aware of the 28-day limitation period sometime in October 2018.

19. The Owners also point to the circumstances which confronted them during October 2018 to June 2019, being the deteriorating health of the Second Applicant's father and the need to relocate him to alternative housing, coupled with the family dispute concerning the Second Applicant's father's will.

20. Reference was made to the Tribunal's decision in *Spruce v HGF*,[3] where the Tribunal accepted that a "serious matrimonial dispute" may constitute an acceptable explanation for delay.

Respondent's reply

21. The Respondent submits that the delay in receiving a response from DBDRV is of no consequence because that process runs parallel with any entitlement under the warranty insurance scheme. There is no requirement for an owner to exhaust resolution through DBDRV before pursuing a claim under the warranty insurance scheme, including seeking a review of a decision to reject a claim made under that scheme.

22. The Respondent submits that ignorance of the 28-day limitation period does not explain why the Owners took more than 10 months before they filed an application for review of the Respondent's decision to reject the Insurance

[3] [1999] VCAT 32.

Claim, especially in circumstances where legal advice was given in relation to the Respondent's decision on or before 30 August 2018.

23. The Respondent submits that the circumstances associated with having to move the Second Applicant's father do not explain why an application for review was not filed immediately after receiving the DBDRV's *Certificate of Conciliation* on 13 September 2018, as this pre-dates the events concerning the Second Applicant's father's health deteriorating and the family dispute over his will.

24. The Respondent distinguishes *Spruce v HGF* on the basis that the delay in *Spruce v HGF* was 70 days, compared with this proceeding, where the delay is 337 days.

Contesting finality of decision

Owners' submission

25. The Owners concede that they did not continue to make the Respondent aware that they contested the finality of its decision. However, they argued that they were distracted by other concerns and thereby failed to communicate their opposition to the Respondent's decision to reject the Insurance Claim.

Respondent's reply

26. The Respondent submits that the failure to communicate or inform the Respondent that they disagreed with its decision is made more significant when one considers the following factors:

    (a) the notice of decision expressly set out that the Owners had 28 days to file a review of the decision to reject the Insurance Claim; and

    (b) the Owners received legal advice on the decision on 31 August 2019.

27. In those circumstances, the Respondent submits that it was reasonable for it to assume that its decision to refuse the Insurance Claim was not contested.

Prejudice

Owners' Submission

28. Section 126(4) of the VCAT Act expressly prohibits time being extended or abridged if to do so may cause any prejudice or detriment that cannot be remedied by an appropriate order for costs or damages.

29. The Owners submit that the Respondent would not suffer any prejudice if an extension of time was granted.

Respondent's submission

30. The Respondent submits that it would suffer prejudice if an extension of time were granted. It argues that due to the delay in the commencement of the

proceeding, the evidential burden to establish that its decision was correct becomes more difficult.

31. The Respondent further submits that it has now become more difficult to assess the condition of the Property, which may lead to it having greater financial exposure than what would have been the case had there been no delay in seeking a review of its decision (assuming the decision was reversed).

32. Finally, the Respondent submits that the prospects of pursuing any rights of recovery becomes more difficult with the passage of time.

Unsettling established practices

Owners' submissions

33. The Owners submit that there are no relevant matters which impact upon the unsettling of established practices.

Respondent's submissions

34. The Respondent argues the need to promptly commence a proceeding seeking a review of a decision is, of itself, an established practice. The Respondent referred to *Clifton Properties Corporation Pty Ltd v Litewaite Constructions*,[4] where Deputy President Cremean stated:

> Without an extension of time under s 126, a party is free from the possibility of an appeal once the time in which to seek review has expired. This, in my view, is a vested right … which is not likely to be disturbed. In order for a right of this nature to be disturbed the Tribunal must be, in my view, strongly of the opinion that time should be extended.[5]

35. Further reference was made to *Jacobson v Wesfarmers General Insurance Limited*,[6] where Senior Member Lothian stated:

> It is a settled practice that owners and builders who wish to challenge a decision of an insurer issue their applications for review within the 28 days allowed. It is certainly the practice that parties who seek a review issue their application for an extension of time as soon as they reasonably can after they obtain legal advice. I am satisfied that to allow an extension to review the first decision would encourage the adoption of tactical measures, instead of encouraging parties to promptly seek an extension of time under s 126.[7]

36. The Respondent submits that in circumstances where the delay is significant, the impact on unsettling established practices increases. Conversely, where the delay is short, the impact on established practices will be less. On that basis, it is said that a determination allowing an extension of time where the delay is more than 10 months, clearly upsets established practices.

[4] [1999] VCAT 49.
[5] Ibid, [10].
[6] [2012] VCAT 949.
[7] Ibid, [60].

Merits of substantial application

Owners' submission

37. The Owners submit that the basis upon which the Respondent rejected the application was erroneous. As indicated above, the Respondent based its rejection on the Owners being *out of time*.

38. The Warranty Insurance policy provides for coverage for loss, damage or expense from a cause other than a non-structural defect which occurs:

> … during the period commencing on the commencement date and ending 6 years after the completion of the work or the date of termination of the building contract, whichever is the earlier.

39. In this case, the works were completed in July 2010. However, the Owners discovered the defects on or about 1 May 2016. Consequently, the Owners argue that the Warranty Insurance should apply.

Respondent's Submissions

40. The Respondent concedes that there are questions concerning the validity of the grounds of rejection originally relied upon. However, it argues that it is open for it to raise any other ground, should time be extended and the review proceeding heard.

41. In that regard, the Respondent notes, correctly, that the insurance policy is of a type that only permits an owner to make a claim where the builder dies, becomes insolvent or disappears. The Respondent submits that in the present case, the Builder has not disappeared. Therefore, according to the Respondent, the right to claim has not yet crystallised.

Considerations of fairness

Owners' submission

42. The Owners submit the application is far removed from the "tactical measures" that Senior Member Lothian warned about in relation to the use of s 126 in *Jacobson v Wesfarmers General Insurance Limited*. In other words, the factors leading to the delay result from extenuating circumstances.

Respondent's submissions

43. The Respondent submits that no specific reasons were proffered by the Owners as to why it would be fair to allow the Owners to commence the proceeding. It argues that given the significant delay, it would be unfair to grant an extension

of time because it would put the Owners in a privileged position, compared to other people who may be in a like position.

SHOULD TIME BE EXTENDED?

44. In my view, the application fails at the first hurdle, in that I do not accept that there is an acceptable explanation for the delay. I have formed this view based on several factors.

45. First, it is difficult to accept that the Owners were not aware of their right to seek a review of the Respondent's decision to reject the Insurance Claim in circumstances where:

(a) the notice of decision dated 25 July 2018 expressly advised the Owners of their rights of review. It stated:

> We advise that you have a right to lodge an application with the Domestic Building List of the Victorian Civil and Administrative Tribunal (VCAT) to seek a review of this decision provided you do so within 28 Days, which is the time limit set out in the Domestic Building Contracts Act. (VCAT can be contacted by telephone 9628 9999). Should you apply for a review of our decision, we may rely on the ground in this letter in support of the correctness of the decision and we reserve our right to rely on any other grounds available to us.

(b) Second, the Owners conceded they obtained legal advice on or before 31 August 2018 in relation to the Respondent's decision to reject the Insurance Claim. In my view, it is inconceivable that the topic of reviewing the Respondent's decision was not canvassed within that legal advice. That said, I do not accept the First Applicant's evidence that he only became aware of his right to seek a review in October 2018.

(c) Third, even if the Owners became aware of their right to seek a review of the Respondent's decision as late as October 2018, nothing was done by them until June 2019. This is an extraordinary length of time for a person to 'sit on their rights'.

(d) Although I appreciate that relocating elderly parents can be extremely stressful, the relocation was completed in March 2019. The only explanation given why an application for review was not lodged immediately after the Second Applicant's father was relocated is that the Owners were then in dispute with other family members regarding the Second Applicant's father's will.

(e) In my view, that is not an acceptable explanation for delay. Moreover, the First Applicant's affidavit reveals that the Owners were sufficiently undistracted by the family dispute to be able to find time to organise a two-month vacation. That must have required some planning, which

weighs against a finding that the Owners were so distracted or pre-occupied that they were unable to file an application seeking a review of the Respondent's decision until they returned from their vacation.

46. My finding is reinforced by the fact that there is a serious question as to whether an insurable event has crystallised. As indicated above, the Warranty Insurance is of the type that requires the relevant builder to have either died, become insolvent or disappeared. In the present case, the Owners contend that the Builder has disappeared. They argue that he has relocated to Thailand and that this, of itself, is evidence of his disappearance.

47. However, the evidence presented in support of that contention does not go that far. In particular, the correspondence referred to indicates that the Builder is living partly in Thailand and partly in Australia. Although the Builder may be difficult to reach at times, the fact that he has not, on the evidence, permanently relocated out of the jurisdiction weighs against a finding that he has *disappeared*.

48. Consequently, I am not persuaded that the Owners' application, even if time was extended, is as meritorious as they contend. In my view, the evidence presented in support of this application points to a contrary conclusion; namely, that the Builder has not *disappeared*. Although I appreciate that the application before me may not distill all the evidence to be adduced if the application for review was heard on the merits, the fact that the affidavit material in support of this extension of time application does not confirm that the Builder has disappeared is a further factor weighing against extending time.

49. In this case, I find that the failure to demonstrate an acceptable explanation for the delay, of itself, justifies the application being refused. In forming that view, I do not consider that the other factors raised by the Owners carry sufficient weight to overcome the failure to provide an acceptable explanation for the delay. Therefore, it is unnecessary for me to fully consider the other factors raised in opposition to the application for an extension of time, including the potential prejudice that might be suffered by the Respondent. As I have already indicated, the application does not pass the first hurdle.

50. For the reasons set out above, I refuse to extend time under s 126 of the VCAT Act. The Owner's application for an order under s 126 of the VCAT Act will be dismissed, with costs being reserved.

51. Subject to any application for costs, I am not aware of any other residual matters left for determination. Accordingly, in the absence of any application for costs, orders will be made that the proceeding be struck out. In relation to any application for costs, I remind the parties that there is no presumption that costs will be ordered in favour of the successful party.

DEPUTY PRESIDENT E. RIEGLER