

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO D723/2009

CATCHWORDS

Domestic building warranty insurance – deemed acceptance – whether insurer made a decision - sufficiency of evidence.

APPLICANT	Owners Corporation Plan 445653U
FIRST RESPONDENT	Vero Insurance Ltd (ACN 005 297 807)
SECOND RESPONDENT	Healey Homes Pty Ltd (ACN 006 853 710) (in liquidation)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	17 June 2010
DATE OF ORDER	29 June 2010
CITATION	Owners Corporation Plan 445653U v Vero Insurance Ltd & Anor (Domestic Building) [2010] VCAT 1095

ORDERS

1. I answer the preliminary questions as follows:
 - (a) Withdrawn.
 - (b) Unnecessary to decide.
 - (c) Yes.
2. **The proceeding is referred to a directions hearing on 29 July 2010 at 9:30 a.m. at 55 King Street Melbourne before Senior Member E Riegler at which time the Tribunal will make further directions as to the conduct of the proceeding.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant: Mr R Andrew of counsel.

For the First Respondent Mr A Laird of counsel.

For the Second Respondent No appearance.

REASONS

Introduction

1. This is the return of an application to hear and determine three preliminary questions set down for hearing by orders made on 29 January and 31 March 2010. Those questions were stated in the orders as follows:
 - (a) The Applicants application for an extension of time in which to seek a review of the first respondent's decision dated 3 May 2004 and 10 June 2005.
 - (b) Whether the letter dated 11 November 2008 from the Manager of the Applicant to the First Respondent constitutes a new claim under the relevant policy of Warranty Insurance, and if so to what extent.
 - (c) Is the first respondent deemed to have accepted liability for written insurance claims lodged by the applicant by reason of any failure of the first respondent to make a determination as to liability in respect of such claims within 90 days of receipt of such claims?
2. At the commencement of the hearing, counsel for the Applicant advised that the Applicant no longer intended to make an application for an extension of time in which to seek a review of the First Respondent's decision dated 3 May 2004 and 10 June 2005. The First Respondent did not oppose that course of action, subject to being heard on the question of costs.
3. Each party filed written submissions. In addition, the Applicant filed the following affidavits:
 - (a) An affidavit of Peter Robert Black, the Owners Corporation Manager, dated 1 March 2010 (**'the Black Affidavit'**).
 - (b) An affidavit of Lawrence Stewart Whiffen, unit holder, dated 3 May 2010.
 - (c) An affidavit of Kristin Jon Bates, unit holder, dated 22 February 2010.
 - (d) An affidavit of Darren Arthur Kittelty, unit holder, dated 19 February 2010.

4. The First Respondent filed an affidavit sworn by Michael Doukas, leader CI Home Claims Warranty Division, dated 29 March 2010 (**‘the Doukas Affidavit’**).

Chronology

5. The Applicant is the Owners Corporation (**‘the Owners Corporation’**) of a property situated in Brunswick upon which 19 apartments and common property are located (**‘the Apartments’**).
6. The Apartments were constructed between August 2001 and 27 May 2002, when occupancy permits were issued for each apartment.
7. The Second Respondent (**‘the Builder’**) constructed the Apartments. It is now in liquidation.
8. The First Respondent (**‘Vero’**) provided warranty insurance pursuant to section 135 of the *Building Act* 1993, in respect of the construction of the Apartments (**‘the Insurance Policies’**).
9. The Insurance Policies were current until 26 May 2009.
10. There were defects discovered in the building work undertaken by the Builder after occupation, including cracking to the exterior of the Apartments.
11. On or about 8 December 2003, Vero received an insurance claim lodged by the then body corporate, which listed the cracking of the exterior of the Apartments (**‘the First Insurance Claim’**).
12. According to Vero, it denied liability in respect of the First Insurance Claim on 2 February 2004, ‘pending receipt of an assessment report’.
13. By letter dated 3 May 2004, Vero advised the Owners Corporation that it had determined to reject the First Insurance Claim (in part).
14. On or about 1 April 2005, the Owners Corporation lodged a second insurance claim, again raising issues related to further cracking of the Apartments (**‘the Second Insurance Claim’**).
15. According to Vero, it denied liability in respect of the Second Insurance Claim by letter dated 10 June 2005. According to the Owners Corporation, it did not receive Vero’s letter dated 10 June 2005 until 5

August 2005, being the date that it says was the first date that it was notified of Vero's decision to reject the Second Insurance Claim.

16. According to the Owners Corporation, a third insurance claim was lodged on 11 November 2008, again raising issues related to further cracking of the exterior of the Apartments (**'the Third Insurance Claim'**). According to Vero, the correspondence alleged by the Owners Corporation to comprise the Third Insurance Claim did not constitute a fresh insurance claim. In particular, Vero contends that the letter dated 11 November 2008 constituted a request on the part of the Owners Corporation that Vero review its earlier decision to reject the First Insurance Claim and Second Insurance Claim.
17. On 23 September 2009, the Owners Corporation filed an application seeking damages against Vero and the Builder in excess of \$430,000. Insofar as the Owners Corporation sought damages against Vero, it alleged that Vero had failed to respond to the insurance claims made by the Owners Corporation within 90 days. Consequently, the Owners Corporation contend that the Insurance Policies expressly deem Vero to have accepted liability.

The insurance policies

18. Clause 35 of the Insurance Policies states:

If a written claim is not determined as to liability by us within 90 days of receipt then, unless you or the Tribunal agree to an extension, we are deemed to have accepted it.

19. Counsel for the Owners Corporation submitted that if the Tribunal found Vero was deemed to have accepted liability for the First Insurance Claim, then there was no need for the Tribunal to further consider Vero's liability in respect of the Second Insurance Claim and Third Insurance Claim. This is because the First Insurance Claim identified cracking to the rendered services of the Apartments, which the Second Insurance Claim and Third Insurance Claim reiterated. Indeed, the Second Insurance Claim expressly states '*Current common property claim. Still active to Vero*'. This seems to be consistent with Vero continuing to cite the same claim number in its correspondence to the Owners Corporation concerning the First Insurance Claim and Second Insurance Claim. I also note that during cross-examination, Mr Black, who is the Owners Corporation manager, agreed that the cracking to the exterior of the Apartments identified in the First Insurance Claim was the same item of

“defective workmanship” reiterated in the Second and Third Insurance Claims.

20. I agree with counsel for the Owners Corporation that a finding of liability against Vero in relation to the First Insurance Claim, will render superfluous the need to consider the validity of the Second and Third Insurance Claims. This is because the cracking to the rendered surface of the Apartments noted in the First Insurance Claim is the same item or substantially the same item identified in the Second and Third Insurance Claims. Moreover, clause 36 of the insurance Policies states:

Notice of a particular defect is deemed to be notice any defect directly or indirectly related to the notified defect and regardless of whether any claim in respect of the notified defect has been settled.

21. The effect and operation of clause 36 reinforces my view that a finding of liability in respect of the First Insurance Claim will render superfluous the need to consider further Vero’s liability in respect of the Second Insurance Claim and Third Insurance Claim.
22. Further, I note that Vero did not raise any contrary argument to the proposition advanced by the Owners Corporation. Accordingly, I accept that if I find that liability in relation to the First Insurance Claim has been accepted by Vero, there is no need to consider further the validity or impact of the Second Insurance Claim and Third Insurance Claim.

Did Vero determine the First Insurance Claim within 90 days?

23. Vero says that it received the First Insurance Claim on or about 8 December 2003. It says that the *deeming date* for the claim was 7 March 2004. It says further that its computer records indicate that it made a decision determining the First Insurance Claim on 2 February 2004, being within 90 days of receipt of that claim. The evidence adduced by Vero in support of its position is contained in paragraphs 8 to 23 of the Doukas Affidavit, together with the exhibits referred to therein.
24. The relevant parts of the Doukas Affidavit are as follows:
- ‘9. Vero’s records indicated that the claim file for the First Insurance Claim was closed in March 2006. I have carried out extensive searches of Vero’s archived files and have been unable to locate the hard copy of the claim file.

10. In addition to the hardcopy claim file Vero maintains for each claim file, as an aid to the claims management process, a computer database of file notes recorded by Vero personnel, in particular the Claims Officer with the primary care of the claim, involved in the claim file process. This database is known as the “Protect Mainframe” Database.
11. The Claims Officer with primary care of the First Insurance Claim was Mr Goran Stavreski. Mr Stavreski ceased his employment with Vero in January 2008. The Protect Notes indicate (line 26 of the Protect Notes) that Mr Stavreski had recorded the “deeming date” for the claim as being 7 March 2004. The “deeming date” is the terminology Vero personnel used to identify the date being 90 days after the date of receipt of an insurance claim. A recorded deeming date of 7 March 2004 would mean that the First Insurance Claim was received 90 days prior to 7 March 2004, namely 8 December 2003.
12. The Protect Notes indicate the following:
 - (a) that the First Insurance Claim was received in early December 2003 (Protect Notes line 8);
 - (b) that the applicant and the Builder were notified that an inspection would be carried out for Vero by “Building Assist” (Protect Notes lines 12, 13);
 - (c) that “Building Assist” was instructed on 15 December 2004 to make arrangements for inspection (Protect Notes lines 17, 18);
 - (d) that on or about 28 January 2004 Mr Black contacted Vero to advised that he had not yet been contacted by Building Assist in respect of the inspection (Protect Notes lines 20, 21);
 - (e) that on 2 February 2004 Vero denied liability for the First Insurance Claim pending receipt of the inspection assessment report (Protect Notes line 26);
 - (f) that the Building Assist inspection report was received by Vero on 26 April 2004 (Protect Notes line 23).
14. Vero provided its decision on the First Insurance Claim to the Body Corporate by letter dated 3 May 2004 with attached inspection summary dated 30 April 2004 (“the First Claim Decision”).’

25. Mr Doukas states in his affidavit that the *Protect Notes* indicate that Vero denied liability for the First Insurance Claim on 2 February 2004. Counsel for Vero further referred to a letter dated 3 May 2004 from Vero addressed to the Owners Corporation which opened with the following sentence:

We refer to our previous correspondence dated 02/02/04.

26. Counsel for Vero submitted that the notation in the *Protect Notes*, stating that the insurance claim had been *denied on 2 February 2004 pending report* and the letter dated 3 May 2004 making reference to previous correspondence of the same date; was evidence that Vero had rejected the First Insurance Claim on 2 February 2004.
27. Vero was, however, unable to locate a copy of the letter dated 2 February 2004 or was able to say what that letter stated. In addition, Mr Black, on behalf of the Owners Corporation, gave evidence during his cross-examination that the Owners Corporation had not received any letter from Vero dated 2 February 2004 nor had he ever seen such a letter. Moreover, there is no reference in the *Protect Notes* exhibited to the Doukas Affidavit to any correspondence dated 2 February 2004.
28. Mr Stavreski, the relevant claims officer that Vero says made the 2 February 2004 entry into the *Protect Notes*, was not called to give evidence. Consequently, Vero relies solely on what the *Protect Notes* record together with Mr Doukas' belief as to what those notes indicate. There is no direct evidence of Vero having determined the First Insurance Claim on 2 February 2004. Mr Doukas does not actually say that Vero made a decision in respect of the First Insurance Claim before 7 March 2004. His evidence simply is that the *Protect Notes* indicate that on 2 February 2004 Vero denied liability for the First Insurance Claim pending receipt of the inspection assessment report. This is to be contrasted with other parts of the Doukas Affidavit where he does give direct evidence as to factual issues. For example, in paragraph 14, Mr Doukas states that Vero *provided its decision on the First Insurance Claim* to the Owners Corporation by letter dated 3 May 2004. He does not say that this letter indicates that the decision was conveyed to the Owners Corporation. His evidence on that point is factual, rather than expressing an opinion as to what should be inferred by the contents of a particular document. Put simply, Mr Doukas does not say that what is set out in the *Protect Notes* is to be taken as fact; nor does he say that the

Protect Notes are an accurate record of the facts. They are, at best, an indication only of what may have occurred.

29. Counsel for the Owners Corporation submitted that it was unsafe to rely on what the *Protect Notes* recorded. He questioned whether the *Protect Notes* were a contemporaneous record of what the claims officer, Mr Stavreski, had recorded at the relevant time. In particular, he submitted that the *Protect Notes* could not be a contemporaneous record because they referred to the Owners Corporation at line 36 on page 3 and line 39 on page 4 as *OWNERS CORPORATION*. He submitted that the term “owners corporation” was first coined following the enactment of the *Owners Corporation Act 1996* and that that term had no meaning or general usage in May 2004, when those entries were allegedly made. Further, other parts of the *Protect Notes* refer to the Owners Corporation as *BODY CORPORATE*, which was the correct title of the Owners Corporation at the relevant time and prior to the enactment of the *Owners Corporation Act 1996*. Vero did not explain this anomaly.
30. In my view, the evidence adduced by Vero is lacking in various aspects. In particular, questions arise as to whether Mr Stavreski had the requisite discretion to make binding decisions on behalf of Vero or whether he needed to obtain approval from a superior before binding Vero to a decision. For example, line 33 of the *Protect Notes* for 4 May 2004 (see below) state: *NOTIFICATION OF DECISION ASSESSMENT FORWARDED OT BOB LONEY*. There is no evidence identifying who Bob Loney is. Nothing suggests that he was a member of or acting on behalf of the Owners Corporation. Accordingly, I presume that he was someone relevant to the operations of Vero. In my view, the file note suggests that the decision making process may have involved more than one person. This seems to be consistent with the file note at line 31 that states *RECOMMENDATION: 7 ITMES ACCEPTED & 40 ITEMS DENIED*. Again it is not clear whether Mr Stavreski’s role was to make a recommendation to another person, be it his superior or the relevant underwriters, or whether he had autonomy to make a decision binding Vero on his own. This is despite the fact the following file note at line 33 states: *(NOTE: NO REFERRAL REQUIRED AS FALLS WITHIN WRITERS AUTHORITY)*. Obviously, these questions could have been answered by Vero, however, it has chosen not to adduce any evidence dealing with this issue, save to say that Mr Stavreski was the relevant claims officer with the primary care of the First Insurance Claim.

31. Moreover, there is nothing in the Doukas Affidavit to shed light on these questions. There is no evidence that what is written in the *Protect Notes* is to be taken as fact. According to Mr Doukas, the notation in the *Protect Notes* is merely an indication of a fact having occurred.

32. A further difficulty in not calling Mr Stavreski to give evidence is that the notation is somewhat ambiguous as to its meaning. The note entered on line 26 of the *Protect Notes* states:

26 DEEMING DATE: 07/03/04 (DENIED ON 02/02/04 – PENDING REPORT)

33. It is not entirely clear what effect the words “pending report” are intended to mean. The MacQuarie dictionary meaning of the word “pending” is:

1. while awaiting; until: *pending his return*. 2. in the period before the decision or conclusion of; during: *pending the negotiations*. 3. remaining undecided; awaiting decision. 4. hanging; impending.

34. As can be seen by the definition of “pending”, the word could mean *the period before the decision is made, remaining undecided or awaiting a decision*. It seems to me that some meaning and purpose must be given to the word “pending”, otherwise Mr Stavreski would not have entered those words in the *Project Notes*. In my view, if the entry on line 26 of the *Protect Notes* was simply meant to record that the First Insurance Claim was denied on 2 February 2004, then it would serve little or no purpose by adding the words “pending report”. Counsel for Vero submitted that the words “pending report” simply meant that the decision was an interim decision. I have difficulty in accepting that proposition. It seems to me that by adding the words “pending report”, no decision was, in fact, made. In my view, what may have occurred is that Mr Stavreski had an intention to reject the claim but held off making any decision until he had received the inspection assessment report. That seems to be consistent with what occurred because ultimately, some of the items comprising the First insurance Claim were accepted, while others were rejected. Of course, my analysis is purely speculative. I am in no better position than Vero to know what Mr Stavreski actually intended that notation to mean. There is no evidence from Mr Stavreski explaining what the notation means.

35. Further, it would appear that the *Protect Notes* are in chronological order or at least substantially so. However, there is no mention of the claim

being rejected within the period when the claims were first received until after the entry for the date of 26 April 2004. It seems peculiar that a rejection of the claim on 2 February 2004 was first recorded in the *Protect Notes* under the date entry for 4 May 2004 and not within the chronology of events occurring in February 2004. In particular, the *Protect Notes* state, in part:

RSSZM 15/09/2003 08:39 STEVEN MICALLEF
1 WE HAVE SENT OUT 19 CLAIM FORMS...

RSSZM 10/12/2003 17:31 GORAN STAVRESKI
9 RECEIVED NEW CLAIM. REVIEWED SAME. FILE FORWARDED TO TSU TO ARRANGE
10 AN INSPECTION OF THE PROPERTY. AWAIT INSPECTION REPORT.

RVGZS 15/12/2003 09:53 GORAN STAVRESKI
11 FILE RETURNED FROM TSU, CONTACTED THE BUILDER AND OWNER AND NOTIFIED THEM
12 THAT BUILDING ASSIST WILL BE CONTACTING THEM SHORTLY TO ARRANGE
13 AN INSPECTION. DISCUSSED ITEMS OF CLAIM WITH BUILDER. HE ADVISED HE
14 WILL BE AT INSPECTION TO PUT FORTH HIS ARGUMENTS.

RSSZM 16/01/2003 13:43 GORAN STAVRESKI
15 SENT MARILYN SEARLE OF TSU ENQUIRING AS TO THE PROGRESS OF THE
16 INSPECTION REPORT, AWAIT SAME

RSSZM 20/01/2003 08:50 GORAN STAVRESKI
17 RECEIVED REPLY FROM TSU, INSTRUCTIONS WERE SENT TO BUILDING ASSIST
18 ON 15/12/04 & INSPECTION REPORT NOT EXPECTED UNTIL EARLY NEXT MONTH.
19 AWAITS SAME.

RVMXD 28/01/2003 14:41 MICHAEL DOUKAS
20 PETER BLACK (BODY CORPORATE MANAGER) CALLED AND STATED THAT HE HAD NOT
21 HEARD FROM BUILDING ASSIST. WRITER HAS ARRANGED FOR BUILDING ASSIST T
22 O CONTACT PETER TO ARRANGE A SUITABLE TIME. MDOUKAS 28/01/2004

RVMXS 03/03/2004 11:19 MARILYN SEARLE
23 03/03/2003 MAS – INSPECTION REPORT RECEIVED FROM BUILDING ASSIST

RVGZS 26/04/2004 11:19 GORAN STAVRESKI
24 RECEIVED INSPECTION REPORT, CURRENTLY UNDER REVIEW.

RVGZS 04/05/2004 11:41 GORAN STAVRESKI
25 DECISION ASSESSMENT
26 DEEMING DATE: 07/03/04 (DENIED ON 02/02/04 – PENDING REPORT)
27 DATE BUILDING WORKS COMPLETED: 05/02
28 CIRCUMSTANCES OF CLAIM: DEFECTIVE WORKS - VARIOUS ITEMS (47)
29 CONTRACT AMOUNT: U/K
30 QUANTUM: \$2,915
31 RECOMMENDATION: 7 ITEMS ACCEPTED & 40 ITEMS DENIED
32 (NOTE: NO REFERRAL REQUIRED AS FALLS WITHIN WRITERS AUTHORITY)

RVGZS 04/05/2004 12:13 GORAN STAVRESKI
33 NOTIFICATION OF DECISION ASSESSMENT FORWARDED OT BOB LONEY ON
34 04/05/04

RVGZS 18/05/04 08:52 GORAN STAVRESKI
35 RECEIVED TELEPHONE CALL FROM ONE OF THE UNIT OWNERS, TRISTIAN WHO WAS
36 CALLING TO DISCUSS OUR DECISION & THEIR (OWNERS CORPORATION)

36. It seems improbable that a decision to reject a claim would not be recorded chronologically but rather, recorded out of chronological place, given the importance of that particular event. Accordingly, and taking

into consideration this anomaly, the ambiguity of the notation itself and the question as to whether the *Protect Notes* were contemporaneous, I find that the *Protect Notes* cannot be taken as an entirely accurate record of Vero's actions during the relevant period.

37. Having considered all of the evidence and submissions, including the evidence given by Mr Black during cross examination, I find that on the balance of probabilities, Vero did not make a decision to reject the First Insurance Claim on 2 February 2004. I further find, on the evidence before me, that the first occasion that the First Insurance Claim was rejected by Vero was on 3 May 2004, as evidenced by Vero's letter of that same date. That being the case, I find that Vero failed to make a determination as to liability within 90 days of receipt of the First Insurance Claim. Consequently, I find that Vero is deemed to have accepted liability in respect of that claim.
38. Given my finding in relation to the deemed acceptance of the First Insurance Claim, it is unnecessary to me to determine whether Vero is deemed to have accepted the Second Insurance Claim or whether the Third Insurance Claim was a valid claim made under the Insurance Policies.

SENIOR MEMBER E. RIEGLER