VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D338/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, extension of time to appeal warranty insurer's decision on merits, "decision" of warranty insurer, *Hunter Valley* principles.

APPLICANT	Javni Homes (Geelong) Pty Ltd
RESPONDENT	Victorian Managed Insurance Authority (VMIA)
JOINED PARTY	Mr Peter Rau & Mrs Lynda Rau
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	25 August 2006
DATE OF ORDER	15 September 2006
CITATION	Javni Homes v Victorian Managed Insurance Authority (Domestic Building) [2006] VCAT 1915

ORDER

1 The Principal Registrar is directed to substitute Mr Nick Javni and Mr Peter Javni as Applicants in place of Javni Homes (Geelong) Pty Ltd. It is noted that all three Applicants are named in the Application received on 19 May 2006.

2 The Application to extend time to commence an appeal against the Respondent's decision of 4 February 2004 is dismissed.

3 **The matter is listed for a mediation before Mr Nicholas Hadjigeorgiou commencing at 10.00 a.m. on 13 October, 2006 at 55 King Street Melbourne.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr G. Fitzgerald
For the Respondent	Mr B. Powell of Counsel
For Joined Party	Mr B. Carew of Counsel

REASONS

1 On 19 May 2006 the Applicants had appealed the decision of the Respondent[1] of 21 April 2006, which was the Respondent's decision to accept the Owners' claim for loss and damage in the sum of $35,960.00 ("the Quantum Decision"). This appeal is within time.

2 On 18 July 2006 I made directions for the conduct of the proceeding, order 3 of which was:

> "Should the Applicant seek to extend time to appeal the decision of the Respondent of 4 February 2004 pursuant to section 126 of the *Victorian Civil and Administrative Tribunal Act* 1998, it must make application and file and serve any Affidavits in support by 8 August 2006."

3 On 8 August 2006 the then Applicant made application for the following orders:

> "1. The time limit to appeal the decision of the Respondent of 4 February 2004 be extended, pursuant to s.126 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic).
>
> 2. Directions for the further conduct of the matter.
>
> 3. Such further or other orders as are appropriate."

4 The decision of 4 February 2004 concerns the Applicants' liability ("the Liability Decision").

5 S126 provides in part:

> The Tribunal, on application by any person … may extend any time limit fixed by or under an enabling act for the commencement of a proceeding.

6 The time to commence an appeal against the decision of a warranty insurer, such as the Respondent, is within 28 days of receipt of notice of the decision. The appeal of the Liability Decision is thus, on its face, approximately two and a half years late.

7 Mr Fitzgerald of Counsel for the Applicants commenced his submission by stating that his clients sought an extension of time to appeal the Respondent's decision of 4 February 2004, but also argued that the decision was not really a decision on liability at all.

8 The decision of 4 February 2004 was communicated to the Applicants by letter which enclosed a document headed "Claims decision". A note under the heading stated in part "This list describes the works to be rectified (not method) and should include associated damage." The items listed were:

> 1&2 Cause and effect of building distress.

[1] For the purpose of these reasons "Respondent" means the Victorian Managed Insurance Authority and its predecessors, Domestic Building (HIH) Indemnity Fund, FAI Insurance and HIH Insurance.

4 Excessive squeaking of the stair treads.

5 Re-align bedroom 1 and dining areas doors, repair and repaint cracks to wall plaster in the kitchen, bedroom 1, lounge room, front entry foyer and stairwell.

6 Movement squeaking to the posi-strut floor joist in the upstairs retreat area.

9 The covering letter stated in part:

> Following the recent inspection at the above dwelling, please find enclosed our claims decision.
>
> You now have the opportunity to complete these works by 05/03/2004.
>
> …
>
> Be aware that if you do not rectify the defects we will ask the owner to obtain quotations, which could far exceed your cost to rectify. …
>
> You have the right to lodge an application with the Domestic Building List of the Victorian Civil and Administrative Tribunal against this decision provided you do so within 28 days. … Should you appeal our decision, [the Respondent] may rely on the grounds in this letter and reserves its right to rely on any other grounds available to it.

10 Mr Fitzgerald submitted that "It is clear that the first decision in February 2004 did not really involve any determination that (the Applicants) had caused the loss." He referred to a report by an engineer, Mr Yttrup, of December 2003 which, he submitted, did not say that the Applicants were liable.

11 The Respondent wrote to the Applicants on 10 March 2004 reminding them to undertake the works, on 25 March 2004 advising that the Respondent would have the Owners obtain quotations to undertake the works, and on 3 November 2005 advising that it would seek an additional quotation for the works.

12 Mr Fitzgerald drew my attention to a letter from the First Respondent to the Applicants dated 16 January 2006 which stated, excluding the formal parts:

> We advise that we have engaged the services of:
>
> C.D.S.T. Pty Ltd
>
> to assess the *cause of damage*[2].
>
> We will contact you again as soon as we receive the consultant's assessment.

13 No adequate explanation for the existence of this letter was provided by the Applicants or the Respondent. However is noted that the letter of 20 February 2006 from C.D.S.T. Pty Ltd is not an assessment of the cause of damage, but a quotation to undertake rectification works.

[2] Emphasis added

Tribunal's Discretion

14 The Tribunal's discretion under s126 is unlimited, however considerable assistance is drawn from the principles enunciated by Wilcox J in *Hunter Valley Developments Pty Ltd and Others v Minister for Home Affairs and Environment* (1984) 3FCR 344.

15 In the words of the learned author Pizer in the second edition of the annotated VCAT Act at page 437, the Hunter Valley principles are:

a Whether the Applicant for extension can show an acceptable explanation for the delay;

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

c The Applicant's actions in particular, whether the Applicant has continued to make the decision-maker aware that he or she contests the finality of the decision as distinct from allowing the decision-maker to believe that the matter was finally concluded;

d Whether the Respondent has been prejudiced by the delay;

e Whether the delay may result, if the Applicant for extension is successful, in the unsettling of other people or of established practices;

f The merits of the substantial application; and

g Considerations of fairness as between the Applicant and other persons otherwise in a like position.

16 It is noted that the Tribunal's discretion is limited by s126 (4) which provides:

> "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".

Did the Respondent make an appealable decision, communicated on 4 February 2004?

17 The Respondent did make an appealable decision that the distress to the Joined Party's ("Owners'") home was to be rectified by the Applicants. The Respondent clearly directed the items to be rectified and that the Applicants had 28 days to appeal. The necessary inference is that the Respondent's direction to the Applicants (described by it as a decision) is based on a decision that the Applicants were liable to the Owners. While the report of Yttrup of 2003 might support the strength of the Applicant's potential case on the merits, it does not change the nature of the letter of 4 February 2004.

The Hunter Valley Principles:

Whether the Applicant for extension can show an acceptable explanation for the delay

18 The only explanation for delay in appealing the decision was given by Mr Peter Javni, who swore in his affidavit of 7 August 2006:

> "34. … after 4 February 2004 … I received the first decision letter. I was very confused about this letter. It said Javni was responsible for rectifying certain works, which I thought were still being investigated by Yttrup and which I thought Javni was not responsible for. I had not received any report from the [Respondent] which it had relied upon in reaching this first decision.
>
> …
>
> 36. Shortly after I received the first decision letter, I called the [Respondent] I again spoke to a woman (I cannot recall who I spoke to, but I think it is likely I spoke to Ms Gawthorn, who was the signatory this time of the letter). I related the history of the whole matter. I again explained my confusion above.
>
> 37. I told the [Respondent] woman that Javni was not liable for these rectification works. I told her that the cause of the damage was not as a result of the construction of the house by Javni, but rather a result of the poor soil and landscaping of the Property and that Javni strongly opposed rectifying movement problems at the Property again.
>
> 38. The [Respondent] woman said the [Respondent] would look into the matter and get back to me. This was the reason why I did not arrange for Javni to lodge an appeal of the decision to VCAT.

19 Mr Javni went on to say that the Applicants received another letter – this one of 10 March 2004 – from the Respondent noting that the Owner had advised the works had not been carried out, asking that they contact the Owners to undertake the work by 18 March 2004, and warning:

> Failure to do so will result in the Fund requesting the owner to obtain quotations, for which you shall be liable for costs.

20 Mr Javni's evidence on affidavit is that he again contacted the Respondent and spoke to a woman he could not name, but whom he believed was Ms Gawthorn who had signed both letters. He said he repeated his assertion that "Javni" was not liable and she:

> … again confirmed that the [Respondent] was looking at the matter and … no decision had been made yet. She said not to worry about this letter, and that the [Respondent] would send another letter once a decision was made.

21 I draw the inference from Mr Javni's affidavit that he asserts that although he received two letters unequivocally stating that the Applicants must do

the work or appeal, he did not do so because he had been assured by officers of the Respondent that it was not necessary.

22 Mr Javni's evidence was not tested under cross-examination and no affidavit was available from Ms Gawthorn as, according to the affidavit of Ms Nadia Plantamura of the Respondent, Ms Gawthorn was overseas on leave. I accept Ms Plantamura's evidence that the usual policy of the Respondent is that telephone calls are logged for each file, and that the only telephone call received from the Applicants was from Mr Peter Javni on 4 November 2005. Although it was the usual policy to log telephone calls, the absence of records of calls from Mr Javni shortly after 4 February 2004 and 10 March 2004 falls short of proving that these calls were not received.

23 More importantly, if Mr Javni's evidence is accurate in every respect, he has been so careless of his interests as not to appeal, nor to write a confirming letter or even to make a note of the name of the person he spoke to, when he was assured that the Respondent would "look into" the letter of 4 February 2004, but then received another letter on 10 March 2004. The second letter would be even more alarming to a normally prudent person, because it contradicted the assurance Mr Javni said he had received. Mr Javni's evidence is not accepted on this point, and there is no acceptable explanation for the delay.

The Applicant's actions in particular, whether the Applicant has continued to make the decision-maker aware that he or she contests the finality of the decision as distinct from allowing the decision-maker to believe that the matter was finally concluded

24 There is no documentary proof that the Applicants made the decision-maker aware that they contested the finality of the liability decision at any time until the Applicants' solicitors wrote to the Respondent on 5 May 2006 (which does not refer to the decision of 4 February 2004), and even the Application purports only to appeal the decision of 21 April 2006.

Whether the Respondent has been prejudiced by the delay

25 The Respondent has not alleged that it has been prejudiced by the delay.

Whether the delay may result, if the Applicant for extension is successful, in the unsettling of other people or of established practices

26 The Owners submit that they will be disadvantaged if the application is granted. It is accepted that the cost and delay of a more extensive legal action is disadvantageous to them.

The merits of the substantial application;

27 The liability decision was not the first one made by the Respondent with respect to this contract. In November 1998 the Owners complained to the Applicants about cracks in the brickwork and plaster, creaking staircase and jamming doors. The Respondent sent the Applicants a decision, being a

schedule of works, under cover of a letter dated 4 December 2000. Another copy of the same schedule of works was sent to the Applicants under cover of a letter dated 22 February 2001. On the same day the Applicants wrote to the Respondent to say that the work would be done within 28 days from 26 February 2001. Mr Peter Javni claimed that he told both the Respondent and Mr Rau that movement was caused by failures of the Owners to properly drain and landscape the site, but there is no documentary evidence of this.

28 The Applicants submitted that movement damage to the Owners' home which is the subject of the current claim has been caused by factors outside the control of the Applicants, such as inadequate drainage or the failure by the Owners to landscape and poor design. The Applicants' evidence is accepted that the Owners provided architectural drawings, an engineer's report and a soil report before building work commenced. The Applicants and Owners agree that they undertook certain site works including clearing and levelling, but the Owners said that the Applicants prepared the site and dug trenches. On their own admission, the Applicants installed some agricultural drains around the house.

29 An exhaustive consideration of the opinions of the experts – Mr Yttrup mentioned above and Mr Lawrence and Mr Genitsaris for the Applicants – has not been carried out, and neither would it be sensible in circumstances where the authors have not been available for cross-examination. It is sufficient to say that the reports, particularly those commissioned by the Applicants, indicate that they have an arguable case, but not more than that.

30 To take one example, Mr Yttrup said:

> The causes of distress to this residence are not clear from the investigation results. There is one cause that we consider most likely to be driving the movement.
>
> The continuous blinding concrete 'curtain' under the perimeter strip footings penetrates the fill and is founded onto the natural ground at a depth in the order of 2m to 2.5m below finished surface level. This would act as a 'cut-off' to any subsurface moisture flow.

31 Mr Genitsaris said:

> We partially agree with the sub-ground curtain theory, however we believe that the simple fact that this localized area has up to 2.5m deep uncompacted fill, would naturally draw water to the area.

32 Matters upon which evidence would still have to be adduced would include whether the Applicants should have been aware of the fill and drawn it to the attention of the Owners, and whether the blinding concrete was part of the design provided by the Owners.

33 Mr Fitzgerald submitted:

> In any event, all that Javni must show on this application is that it has an arguable case on the merits: *World Link* at [10].

34 At paragraph 10 of *World Link Assets Pty Ltd v James Kay* [1999] VCAT DB 5, Deputy President Cremean, as he then was, said:

> The case for the Applicant is that I should extend time under s126(1) in all the circumstances, having regard particularly to the "merits". It was put to me that the merits are the principal ground of consideration. The authorities, however, do not uniformly or at all bear this out. But, even if they did, having regard to the width of the discretion involved, other factors might still be considered. In any event, in a sense, there was no argument from the Respondent insurers regarding the merits: they conceded that the Applicant had an arguable case on the merits. In light of this concession, other factors fall for consideration.

35 I take Mr Fitzgerald to mean that as far as this *Hunter Valley* principle is concerned, an arguable case is enough. I accept his submission, and if other factors had not been adverse to his clients, their submissions concerning merits would not have prevented them from obtaining an extension.

Considerations of fairness as between the Applicant and other persons otherwise in a like position

36 It is not reasonable for builders to think that they can wait and see what happens. Those with good grounds for appeal need to exercise their rights promptly in their own interests and the interest of others affected by the dispute.

Whether it is fair and equitable in the circumstances to extend time

37 Comments have been made about parties who apparently sit on their rights by Judge Davey in *Grandville Homes Pty Ltd v HGF and Anor* [2001] VCAT 40 and DP Aird in *Seventy-Eighth Evolution v Vero* [2005] VCAT 1052. In *Grandville* His Honour 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 right to seek a review of that decision and the fact that any application to seek a review before VCAT would involve compliance with timing limits.

38 In *Seventy-Eighth Evolution* DP Aird said:

> 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.

39 On balance it is found that it is not fair to extend time for appeal of the liability decision. The quantum decision is, of course, the subject of appeal,

so the matter will still have to proceed to mediation, and if that is unsuccessful, to a hearing. Nevertheless, the appeal on liability and quantum is likely to be more extensive and expensive than an appeal on quantum alone. The Applicants' failure to appeal promptly has no credible explanation and in circumstances where they were repeatedly warned of time limits, they will not be granted a further indulgence.

SENIOR MEMBER M. LOTHIAN