

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D454/2002

CATCHWORDS

Limit of indemnity under HGF guarantee - \$40,000 – payment into Domestic Builders Fund

APPLICANT	Sheila Veronica Sheehan
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Wortley Constructions
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	7 and 14 November 2007
DATE OF ORDER	5 December 2007
CITATION	Sheehan v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 2342

ORDER

- 1 The proceeding as between the applicant and the first respondent is reinstated.
- 2 The first respondent shall pay the applicant the sum of \$40,000.00 forthwith.
- 3 Should the applicant fail to present for payment the cheque from the first respondent in the sum of \$40,000.00 within 28 days of payment being made, the first respondent is at liberty to cancel the cheque, and pay the sum of \$40,000.00 into the Domestic Builders Fund. Any such payment must be accompanied by a copy of this order.
- 4 Upon receipt of a written request from the applicant that the sum of \$40,000.00 deposited into the Domestic Builders Fund be paid to her, I direct the Principal Registrar to refer any such request to Deputy President Aird (or another member) in chambers for the making of the appropriate orders.

- 5 The proceeding as between the applicant and the first respondent is otherwise dismissed.
- 6 The application by the applicant to reinstate the proceeding as against the second respondent and to join Michael Wortley as a party to this proceeding is referred to a directions hearing before Deputy President Aird on 30 January 2008 at 10.00 a.m. at 55 King Street Melbourne with an estimated hearing time of half a day. I direct the principal registrar to send the parties a Notice of Hearing.**
7. By 11 January 2008 the applicant must file and serve fully itemised particulars of her claim against the second respondent and Mr Wortley, the proposed joined party, together with particulars of loss and damage claimed, and the relief or remedy sought.
8. By 25 January 2008 the second respondent and Mr Wortley must file and serve any affidavit material in reply.
- 8 Costs of the proceeding as between the applicant and the first respondent are reserved with liberty to apply. I direct the Principal Registrar to list any such application for hearing before Deputy President Aird (but not on the same day as the applicant's application for reinstatement and joinder referred to in order 6 hereof) – allow half a day.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Ms S. Sheehan, in person
For First Respondent	Ms S. Kirton of Counsel and Mr B. Powell of Counsel
For Second Respondent	Mr Wortley, Director (excused from attending on 14 November 2007)

REASONS

- 1 In April 2005 the applicant ('Miss Sheehan') entered into a building contract with Wortley Constructions Pty Ltd for the construction of a residential dwelling at 2/5 Thurso Street, East Malvern. It is my understanding that this house was built behind an existing dwelling owned by Miss Sheehan. The works were guaranteed by the Housing Guarantee Fund ('HGF') as required under the *House Contracts Guarantee Act 1987* ('the HCG Act').
- 2 Miss Sheehan initially made a claim under the guarantee in August 2001. Proceedings which were commenced in this tribunal in August 2002 have had what can best be described 'a chequered history'. It must be said, at the outset, that there is no doubt the subject property has some significant defects which require rectification.
- 3 Victorian Managed Insurance Authority ('VMIA'), which has had the responsibility for managing the Housing Guarantee Claims Fund on behalf of the State of Victoria since 1 February 2006, by Application for Orders/Directions dated and filed 19 September 2007 seeks:
 1. The proceeding be reinstated pursuant to s13(3) of the *House Contracts Guarantee Act 1987*.
 2. The First Respondent pay to the Applicant the sum of \$40,000 (forty thousand dollars).
 3. Pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act 1995* ("the Act") order that the First Respondent pay the sum of \$40,000 into the Domestic Builders Fund established by s.124 of the Act, pending resolution of the dispute between the Applicant and the First Respondent.
 3. Liberty to apply.
- 4 The application came on for hearing before Deputy President Macnamara on 2 October 2007 when VMIA sought to amend its application to seek orders that, following an order for payment to Miss Sheehan and/or into the Domestic Builders Fund, the proceeding be otherwise struck out or dismissed. This application is made under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). Miss Sheehan sought an adjournment of the hearing pending the outcome of her application to PILCH for pro bono legal assistance, and her complaint to the Ombudsman. Deputy President Macnamara made orders amending VMIA's application and adjourning the hearing to 7 November 2007 at 2.15 p.m.
- 5 On 31 October 2007, Miss Sheehan wrote to the tribunal advising that she wished to amend her application. She attached an updated application form setting out new claims against the VMIA, Wortley Constructions and Mr Wortley personally. She also filed a lever arch folder comprising a Summary of Affidavit, 11 photos, exhibit index, a 34 page affidavit, and 102 exhibits. In her 'amended application' Miss Sheehan seeks:

1. In excess of \$100,000 as costs of the rectification.
 2. HGF/VMIA enclosed claims handling Procedures in affidavit dated 19 September 2007 clearly show they have not followed their own procedures.
 3. To subpoena HGF/VMIA to produce correspondence file and notes relating to matters before VCAT – Matter No 170940.
 4. Michael Wortley has failed to provide undertaking of Building Commission Inspect Report and VCAT Terms of Settlement.
 5. HGF/VMIA failing to observe its own procedures and misleading owner about the proper way to prosecute owner's claim.
 6. Wortley Constructions and Michael Wortley personally in breach of undertaking provided as Wortley Construction and on personal basis to carry out Building Commission Inspection Report dated 27 October 2005.
 7. Wortley Constructions in breach of not carrying out VCAT Terms of Settlements – latest dated 1 March 2006.
 8. All has been set out in my Affidavit dated 29 October 2007. (sic)
- 6 At the commencement of the hearing on 7 November 2007 Miss Sheehan said there had been some difficulties with her application to PILCH and that she had been unable to obtain legal assistance. VMIA was represented by Ms Kirton of Counsel. Mr Wortley, a director of Wortley Constructions Pty Ltd attended and confirmed that the company had ceased trading, although it had not been formally de-registered. Its application for deregistration had been placed on hold until February 2008.
- 7 I advised Miss Sheehan that she could not simply amend her application without leave of the tribunal, but that I would treat her amended application as an application for reinstatement as against VMIA and Wortley Constructions, and an application to join Mr Wortley as a party to the proceedings in his personal capacity. I indicated that I would consider VMIA's application, and her application insofar as it concerned VMIA first, and, after I had determined them, I would list the application for reinstatement as against Wortley Constructions and the joinder of Mr Wortley for hearing on another occasion.
- 8 When it became apparent that the issues as between Miss Sheehan and VMIA could not be fully heard on 7 November, I adjourned it for further hearing on 14 November 2007 and excused Mr Wortley from attending, confirming that he would receive notification as to when the matters concerning him and Wortley Constructions would be heard. At the further hearing, Ms Kirton, having found herself otherwise committed, attended for a short time, and VMIA was represented by Mr Powell of Counsel (who had appeared at the hearing before Deputy President Macnamara).
- 9 Before concluding on the first day, I explained to Miss Sheehan that whilst it is apparent, and accepted by VMIA, that there are defective works and the

cost of rectification is significant, and although she believed she had been ‘badly done by’ and let down by the system, I was required to apply the law, which might not give her what she believed to be a ‘moral outcome’. I urged her to seek further legal advice in the intervening period.

- 10 When the hearing resumed, Miss Sheehan said that she had been unable to obtain further pro bono legal assistance, which she thought was because solicitors had previously acted for her on a pro bono basis over a number of years, ceasing in late 2006. Further, she said she was no longer even certain that she had been provided with the correct advice by her former lawyers when they advised her that the limit of the guarantee was \$40,000.

Background

- 11 Before considering the issues between Miss Sheehan and VMIA, it is important to understand the context in which VMIA makes its application and to this end, it is helpful to set out a history of the claim and this proceeding:

1995	HGF guarantee issued with commencement date of 24 April 1995.
August 2001	Miss Sheehan lodged claim with HGF – Claim No 17940. Following inspection by Julian Davies, an inspector engaged by HGF, the claim was accepted.
7 November 2001	HGF directed Wortley Constructions to rectify.
January – July 2002	Miss Sheehan wrote to HGF and Wortley Constructions expressing her concern about the proposed works. Wortley Constructions agreed to carry out works recommended by Julian Davies. HGF advised Miss Sheehan to allow Wortley Constructions to carry out those works.
11 July 2002	HGF received a letter from Wortley Constructions who said that they had been told by Miss Sheehan not to proceed with the works because she was obtaining legal advice.
12 July 2002	HGF issued a further decision rejecting the claim because Miss Sheehan had denied reasonable access to Wortley Constructions to carry out the works.
6 August 2002	Miss Sheehan made application to VCAT appealing HGF’s decision.
3 December 2002	Following an on-site mediation, Terms of Settlement were entered into. Under the Terms of Settlement the parties agreed that Mr Davies would inspect and report in relation to a scope of works. Wortley Constructions agreed to carry out the works specified by Mr Davies by 31 March 2003 and Mr Davies was to certify when the works were completed. The scope of works and Mr Davies’ certification were to be final

	and binding on Miss Sheehan and Wortley Constructions. It seems that Miss Sheehan was legally represented at the mediation – a typed copy of the terms having been forwarded to the other parties by her then lawyers on 4 December 2002.
17 March 2003	Mr Davies issued a scope of works following inspections on 16 December 2002 and 6 February 2003 –Wortley Constructions commenced the recommended works and Mr Davies inspected several times. Miss Sheehan expressed concerns about the works leading to correspondence between her solicitors and HGF in relation to the scope.
June 2004	Miss Sheehan applied to the tribunal to reinstate the proceeding.
22 October 2004	4 days prior to the hearing (scheduled to commence on 26 October 2004) Miss Sheehan served Particulars of Loss and Damage confirming the claim as against the HGF was for the sum of \$40,000 <i>‘for the benefit of the Guarantee and interest’</i> . Particulars of loss and damage of the claim against Wortley Constructions were also filed.
26 October 2004	<p>The parties entered into negotiations which lasted for 2 days resulting in further Terms of Settlement dated 27 October 2004 – these were in the form of an Addendum to the previous Terms of Settlement. They confirmed that Mr Davies was the expert; Wortley Constructions had done some works and the parties agreed that Wortley Constructions was to complete the works to Mr Davies’ satisfaction. The items to be carried out were listed. The significant change from the previous Terms of Settlement was that Wortley Constructions was to obtain a building permit and arrange warranty insurance for the works. Failure to do so would render the Terms of Settlement null and void.</p> <p>Miss Sheehan also agreed to allow Wortley Constructions access to carry out the works and not to communicate with them.</p> <p>If Wortley Constructions was in liquidation HGF was to indemnify Miss Sheehan an amount up to \$40,000:</p> <p>Paragraph 26(d) provides:</p> <p><i>HGF agrees to indemnify the Applicant for the amount of the quotation (or the lesser amount if more than one quotation is obtained) up to the guarantee limit of \$40,000 (forty thousand dollars) provided that the Applicant agrees to sign all documents necessary to allow HGF to provide the indemnity.</i> (emphasis added)</p>

November 2004 – March 2005	Further correspondence between Miss Sheehan, Wortley Constructions and the HGF relating to delays in the obtaining of the building permit and warranty insurance, and the claim generally.
10 March 2005	At a directions hearing the parties agreed to extend the dates for completion.
2 July 2005	Wortley Constructions advised it had obtained the building permit and was prepared to start work on 11 July 2005.
11 July 2005	Miss Sheehan's solicitors advised the other parties she would not allow access until new terms of settlement were executed, as the time periods set out in the terms of settlement dated 3 December 2002, the Addendum to the terms of settlement dated 27 October 2004 and the Agreement to Amend Dates dated 10 March 2005 had passed. They also noted that, contrary to the requirements of the Addendum, Wortley Constructions had obtained a building permit which provided for a mechanical fan driven system rather than the wind driven cowls which had been agreed.
22 July 2005	At a further directions hearing Miss Sheehan's solicitors proposed further Terms of Settlement and the directions hearing was adjourned to a date in August at which time the proceeding was referred to a compulsory conference on 7 October 2005.
2 September 2005	Miss Sheehan advised the tribunal (and the other parties) she had arranged for the Building Commission to arrange an inspection and the compulsory conference was adjourned to February 2006 pending receipt of the Building Commission (BACV) report.
10 February and 1 March 2006	<p>A compulsory conference was held over two days conducted by a Senior Member. The applicant was legally represented and further Terms of Settlement were drafted and signed on 1 March 2006. Under those Terms of Settlement the parties agreed:</p> <ul style="list-style-type: none"> • Wortley Constructions would carry out the BACV items, • Ray Martin would be the independent expert, • Wortley Constructions would carry out any items as directed by Ray Martin, • a method for the rectification of the sub-floor ventilation was specified, • Wortley Constructions was to carry out some further

identified items,

- Miss Sheehan and Wortley Constructions were to enter into a new building contract, a copy of which was attached to the Terms of Settlement,
- Wortley Constructions would arrange for warranty insurance to be provided by Vero,
- Wortley Constructions would amend the plans as necessary and deal with Laurie Hargrave, her building consultant.
- the works would be completed within 90 days of the varied building permit being issued,
- Ray Martin was to inspect and certify when the works were complete,
- the building surveyor was to certify when the works were complete,
- any direction by Ray Martin and/or the building surveyor was binding,
- Miss Sheehan would grant Wortley Constructions access to carry out the works,
- liquidated damages if the works were not completed within the 90 day period,
- after 105 days Ray Martin was to assess the cost of completing the works and Wortley Constructions was to pay this amount to Miss Sheehan. In default of payment Miss Sheehan could apply to the tribunal for judgement in default. If Wortley Constructions was in liquidation, Miss Sheehan could make a claim on Vero and/or HGF.
- HGF's liability was for items that would not be covered by the Vero policy and are set out in paragraph 16 of the Terms of Settlement.
- HGF was to obtain a list of the outstanding items and a costing to complete them from the Independent Expert (Ray Martin) and Miss Sheehan and the HGF agreed they would accept that costing (clause 16(b)) and under clause 16(c):

the HGF agrees to pay Sheehan the amount of the costing (up to the guarantee limit of \$40,000) provided that Sheehan agrees to sign all documents necessary to allow HGF to provide the

	<u>indemnity</u> (emphasis added).
1 March 2006	Consent orders were made in accordance with clause 18 of the Terms of Settlement whereby the proceeding was struck out with a right to apply for reinstatement.
March-September 2006	Further correspondence between the parties in relation to the rectification works.
5 September 2006	Wortley Constructions wrote to the HGF advising: Following our phone conversation this afternoon 5-9-06, I am writing to inform you that as we cannot get any resolution in the case with Ms S Sheehan and to this result we have been advised to close down Wortley Construction. We have tried over the past five and half years to get this project finalized only to be frustrated at every turn. If you could please advise us of our responsibilities regarding this matter.
14 September 2006	Wortley Constructions applied to ASIC for voluntary de-registration.
15 November 2006	VMIA wrote to Miss Sheehan advising it had assessed her loss and damage at \$40,000.00 and advising her of her right to appeal the decision to the tribunal. Neither Miss Sheehan nor Wortley Constructions appealed the decision.
18 December 2006	VMIA wrote to Miss Sheehan advising it would pay her the sum of \$40,000 upon return of the signed and dated Release and Authority.
29 January 2007	VMIA wrote to Miss Sheehan noting she had not returned the signed and dated Release and Authority and: We would appreciate your intentions, in writing, with respect to your claim.
10 January 2007 (dated stamped as having been received on 20 January 2007)	Miss Sheehan responded advising: As I have received your letter dated 18 December 2006 right on the Festive Season I have not been able to consider your offer as yet. From now, I need a minimum of 90 days to consider your offer, and if I have a result earlier I will inform you.
31 January 2007	Miss Sheehan wrote to VMIA advising: I believe HGF are making dictatorial immoral demands well over and far beyond your place and authority, to imprudently summons my signature on your unprincipled enclosed Release and Authority Form. This is unconscionable of HGF to attempt to

	<p>deny me, my moral and legal rights.</p> <p>My legal advice is that I am not to sign, and that HGF do not have the right to make this outrageous demand of me.</p> <p>I quote your letter dated 18 December 2006, ‘<u>we are pleased to be able to confirm that your claim has now been accepted and that the decision has been made to pay you the maximum amount of \$40,000.00</u>’ (emphasis by Miss Sheehan)</p> <ul style="list-style-type: none"> • This is my entitlement. • HGF have made the decision to pay me. • HGF are obligated to pay. • Please do so within 7 days without placing any further conditions or demands on me.
6 February 2007	A representative from VMIA rang Miss Sheehan to discuss her letter and left a message when there was no answer.
Mid February 2007	Two representatives from VMIA met with Miss Sheehan at her home and agreed to arrange for a builder to inspect and provide a quotation. Master Menders have quoted \$113,339.60.
5 April 2007	<p>VMIA wrote to Miss Sheehan again confirming the agreement embodied in the Terms of Settlement entered into on 1 March 2006 which replaced earlier Terms of Settlement dated 3 December 2002 and amended on 27 October 2005 and 10 March 2005 by agreement between the parties. It is helpful to set out part of that letter:</p> <p style="padding-left: 40px;">As you are aware, the maximum amount which VMIA is required to pay you is \$40,000. This is the amount set by s7(4) of the <i>House Contracts Guarantee Act</i> 1987 and to which you have agreed under clause 16(c) of the 2006 terms of settlement.</p> <p style="padding-left: 40px;">...VMIA has assessed the amount it will cost to rectify those items listed in paragraph 16(a) of the terms. In order to make this assessment, VMIA engaged a builder, Master Menders, to provide a quotation to it. A copy of the quote is enclosed for your information. You will note that the amount quoted exceeds \$40,000.</p> <p style="padding-left: 40px;">Although the maximum liability of VMIA is \$40,000, VMIA has resolved to offer you an amount in excess of that, in order to finally conclude your claim and the VCAT proceeding. Accordingly, VMIA is pleased to offer you a payment of \$55,000 (fifty five thousand dollars) in satisfaction of its obligations under the</p>

	<p>2006 terms of settlement and the <i>House Contracts Guarantee Act 1987</i>.</p> <p>I enclose a Release and Authority form for you to complete and return to me, if you accept this offer. You will note that under paragraph 16(c) of the 2006 terms of settlement, you have agreed to complete all documents necessary to allow VMIA to provide the indemnity. VMIA requires this form be completed and returned to it. Payment of the sum of \$55,000 will be made by cheque sent to you on or before 28 days after receipt of the Release and Authority form signed by you.</p> <p>You should note that this offer is open only until 03 May 2007. It will not be made again. If you refuse to accept this offer, VMIA will close your claim. If you refer the matter back to the Tribunal, VMIA will submit that its maximum liability to you is \$40,000. VMIA will also apply for its costs of the proceeding from you.</p> <p>This offer is served in accordance with Part 4, Division 8 of the <i>Victorian Civil and Administrative Tribunal Act 1998</i> and/or alternatively in accordance with the principles set out in <i>Calderbank v Calderbank</i> [1976] Fam 92...</p>
23 April 2007	<p>Miss Sheehan wrote to VMIA setting out a chronology and seeking further time to consider her position. She reiterated her belief that in requiring her to sign the Release and Authority VMIA were denying her moral and legal rights.</p>
28 May 2007	<p>Miss Sheehan wrote to the CEO of VMIA advising that she had reported the matter to the Ombudsman and setting out the substance of her complaints against each of VMIA, the City of Stonnington, and the Building Commission. She concludes:</p> <p>Nothing less than \$300,000 is acceptable presently, but your delay of inaction may cause me to incur legal expense to satisfy my requirement. So, I believe HGF/VMIA, City of Stonnington and the Building Commission need to get together to sought (sic) out what proportion of this amount you are all going to contribute. I do not mind how the three parties proportion this sum, but it must be provided in full, immediately so that this matter can be concluded and my home rectified without any further delay or constraints.</p> <p>I am hand delivering this letter to your office today, so</p>

	<p>please have your written response to me within 14 days of the date of this letter, so we can all finally close this matter.</p>
8 June 2007	<p>Mr Steve Marshall, the CEO of VMIA replied with a lengthy, detailed response to each of the issues raised by Miss Sheehan in her letter and concluded:</p> <p>Notwithstanding that VMIA has no liability to you above \$40,000, in an open and genuine attempt to resolve the VCAT proceeding the VMIA again offers that it will pay you the sum of \$55,000 in full and final settlement of all claims made by you, and in settlement of VCAT proceeding D454/2002, within 28 days of receipt of the enclosed Release & Authority form signed by you. This is a reinstatement of our earlier offer to you. You should note that this offer is only open for 7 days from the date of this letter.</p> <p>Please note that if you do not accept this offer the VMIA will make an application to VCAT without entering into further correspondence, to obtain the Tribunal's consent to the VMIA depositing the sum of \$40,000 into the Domestic Builders Fund pending your agreement to receive that sum, to be held there until further order of the Tribunal, and that the application be otherwise struck out or dismissed.</p> <p>Whilst I sincerely regret that the resolution of your claim has been so protracted, I wish to take this opportunity to emphasise to you that every effort has been made to achieve resolution of your claim in accordance with the VMIA's statutory obligations. I trust that I have adequately addressed each of your concerns and that you will give careful consideration to accepting the open offer of settlement made herein.</p>
19 June 2007	<p>Mrs Sheehan responded in an 8 page letter reiterating her concerns that she had been badly treated and asking that the Release & Authority be amended, although the precise amendments sought are not clear from the letter. Throughout this letter she denies that she has rejected VMIA's offer.</p>
27 June 2007	<p>VMIA wrote to Miss Sheehan restating the offer of \$55,000, confirming if it is not accepted application will be made to VCAT that the sum of \$40,000 be deposited into the Domestic Builders Fund <i>'pending your agreement to receive that sum or the further order of the Tribunal'</i>.</p>
6 July 2007	<p>Miss Sheehan responds and again expresses her concerns about the way in which she has been treated</p>

	and her claim handled by HGF/VMIA. In this letter she effectively seeks the removal of clause 6 from the Release & Authority.
11 July 2007	<p>VMIA confirm they are prepared to delete clause 6 and forward a further Release & Authority with clause 6 deleted in its entirety and confirming that if she signs the Release & Authority VMIA will pay her the sum of \$55,000 but:</p> <p style="padding-left: 40px;">...I remain prepared for your legal adviser to consider this offer and to advise you accordingly. However, in the circumstances I am not prepared to delay the resolution of this dispute beyond 14 days from the date of this correspondence. Accordingly, in the event that I do not receive the executed release at the expiration of 14 days, the offer will lapse and will not be open for acceptance. At that time, application will be made to the Tribunal as contemplated in my letter of 27 June for payment of the sum of \$40,000 into the Domestic Builders Fund pending further order, and such other orders as are necessary to bring the VCAT application to a prompt conclusion.</p> <p style="padding-left: 40px;">I trust it will not be necessary to apply to the Tribunal and I urge you to seek advice in relation to this offer.</p>
23 July 2007	Miss Sheehan replied seeking an amendment to clause 3 of the Release & Authority (which referred to the offer contained in the letter dated 27 June 2007) and advising she would not be in a position to sign the Release & Authority until she had received advice from the Ombudsman.
12 September 2007	VMIA advised it did not consider any amendment to clause 3 was necessary, and that the offer had expired. VMIA also advised it would arrange for the matter to be relisted for hearing at VCAT.

Discussion

12 Although Wortley Constructions is not technically in liquidation it seems that VMIA have treated Wortley Constructions's advice that it has ceased operating, and its subsequent application for voluntary de-registration as the trigger for it to indemnify Miss Sheehan under the Terms of Settlement.

1) VMIA seeks that this proceeding be reinstated pursuant to s13(3) of the *HCG Act*. Section 13(3) provides:

(3) If—

- (a) the approved guarantor, before the appointed day, or VMIA on or after the appointed day has made an offer in respect of a claim by a person for loss or damage; and
- (b) within 6 months after the offer was made the offer has not been accepted or rejected—

VMIA may refer the matter to the Tribunal and the Tribunal must treat the matter as if the claimant had not been satisfied with the offer and had appealed to it under section 16.

- 13 As noted above, VMIA's application for orders/directions first came on for hearing before Deputy President Macnamara on 2 October 2007. Although he granted the adjournment for the reasons set out above, his observations at paragraph 11 and 12 are apposite:

Acceding then to the adjournment application I ask myself what will happen then. For the moment I am unable to perceive how Miss Sheehan will be able to make good a legal as distinct from a moral claim to any amount exceeding \$40,000. It may be that the matter will be referred by PILCH to some legal practitioner who has a more active imagination than I possess; but for the moment the diagnosis made by Mr Powell that this proceeding ultimately cannot go anywhere beyond \$40,000 appears to me with respect to be a correct diagnosis.

Mrs Sheehan refers to and relies upon procedures which have been adopted by VMIA under Section 13 of the *House Contracts Guarantee Act 1987*...Mrs Sheehan says that since there is no mention of the liability cap in those procedures implicitly I suppose, that liability cap is somehow disposed of. I have difficulty seeing how as it were by a side wind so fundamental a point as the liability cap under the guarantee can possibly have been changed. Again, maybe someone from PILCH will be able to argue differently but for the moment I cannot see how it can be.

- 14 This an unfortunate situation where Miss Sheehan has been battling the bureaucracy, and what she believes is an injustice, for many years rather than, it seems to me, allowing her house to be rectified. There have been three Terms of Settlement, all entered into when she was legally represented, yet her house is still not rectified. Many of the problems appear to stem from her initial concerns about the proposed method of rectification, and the scope of works recommended by Julian Davies, even though she agreed in the first two Terms of Settlement that he would be appointed as the independent inspector and certifier and that she would be bound by whatever decision he made.
- 15 For instance, Miss Sheehan complains that she has not had a bathroom since May 2003 (when she effectively stopped the rectification works) and that she has been showering at the local swimming pool. However, in his final submissions in reply Mr Powell advised, and Miss Sheehan confirmed, that she is living in the original house at the front of the property. Although

she says the shower is unsuitable for her needs it seems she has not made any enquiries about appropriate modifications so that she can shower at home.

- 16 Miss Sheehan seeks to rely on the HGF Claims Handling Procedures ('CHP') which were approved by the Director of Consumer Affairs in December 1991. However, she does not seem to appreciate or understand that these do not stand on their own and must be read in conjunction with the relevant statutory provisions as set out in the *HCG Act*. Of most significance is s7(4) which provides:

(4) The maximum liability of the approved guarantor under a guarantee is \$40,000 or any larger amount that is prescribed for the purposes of this subsection.

No higher amount has been prescribed and the guarantee is therefore capped at \$40,000.

- 17 It is apparent that Miss Sheehan does not fully understand how the HGF 'system' or the system of warranty insurance operated. On the second day of the hearing I attempted to explain to her that under both the guarantee and the warranty insurance schemes it was not unusual for there to be a shortfall between the actual cost of rectification works, and the limit of the indemnity under the guarantee or relevant policy of warranty insurance.
- 18 Upon receipt of a claim, and following an inspection by one of its inspectors, if the HGF determined there was a defect which was the responsibility of the builder, it would issue a direction to the builder to rectify. It did not, and was not required to, prescribe the method of rectification nor supervise the rectification work. In this case, the parties agreed, in the first and second Terms of Settlement, that Julian Davies would provide a scope of works, inspect and certify when the works were complete and that they would be bound by his certification. Subsequently, in October 2004, further Terms of Settlement were entered into and the parties agreed that Ray Martin would be appointed as the independent inspector and certifier. Unfortunately, on each occasion after Terms of Settlement were agreed and signed by all the parties, rather than allowing the independent inspector and certifier to perform their obligations, Miss Sheehan appears to have become distracted and placed obstacles in the path of the rectification works being carried out, completed and certified.
- 19 It appears there have been some delays in Wortley Constructions attending to of its obligations under the Terms of Settlement but I make no findings whether those delays were due to matters within its control. However, whether Miss Sheehan unreasonably denied Wortley Constructions access, or whether she hindered the carrying out of the rectification works because of her repeated demands, is irrelevant in determining VMIA's application.
- 20 They are also irrelevant considerations in determining Miss Sheehan's application for reinstatement against VMIA. What has happened in the past is of no more than historical interest. As I have mentioned before, this

application must be considered in the context of the statutory regime, which clearly provides that the maximum amount which can be paid to an owner under a guarantee provided by the HGF is \$40,000. Irrespective of what Miss Sheehan alleges are breaches of the CHP, she is unable, at law, to recover any additional amount from the VMIA.

- 21 Even if the HGF had failed to comply with its obligations under the CHP, and I cannot be satisfied it did, the outcome would be no different. If the HGF had offered conciliation prior to the matter coming before the tribunal there can be no certainty that it would have avoided the subsequent disputes between the parties. If the HGF had obtained two quotations in 2002 (notwithstanding that it was not obliged to do so under the CHP as Wortley Constructions was willing to carry out the works at the time), irrespective of the quoted cost of rectification, the maximum the HGF was liable to pay to Miss Sheehan was \$40,000. There is no statutory requirement or provision allowing the HGF to pay Miss Sheehan or any other owner the actual costs of rectification and recover the total amount paid from the builder.
- 22 Miss Sheehan also suggests that the HGF should have insisted Wortley Constructions obtain a building permit to carry out the works. There are contrary opinions expressed in the correspondence and documents exhibited to her affidavit as to whether a building permit was required. This issue has not been determined by the tribunal and was in effect overtaken by the October 2004 Terms of Settlement under which Wortley Constructions agreed to obtain a building permit, which it subsequently did (although Miss Sheehan contends that it did not accurately reflect the works to be done under the October 2004 Terms of Settlement). However, it may well be that an amended permit could have been obtained but for the further disputes and delays which arose.
- 23 Further, HGF **accepted** her initial claim and in accordance with the CHP directed Wortley Constructions to return to carry out rectification work. It was only after the further decision to reject her claim, because it considered Miss Sheehan had refused to allow Wortley Constructions reasonable access to carry out the works, that the matter came before the tribunal. Once it was before the tribunal, and until the issues were determined by the tribunal, the HGF was under no obligation to do anything further under the CHP.
- 24 Although Miss Sheehan has obtained advice in relation to matters such as whether a building permit was required for the works, such advice is not of itself definitive. It is not unusual for courts and tribunals to be called upon to interpret statutory provisions and the obligations imposed by them. Similarly, an opinion expressed by an expert for a party in any litigation, for instance in relation to a scope of rectification works, is not evidence that such works must be carried out. It is simply one expert's opinion and courts and tribunals must decide which opinion, if any, it accepts.

- 25 In my view, VMIA have been eminently reasonable in its approach to trying to finalise Miss Sheehan's claim. Although, technically, Wortley Constructions is not in liquidation, and the default provisions under the Terms of Settlement, whereby VMIA will pay Miss Sheehan an amount up to the maximum of \$40,000, have not been formally triggered, VMIA has nevertheless approached the situation as if Wortley Constructions was in liquidation. No doubt because Wortley Constructions has advised it has ceased trading and it has applied for voluntary de-registration. VMIA first made the offer to pay Miss Sheehan the sum of \$40,000 in December 2006 having assessed quantum in November 2006 (more than 12 months ago). As required by clause 7.4.25 of the CHP, and acknowledged and agreed to by Miss Sheehan in the three Terms of Settlement, the VMIA required her to sign an Authority & Release form before payment of the settlement sum. Despite her protestations about the form of the Release, which were never entirely clear until her letter of 6 July 2007, VMIA continued to allow her additional time in which to consider the offer. In April 2007, in an apparent attempt to make the offer more attractive, VMIA increased its offer to \$55,000 and on 11 July 2007 advised it would be withdrawn unless it was accepted within the next 14 days. Miss Sheehan did not accept the offer proffering a number of what can only be described as excuses culminating in advice that she had referred the matter to the Ombudsman and would not be in a position to respond until she had received his advice.
- 26 I will therefore make the orders sought but having regard to the history of this dispute consider I should allow 28 days before VMIA is entitled to cancel the cheque and make payment of the \$40,000 into the Domestic Builders Fund. I am satisfied that there is nothing else left to be determined in this proceeding as between Miss Sheehan and VMIA and consider the appropriate order is that the proceeding be otherwise dismissed. In making this order I have had regard to s75 of the *VCAT Act* which provides
- (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
 - (a) is frivolous, vexatious, misconceived or lacking in substance;
 - or
 - (b) is otherwise an abuse of process.
 - (2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
 - (3) The Tribunal's power to make an order under subsection (1) or (2) is exercisable by—
 - (a) the Tribunal as constituted for the proceeding; or
 - (b) a presidential member; or
 - (c) a member who is a legal practitioner.
 - (4) An order under subsection (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.

- (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law.

27 Miss Sheehan's amended application as far as it concerns VMIA is clearly misconceived and lacking in substance. Insofar as it is an application to appeal VMIA's decision of 15 November 2006, to assess her loss and damage at \$40,000, being the maximum amount payable under the guarantee, she is out of time. In circumstances where I have found that the limit of the guarantee is \$40,000 there would be no utility in granting an extension of time, even if I was minded to do so. The decision could not be changed by the tribunal.

28 Further, HGF was de-registered on 15 July 2007. Section 11B of the *House Contracts Guarantee Act 1987* makes it quite clear that VMIA administers the Housing Guarantee Claims Fund on behalf of the State of Victoria. Section 11B(5) provides:

No claim on a guarantee given by HGFL or the State under this Act can be made on the assets of VMIA and the assets of VMIA are not available for the payment of any amount of claim, costs or expenses under such a guarantee.

As I understand it, this is the last outstanding claim under a guarantee issued by the HGF and, following payment of the \$40,000 to Miss Sheehan, the Housing Guarantee Claims Fund will be closed and the balance of funds deposited into the Domestic Builders Fund (VMIA Annual Report 2007, page 74). Having considered the allegations in her 'amended application' concerning the HGF/VMIA there is nothing left to be determined and it is appropriate that her claim be dismissed.

29 It is, perhaps, unfortunate that Miss Sheehan did not accept her former solicitors' advice that the limit of the indemnity was \$40,000. Despite Deputy President Macnamara's clearly worded Reasons of 2 October 2007 Miss Sheehan has persisted with her application which was always destined for failure.

30 I will set down for hearing her application for reinstatement as against Wortley Constructions and her application to join Mr Wortley personally to the proceedings. However, I would urge her to obtain legal advice before the hearing as it seems it is only a matter of time before Wortley Constructions is formally deregistered following which she will need the leave of the Supreme Court to proceed against the company if her application for reinstatement is successful. If she wishes to proceed with her application to join Mr Wortley personally it will be necessary for her to more fully enunciate her claim against him, and the loss and damage she is claiming from him and how that is referable to her claim. It is not sufficient to make bald assertions – there must be a legal, not a moral basis for her claim. Even if she is successful in her application for joinder, it does not

follow that she will succeed as against Mr Wortley who I anticipate will be legally represented.

31 I will also reserve the costs of this application with liberty to apply.

DEPUTY PRESIDENT C. AIRD