VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO.D736/2008, D743/2008, D744/2008, D748/2008, D751/2008, D634/2010, D635/2010, D636/2010, D637/2010 AND D638/2010

CATCHWORDS

Domestic Building Contracts Act 1995 – s 8 Warranties – sections 5(1)(e), 6(f) and 30 – claim by a number of subsequent purchasers against builder of homes – joinder of geotechnical engineer as party – whether contract between builder and joined party- whether joined party owed duty of care to builder, original owner and subsequent owners where the claim is for pure economic loss – *Woolcock St Investments Pty Ltd v CDG Pty Ltd & Anor (2004) 216 CLR 515* applied and *Perre v Appand (1999) 198 CLR 180* applied – whether insurer under Domestic Building Insurance Policy entitled to recovery against builder subrogating to the rights of the owners under a number of insurance policies – cross applications by builder seeking declarations that payments of claims by insurer under a number of insurance policies to the owners wrong in fact and law – questions of fact and law agreed by the parties answered by the Tribunal.

APPLICANT	Leslie Joseph Spiteri & Wesfarmers General Insurance Ltd t/as Lumley Insurance & Ors
RESPONDENT	Stonehenge Homes & Associates Pty Ltd
JOINED PARTY	Civil Test Pty Ltd
WHERE HELD	Melbourne
BEFORE	Judge Lacava, Vice President
DATE OF HEARING	24, 25, 25 and 28 October 2011
DATE OF ORDER	2 December 2011
CITATION	Spiteri & Ors v Stonehenge Homes & Associates Pty Ltd (Domestic Building) [2011] VCAT 2267

ORDER

The tribunal answers the various questions of fact and law agreed by the parties in accordance with the reasons that follow.

Judge Lacava
Vice President

APPEARANCES:

For Applicant	Mr. Andrew Laird of counsel
For Respondents	Mr. Peter Lithgow of counsel
For Joined Party	Mr. Matthew Barrett of Counsel

REASONS

Background

1. It is conceded that each of the applications before the tribunal raise similar questions of fact and law for decision.

2. In order to shorten the hearing, the parties have agreed a statement of facts and documents. They have also agreed a list of factual and legal issues in dispute. A document was prepared by the parties dated 13 October 2011 and was filed in the tribunal. A copy of that document is attached to these reasons marked **"A"**. The agreed list of factual and legal issues in dispute raises seven (7) factual questions and eight (8) legal questions to be answered by the tribunal.

3. On 24 to 26 October, I heard evidence related to the questions of fact and law to be answered. I heard submissions from each of the parties on 28 October 2011. A transcript was made of the hearing and evidence given.

4. The parties agreed that for the purposes of the various applications, the questions of fact and law now to be answered by me would determine questions of liability between the parties. It was agreed between the parties that questions of quantum would be resolved, if necessary, by a separate hearing.

5. Also, for the purposes of the hearing, the parties have agreed upon the contents of a two volume tribunal book comprising 720 pages. In the course of the hearing other pages were added to the tribunal book.[1]

6. In accordance with the way the parties have agreed to proceed, this decision is confined to answering the questions of fact and law listed by the parties.

The Various Applications

7. There are 10 different applications in all before the tribunal. They may be divided in general terms into two distinct groups.

8. The first group of applications are what the parties have described as 'the primary proceedings'. This group comprises applications brought by the owners and insurers of dwellings known as units 2, 4, 6, 8 and 10 Lilardia Avenue, Maribyrnong ('the dwellings') against the builder of the dwellings, Stonehenge Homes & Associates Pty Ltd ('Homes') and Stonehenge Estates Pty Ltd ('Estates'), the developer and original owner

[1] The tribunal Book was admitted into evidence by consent as Exhibit A-3.

of the land upon which the dwellings have been constructed and, Lumley General Insurance Ltd ('the insurer') which company provided compulsory insurance cover for estates as builder of the dwellings.

9. The primary proceedings comprise applications D736/2008 (Leslie Joseph Spiteri, owner of unit 10 as applicant), D743/2008 (Leigh Graeme Sloan owner of unit 4 as applicant), D744/2008 (James Cantwell and Connie Cantwell as owners of unit 8 applicants), D748/2008 (Kerry John Larmer owner of unit 6 as applicant) and D751/2008 (Guillaume Leon Joseph Willems owner of unit 2 as applicant).

10. Estates, although originally joined as a respondent to the primary applications, is now deregistered.[2] The primary applicants no longer seek relief against Estates for that reason.

11. The cause of action alleged by each applicant in the primary proceedings is the same. As against the builder Homes, it is alleged that defects, which became evident in each of the dwellings in the first few years after occupancy, arose as a result of breach of warranties implied by law by reason of the *Building Act* 1993 and by s 8 of the *Domestic Building Contracts Act* 1995 ('the Act').[3]

12. As against the insurer, the applicants plead a failure to indemnify under the terms of insurance policies. Because the insurer has since paid out under the policies of insurance, that claim is no longer on foot.

13. Wesfarmers General Insurance Ltd (Wesfarmers), at some point, took over the insurer. It now assumes the place and rights of the original insurer.[4] Subrogating to the rights of the original applicants as owners, Wesfarmers has taken over the primary applications and seeks to recover from Homes as the builder, the money it has paid out under the policies. The insurer therefore presses the claims against Homes for alleged breach of statutory warranties.[5]

14. It is not controversial that Homes constructed the five dwellings for Estates pursuant to building contracts.[6] Further, it is common ground the building contracts were 'major domestic building contracts' within the definition in the Act.

---

2 Agreed Statement of Facts, Introductory Note C.

3 See the points of claim filed in the Spiteri application (D736/2008) dated 15 September 2009.

4 TB 1 to 13.

5 See TB 31 clause 3.6 of the insurance policy.

6 Further amended points of claim dated 24/11/10 para 3 and points of defence dated 17/12/10 para 3.

15. Each of the building contracts contained the statutory warranties ('statutory warranties') implied by s 8 of the Act.[7] It is also agreed that the individual applicants are the current owners of the dwellings.[8]

16. Pursuant to s 9 of the Act, the Owners were entitled to make claims on the statutory warranties as if they were parties to the original building contracts between Estates and Homes.

17. Prior to commencing the construction of the dwellings, a consulting engineer acting on behalf of either Estates or Homes or another company, Stonehenge Creative Services Pty Ltd ('Creative'), requested a Geotechnical Engineer, Civil Test Pty Ltd ('Civil Test') to provide a geotechnical report in relation to the site upon which the dwellings were later built by Estates.

18. Homes has joined Civil Test as a party to each of the primary applications.[9] By its notice joining Civil Test as a party, Homes denies liability to each applicant but in the event it is ultimately ordered to pay damages to any of them, it seeks indemnity from Civil Test. It does so on four bases. Firstly, it claims that there existed a contract between Homes and Civil Test and, in carrying out its work, Civil Test breached the terms of that contract. Secondly, it claims that Civil Test owed a duty of care to each of the applicants and to Homes which duty it breached and/or was negligent in carrying out its work. Thirdly, it alleges the claims made against it by the applicants as owners and the insurer are apportionable claims within Part IVAA of the *Wrongs Act* 1958. It seeks to have any liability for damages it may be ordered to pay apportioned between Homes and Civil Test. Finally, in the alternative, it seeks contribution from Civil Test to pay any damages it may be ordered to pay to the applicants pursuant to section 23B of the *Wrongs Act* 1958.

19. Civil Test denies the existence of any contract between itself and Homes. It pleads that it contracted with Creative. Creative is not joined as a party to any of the applications. Civil Test also denies it owed any duty of care to any of the applicants or Homes in the circumstances. Alternatively, it also seeks relief under Part IVAA of the *Wrongs Act* 1958.[10]

20. The final part of the primary applications is a further claim by the applicants and the insurer against Civil Test. In the event that Homes is successful against Civil Test as joined party to the primary applications

---

7 Further amended points of claim dated 24/11/10 para 4 and points of defence dated 17/12/10 para 4.

8 Statement of agreed facts para 9 and TB 576 to 580.

9 See the Points of Claim against Civil Test as the joined party filed in the Spiteri application dated 24 March 2010.

10 See the Points of Defence filed by Civil Test as the joined party filed in the Spiteri application dated 17 June 2010.

and, either Homes or Civil Test is correct that the claims made against each of them are apportionable claims within Part IVAA of the *Wrongs Act* 1958, then the applicants and the insurer seek orders against either or both of Homes and Civil Test equivalent to the proportion of liability found against each of them respectively.[11]

21. The second group of applications is referred to by the parties as 'the appeal applications'. Homes has filed a cross-application to each of the primary applications. Each cross-application seeks relief against the owner and the insurer in the nature of a declaration that the decision by the insurer to pay out each applicant as owner was wrong in fact and law.

22. Homes alleges that in building the dwellings it acted upon the recommendations and design criteria provided to it by Civil Test and, that the recommendations and design criteria is not 'domestic building work' within the meaning of the policies of insurance issued by the insurer or, within the Act. It further alleges it did not 'organise' any domestic building work to be performed by Civil Test within s 1 or cl 2.2 of the relevant policies. It further alleges there is no 'domestic building work' carried out by it as builder which is 'defective' within the meaning of s 1 of the relevant policies.[12] The appeal applications are respectively D634/2010 (Insurer and Willems), D635/2010 (Insurer and Sloan), D6636/2010 (Insurer and Larmer), D637/2010 (Insurer and Cantwells), D638/2010 (Insurer and Spiteri).

The Civil Test Reports

23. Civil Test is a company practising as Geotechnical engineers. Homes or Creative had retained Adams Consulting Pty Ltd as the design engineers for the dwellings.

24. It is agreed that Civil Test provided two documents.[13] It is common ground the dwellings are constructed on what were known as Lots 78 to 83.

25. The first document provided by Civil Test was addressed to 'Stonehenge Creative'.[14] It is a detailed report comprising (with attachments), some 26 pages.[15] The report was based on the results of 24 boreholes drilled at the site. Civil Test reported that its tests had shown the soil profile at the site where the dwellings are now constructed revealed controlled fill up to a

---

11 See Further Amended Points of Claim filed by the applicants and the insurer in the Spiteri application (D736/2008) dated 24 November 2010.

12 See points of claim filed by Homes as applicant against the insurer and Spiteri dated 13 May 2010.

13 Agreed document 4.

14 TB 590.

15 TB 590-619.

depth of 1.8M. It warned that no compaction testing had been carried out at Lots 78 to 83. It added:

> Some oversize material appears to be present in the FILL soils on Lots 78 thru to 83. A number of drilling attempts suffered refusal on shallow floater material in the FILL layer. It is reasoned that bored or screw in piles would have difficulty in these lots and bulk excavation would be a preferred option.[16]

26. In its first report Civil Test also identified that the site was a 'P' site containing highly reactive and uncontrolled fill to a significant depth as well as floaters.[17] The report then expressly warned about the problems that would result from 'abnormal moisture conditions'[18] at the site as defined in AS2870-1996 and attached a copy of CSIRO Information Sheet No 10-91.[19] The warning said:

> However, with abnormal moisture conditions, distress will occur and may result in non 'acceptable probabilities of serviceability and safety of the building during its design life', as defined in AS2870-1996, Clause 1.3.1. If these distresses are not acceptable to the builder, owner or other relevant parties then further fieldwork and revised footing recommendations must be carried out.[20]

27. For the above reasons, Civil Test's initial report recommended 'an engineered designed slab, founded on driven bored piers' and 'the slab should be designed as a suspended slab'.[21]

28. In considering the conditions likely to be encountered at the site, the evidence shows Homes knew that it was dealing with a problem site that contained highly reactive soils. Homes had prior knowledge that the dwellings that it constructed on the site would be extremely vulnerable to the effects of abnormal moisture conditions however caused.

29. Homes acted on the first Civil Test report and commenced work constructing the dwellings. Whilst excavating for plumbing works a 'substantial amount of rock which had not been anticipated'[22] was encountered at the site. Because the design of the building called for construction of 'bored piers' Mr Roads thought that the rock encountered

---

16 TB 591.
17 TB 591.
18 Which can include trees, watering, site drainage and plumbing leaks **(TB 654)**.
19 TB 697.
20 Statement of Steven Buffington Exhibit JP-3 paragraph 33.
21 TB 592.
22 Witness Statement of Adrian Roads Exhibit R-1 paragraph 21. Witness Statement of David Kelly Exhibit R-6 paragraph 6.

could be an obstacle in relation to boring of the piers.[23] With others, Mr Roads went back to the consulting engineers, Adams Consulting and sought an alternative design for the foundation of the dwellings. The 'preferred option' of bulk excavation of the site was dismissed by Mr Roads and others at Homes as too expensive and impractical.[24]

30. Civil Test was asked by the design engineers to reconsider its initial report. On 12 December 2001, it wrote to Adams Consulting by fax:[25]

> Further to our geotechnical report RM2903-01 for the abovementioned project and our recent telephone conversations, we now confirm that an alternative construction method would be to use a waffle slab as per details in AS2870-1996 but designed to span a loss of support under the slab (including the corners) of an area of 1.5 metres in diameter.

31. There is no evidence as to what was said in the telephone conversations referred to by Civil Test. The design engineers (Adams Consulting), then recommended and, designed, a waffle slab foundation for the construction of the dwellings at the site. The dwellings were then constructed in that way.[26]

32. In late 2006 early 2007, problems were encountered at the dwellings. Each dwelling evidenced cracking. It is an admitted fact each of the dwellings suffers from foundation movement and associated damage.[27]

33. Exhibit R-2 are photographs of the dwellings taken shortly after construction finished and at the time when the properties were being marketed. The dwelling in the foreground of the first photo shows shrubs that have been planted, apparently as part of the soft landscaping, by Homes around the perimeter of the front fence. It is not disputed that Homes was responsible for installing the hard and soft landscaping in each dwelling.

Factual issues requiring determination

A. Who engaged Civil Test?

34. This question arises because Civil Test has been joined as a party to the proceeding by Homes, the builder. In its points of claim against Civil

---

23 Witness Statement of Adrian Roads Exhibit R-1 paragraph 22. Witness Statement of Mark Davis Exhibit R-3. Witness Statement of Bruce Adams Exhibit R-8 paragraph 8.

24 Transcript page 127.

25 Witness Statement of Bruce Adams Exhibit R-8 paragraph 8.

26 Witness Statement of Adrian Roads Exhibit R-1 paragraph 28. Witness Statement of David Kelly Exhibit R-6 paragraph 9-13. Witness Statement of Bruce Adams Exhibit R-8 paragraph 11.

27 Admitted fact 10.

Test, Homes specifically pleads it had a contractual relationship with Civil Test and that Civil Test breached that contract.[28]

35. Civil Test denies it had a contractual relationship with Homes. It pleads an admission that it had a contract with Stonehenge Creative Services Pty Ltd, which is not a party to the proceeding in the tribunal. Civil Test admits it provided the first geotechnical report and the letter of 12 December 2001. But it says the reports were provided to Adams Consulting for consideration by Creative and not Homes.

36. Mark Davis, who is a Director of Homes and Creative, and was a Director of the now deregistered Estates gave clear evidence that Civil Test was engaged by Creative.[29] He made clear that a number of companies were set up as part of a group to perform different functions within the group.

37. The documentation tendered assists in a decision as to which company Civil Test contracted with. The documentation supports the evidence of Mr Davis. The starting point in the documentation is the request for a quotation for a Geotechnical Report to Civil Test from Adams Consulting dated 25 October 2001, marked for the attention of Steven Buffington and sent by fax.[30] That document does not identify for whom Adams Consulting acts.

38. Civil Test gave a quotation in writing on 26 October 2001. It too does not identify any contracting party. But it does say 'The abovementioned work could be carried out within 5 clear working days of us receiving written acceptance of this quotation by the person or persons responsible for the payment of the account'.[31]

39. The quotation from Civil Test was forwarded on to one Hans Barwaldski who faxed Adams accepting the Civil Test quote on 3 November 2001. His acceptance said, 'Attached our acceptance of the quotation by Civil Test Pty Ltd. Please proceed.' The acceptance was on Letterhead of 'Stonehenge Creative' identified as 'Stonehenge Creative Services Pty Ltd'. The letterhead identified that company as 'A member of the Stonehenge Group'. Barwaldski signed the faxed acceptance as 'Project Architect – Major Projects – Stonehenge Creative Pty Ltd'.[32]

40. In my view, the documentary evidence is both clear and strong, Civil Test Pty Ltd was engaged by Stonehenge Creative Services Pty Ltd. That evidence was confirmed by Mark Davis. I reject the submissions

---

28 Homes Points of Claim against Civil test paragraphs 2-5 and Further and Better particulars filed by Homes.

29 Transcript 144 to 145.

30 TB 580-581.

31 TB 587.

32 TB 588A.

advanced by Homes that Civil Test contracted with Homes because that company was part of the 'Stonehenge Group'.

B. What were the terms of engagement of Civil Test?

41. The request for quotation from Adams Consulting Engineers to Civil Test asked for the provision of a 'Geotechnical Report'. It also asked for 'a site investigation and soil report'.[33] The quotation had various boxes marked on the second page which, I infer, described areas the report provided was to cover. They included, 'location and depth of filling, if present' and 'ground water level and soil moisture conditions' and 'anticipated behaviour of soils during construction in winter months'.[34]

42. The first Civil Test report described the 'Commission' to Civil Test in the following terms 'Investigation for site classification (Australian Standard 2870-1996 Residential Slabs and Footings), recommend a founding depth and or foundation treatment where appropriate'.[35] In my judgment, there can be no doubt Civil Test itself was of the view it had been retained to make recommendations. Paragraphs 7 and 8 of its initial report dealt with its 'Recommended Foundation For Slab and or Strip Footings' and 'Conditions of the Recommendation'.

43. In my view, Civil Test was engaged by Creative to provide a geotechnical report on the relevant site that included reporting on the location and depth of filling, if present at the site, the ground water level and soil moisture conditions at the site and how the type of soils found at the site could be anticipated to behave during construction in winter months.

44. In addition, Civil Test was engaged by Creative to recommend a founding depth and or method of foundation treatment appropriate for the site having regard to all of the information available to it about the site.

C. Did Homes Construct the footings in accordance with the engineer's design?

45. For the purpose of answering this question I have assumed the engineer referred to is Adams Consulting Engineers and not Civil Test.

46. The waffle slab footings for each of the dwellings were designed by Adams Consulting Engineers. The plans they produced appear in the Tribunal Book.[36] The plans provided for a waffle pod slab type footing for each dwelling. The plans drawn for the dwellings at Lots 6 and 8 differed from the plans drawn for Lots 2,4,10 and 12. Lots 6 and 8 had

33 TB 580.
34 TB 581.
35 TB 590.
36 TB 622-647.

provision for a separate pad or strip footing to support the front portico. Those separate pad or strip footings do not form part of the waffle pod slab footing for Lots 6 and 8.

47. Civil Test did not recommend a separate strip or pad footing to support any portico.

48. The evidence of the witnesses, Mr Roads[37] and Mr Kelly[38] and the Turnbull Report[39] is to the effect that the footings were constructed in accordance with the engineer's design.

49. There is no definitive evidence the footings were not constructed in accordance with the engineer's design.

50. I conclude the footings were constructed in accordance with the design of Adams Consulting.

D. Did the engineer's design comply with AS 2870-1996?

51. Again, for the purpose of answering this question, I have assumed the engineer referred to is Adams Consulting Engineers and not Civil Test. Civil Test performed no design work.

52. The parties did not direct submissions to this question. Adams Consulting is not a party to the proceeding and there is no pleaded allegation that the waffle slab designed by Adams Consulting failed in any way to comply with AS 2870-1996.

53. There was no evidence specifically directed to this question. There is evidence that the separate pad or strip footings to support the porticos of the dwellings at Lots 6 and 8 respectively are not properly tied into the waffle slabs causing differentiation in movement between the slabs and the pad or strip footings. But there is no particular aspect of AS 2870-1996 that such a design is alleged not to have complied with. Mr Brown was critical of the design of separate pad or strip footings to support the porticos which he said were 'poorly tied into the waffle pod slab' but he did not go on to identify how this design does not comply with AS 2870-1996.[40]

54. Therefore, on the state of the evidence, I am unable to answer this question.

---

37 Ex R1 and Transcript pages 38-66.
38 Ex R5 and Transcript pages 102-109.
39 TB 701- 710 – Report of TD&C Pty Ltd – December 2009 and Exhibit R4 and Transcript pages 79-97.
40 Brown Report page 9 TB 94-5.

E. What is the cause of the movement of the foundations and footings?

55. Occupancy permits were issued for each dwelling in 2003.[41] The owners purchased the dwellings at various times in 2004.[42]

56. It is not in dispute between the parties that both the hard and soft landscaping was in place in each of the dwellings at the time each of the owners purchased the dwellings. It is also not disputed that at least one of the dwellings, possibly more, was used as a display home prior to sale.

57. Each of the dwellings suffers from foundation movement and associated damage.[43]

58. On 7 March 2008, the owners made claims under insurance policies in respect of the defects.[44] It follows that the foundation movement and associated damage occurred sometime between the time of the granting of the occupancy permits and 7 March 2008. On average, a period of four to four and a half years.

59. Each of the dwellings was constructed between about 2001 and 2003.[45] It is conceded that each dwelling was constructed on a waffle pod or slab. It is also conceded that the dwellings at Lots 6 and 8 were slightly different to the others in that the porticos for each of those dwellings were supported by a strip footing or pad separated from the waffle slab and not tied to it.

60. Prior to commencing construction Homes, through its consulting engineers, Adams Consulting, requested Civil Test to provide a geotechnical report on the site where the dwellings were to be constructed. Civil Test did this and provided a report on 26 November 2006.[46]

61. The first Civil Test report provided Adams Consulting and Homes with considerable information about the geological profile of the site upon which the dwellings were constructed. Specifically, the first Civil Test report advised that the soil profile at the site consisted of a red-brown sandy silty 'Clay Controlled Fill' overlying a grey mottled dark grey and minor brown silty 'Clay Fill'. Below the fill, the report advised the natural soil profile comprised of a pale grey silty Clay. The report also advised the depth of clay was up to 1.8M. Importantly, the report advised, 'no compaction testing was carried out on Lots 78 to 83 or in the lower

41 Agreed fact No. 8.
42 Agreed fact No. 9.
43 Agreed fact No. 10.
44 Agreed fact No. 11.
45 Agreed fact No. 2.
46 Agreed Document No. 4. TB 590-619.

FILL material in Lots 56 to 61'.[47] The dwellings are constructed on what were Lots 78 to 83.

62. The Civil Test report added that some oversize material appeared to be present in the FILL soils of Lots 78 to 83. The report warned that 'bulk excavation would be a preferred option'.[48]

63. The Civil Test report classified the site where the dwellings were to be constructed as a 'CLASS P'.[49]

64. The first Civil Test report recommended the foundation or footings for the dwellings to be constructed at the site consist of 'Edge Beams and Driven or Bored Piers'.[50] Relevantly, the report said: 'an engineered designed slab, founded on driven bored piers' and 'the slab should be designed as a suspended slab'.[51]

65. The first Civil Test report was qualified. Relevantly, it warned of abnormal moisture conditions. It said:

> However, with abnormal moisture conditions, distresses will occur and may result in non 'acceptable probabilities of serviceability and safety of the building during its design life', as defined in AS2870-1996, Clause 1.3.1. If these distresses are not acceptable to the builder, owner or other relevant parties then further fieldwork and revised footing recommendations must be carried out.[52]

-and-

> To ensure acceptable performance of the footing systems recommended in this report, care should be taken to ensure that the fundamental building, landscaping and long term maintenance procedures are adhered to as set out in the CSIRO Information Sheet No 10-91, 'Guide to Home Owners on Foundation Maintenance and Footing Performance' attached.[53]

66. Homes acted on the first Civil Test report and commenced work constructing the dwellings. Whilst excavating for plumbing works a 'substantial amount of rock which had not been anticipated'[54] was encountered at the site. Because the design of the building called for

---

47 TB 591.
48 TB 591.
49 TB 591.
50 TB 592.
51 TB 592.
52 TB 592.
53 TB 594.
54 Witness Statement of Adrian Roads Exhibit R-1 paragraph 21. Witness Statement of David Kelly Exhibit R-6 paragraph 6.

construction of 'bored piers' Mr Roads thought that the rock encountered could be an obstacle in relation to boring of the piers.[55]

67. Civil Test was asked by the design engineers to reconsider its initial report. On 12 December 2001 it wrote to Adams Consulting by fax:[56]

> Further to our geotechnical report RM2903-01 for the abovementioned project and our recent telephone conversations, we now confirm that an alternative construction method would be to use a waffle slab as per details in AS2870-1996 but designed to span a loss of support under the slab (including the corners) of an area of 1.5 metres in diameter.

68. The design engineers (Adams Consulting) then recommended, and designed, a waffle slab for the construction of the dwellings at the site. The dwellings were then constructed in that way.[57] As noted above there was a variation in the treatment of the footings or slab for the porticos of the dwellings at Lots 6 and 8.

69. Exhibit R-2 are photographs of the dwellings taken shortly after construction finished and at the time when the properties were being marketed. The dwelling in the foreground of the first photo shows shrubs that have been planted apparently as part of the soft landscaping by Homes around the perimeter of the front fence. It is conceded the other dwellings had similar vegetation planted as part of the soft landscaping carried out.

70. Other photographs taken of the dwellings in March 2009 show the extent of the growth of vegetation near the dwellings at that time. Significantly, trees have been planted in the street, but they are not large and, according to the evidence, are about 6 metres (about the height of each tree) away from the front of each house. Many smaller shrubs take up the small front garden area of each dwelling.[58]

71. Various experts have looked at the dwellings and attempted to opine what are the cause or causes of the agreed foundation movement and associated damages. There is not a lot of difference in the opinions.[59]

72. All agree that, having regard to the soil profile at the site, the use of the waffle slab or pod as a foundation system for the dwellings was entirely

---

55 Witness Statement of Adrian Roads Exhibit R-1 paragraph 22. Witness Statement of Mark Davis Exhibit R-3. Witness Statement of Bruce Adams Exhibit R-8 paragraph 8.

56 Witness Statement of Bruce Adams Exhibit R-8 paragraph 8.

57 Witness Statement of Adrian Roads Exhibit R-1 paragraph 28. Witness Statement of David Kelly Exhibit R-6 paragraph 9-13. Witness Statement of Bruce Adams Exhibit R-8 paragraph 11.

58 Exhibit A-2 Photographs 1 to 18.

59 See for example Brown at TB 104 to 106; Turnbull at TB 707 to 708; Holt TB 185 to 188; Censeo TB 236 to 238.

inappropriate.[60] In respect of dwellings 6 and 8, it is agreed the separate strip footing or slab exacerbated the problems that were subsequently being encountered at the site.

73. Mr Russell Brown is a well known Chartered Civil Engineer and expert in the field. He prepared a report, dated 20 August 2009, a copy of which went into evidence, together with a supplementary report which, inter alia, contains coloured photographs.[61] Mr Brown was called to give evidence and was cross-examined.

74. At pages 19 to 21 of his report he summarised his findings.[62] In short, his main findings can be summarised as follows. He thought the most likely cause of failure of the foundations was the drying out action caused by the trees, shrubs and ground cover at the front of each property. Added to this he said was the affect of non-consolidated soil, now self-consolidating and not providing support to the waffle slabs. Mr Brown found evidence of plumbing failure (which he described as a strong possibility) at the rear of the dwellings in various forms which was contributing to the creation of abnormal moisture conditions. The plumbing defects he thought were responsible for initiating localised heave and movement at the rear of the dwellings.

75. Mr Brown depicted in graphic form what was happening at each unit with a drawing that shows the front of the dwellings dropping whilst the rear of the premises lifts up.[63] The dropping is caused by the soil drying out and reducing in volume at the front of each dwelling. That drying out is caused by vegetation. In contrast, at the rear of each dwelling, the soil with added moisture from plumbing defects, increased in volume causing lift or heave in the dwelling.

76. In addition, Mr Brown opined that, save for one small exception in the case of dwelling 2, Homes did not install any site drainage.

77. Mr Brown was cross-examined by counsel for Homes. It was put to him that it was possible the movement in the slabs had caused the defects in the plumbing rather than the plumbing being responsible for the movement in the slabs. Mr Brown thought this was not possible because his investigation with cameras had indicated a failure in the sewerage system in an area beneath the slab where there was no evidence of lifting.[64]

---

60 Brown TB 105. Turnbull TB 708.
61 TB 86-173 and Exhibit A-2.
62 TB 104 to 106.
63 TB 142.
64 Transcript page 83.

78. Mr Brown was also taken to the summary of opinion of Mr Turnbull. He was asked whether he agreed with his opinions. In summary, he did agree, but prioritised the causes slightly differently. This is the exchange between the witness and counsel:

> "The units are suffering distress due to settlement of the waffle slab's footings" I mean - - -?---Yep.
> - - - you agree with that?---Yes.
> "The settlement is primarily due to the slab footings being constructed on foundation soils including unconsolidated fill"?---True.
> Do you accept that?---Yes.
> "The settlement may also be due to drying, shrinkage of the soil due to both the drought and the vegetation at the front of the units and I agree with RI Brown, there's probably some interactions between the effect of the fill and the vegetation"?---Yep.
> Now you agree with that, but do you - I think your word was, "Lean a little more one way than the other"?---I'd have three as No.2 and two as No.3.
> "For the slab construction by Stonehenge isn't in accordance with the design by Adams Consulting?---I believe it was from my observations.
> Yes, "The slab design by Adams Consulting was in accordance with the report of Civil Test, the second one, possibly with the exception of the Portacoat footings at Lots 80 and 81"?---Not possibly, certainly not in compliance.
> All right, but as a general proposition the slab design was consistent and there's a problem in relation to two Portacoats which seem to be not on the slab. You agree with that?---Yes.
> The waffle slab design recommendations by Civil Test were unfounded and appear to me to have been made without due consideration of the possible extent of settlement due to consolidation of the unconsolidated fill layer?---Yes.
> We all accept there's an unconsolidated fill layer. "The soft spot design criteria offered does not appear to conform with the guidelines of the original paper on which the approach is based and I do not believe it's (indistinct) for this site"?---Correct.
> You agree with that?---Yeah.
> One final matter. Do you think there's an issue in relation to soil being graded away?---It's useless to grade it away if you've got shrubs planted hard against the building. It doesn't have a great deal of effect.
> Yes, it would be fair to say that these sites though don't have large gardens by any stretch of the imagination?---Um, Unit 1 tends to have one on the south side.
> Yes, well the two at either end have a garden both - - -?
> ---Yes.

- - - at the front and along the side?---Yes.
All the others simply have a - what would be a relatively small front area?---M'mm.
Would you like to give an estimate? Five metres from the footpath?---Yeah I think they're four and a half or five metres set backs from memory.
Yes, it's not very far is it?---No.
They're relatively narrow?---Yes,. But they've all got shrubs in - when I was there they had shrubs and trees.
Yes they've all got a garden as such?---Yes.
But none of them have an English Elm that's 80 feet high or whatever?---Well not yet.
Well not ever I don't think when you look at the garden?---No.
Indeed they have what you'd call sort of shrubs and plants and garden beds rather than trees?---Yes, they do.
And they all have a small courtyard?---Yes.
About midway down. Is that right?---Yeah.
None of them have substantial plantings in them?---One did I understand and cut them back from memory but that's only memory. I didn't sight it.
Did you see any of the courtyards?---All of them.
All right and how would you describe the courtyards?---Varying from treeless.
Yes?---To a couple of them having two to three metre high trees and shrubs.
Two to three what, so what - - -?---Yeah higher than they - - -
Shrubs?---Shrubs, oh, Maples, Japanese Maples, that sort of thing.
All right so they're all in a very confined area?---Yep.
Most of them paved?---Yes. T93-95

79. In deciding the question of the cause of the movement of the foundation and footings, although there is not a great deal of difference in the opinions or the evidence of the experts, I prefer the evidence of Mr Brown and act on it. In his evidence, Mr Brown was strong in his opinion that most of the damage to the units stems from the increased moisture levels towards the rear of the premises caused by plumbing defects. As part of his investigation, he retained a plumber and inserted cameras down pipes and carried out other testing before arriving at his opinion that part of the problem was plumbing defects.

80. I find, on the evidence, there are a number of causes of the foundation movement. Firstly, the drying out action caused by the trees, shrubs and ground cover to the soils at the front of each dwelling. Secondly, the effect of drying out to non-consolidated soil at the front of each dwelling meant the soils beneath did not provide adequate support to the slabs. Thirdly, plumbing failures in the sewerage and storm water systems at the

rear of the dwellings in various forms lead to the creation of abnormal moisture conditions at the rear of each dwelling initiating localised heave and movement at the rear of the dwellings. As a result of these factors at work the foundation slab on each dwelling moved in the way depicted by Mr Brown in his drawing at Tribunal Book 142.

81. I add, I accept the submissions of counsel for the applicants, Mr Laird, that Homes built these dwellings in full knowledge of the difficulties with the site. The first Civil Test Report correctly classified the site as a 'P' site and warned of the presence of uncompacted fill. Homes had the benefit of confirming what it had already been told when it encountered rock whilst excavating for plumbing works. It was told in the first Civil Test report that removal of the fill was the preferred option. It chose a cheaper alternative.

82. Further, Homes had been warned of the dangers at the site of abnormal soil conditions. Notwithstanding that warning, Homes constructed the dwellings with small gardens and furnished them with plants and shrubs. In so doing, it was no doubt mindful subsequent owners would likely water the plants and, that the plants would grow. Further, it failed to take any steps to drain the site of the dwellings and it did not take care to make absolutely sure the plumbing fittings installed beneath the slabs towards the rear did not leak.

83. Although not specifically asked to do so, I find the foundation movement at the dwellings was caused by the way the dwellings and the garden surrounds were constructed by Homes, having regard to the particular circumstances of the soil profile at the site of each dwelling.

F. When the applicants' causes of action accrued and whether they are statute barred?

84. During the hearing, I was advised by counsel that I was no longer required to answer this question.

G. What is the approximate scope and quantum of the rectification works that are reasonably required to rectify the defects?

85. During the hearing, I was advised by counsel that I am not required to answer this question at this stage of the hearing. If the question remains unresolved I will be required to answer this question as a separate issue.

Legal issues requiring determination

I. Did Civil Test owe a duty of care to the Owners and/or Homes and/or Estates, and if so what was the scope of that duty?

86. I deal first with the question of whether or not a duty of care was owed to Homes.

87. The applicants' claims in the primary applications are regarded at law as claims for pure economic loss.[65]

88. In such a case it is appropriate for a court or tribunal to proceed on the basis of a bias against finding a duty of care. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27, at paragraph 705, Gillard J stated:

> As a general proposition, the application of the Atkinian formula to personal injury and property damage cases is more likely to produce a duty of care than in a case where the claim is purely economic loss. If one is to talk in terms of a bias, one may say that in personal injury and property damage cases, there is a bias towards finding a duty of care, whereas in purely economic loss cases, the bias is to the contrary.

89. At paragraph 705 Justice Gillard added:

> In the area of purely economic loss, the courts have proceeded with caution - Perre's case at para93 per McHugh J.

90. Mr Barrett, who appeared on behalf of Civil Test, submitted that, as a general rule, there is no duty to take care to avoid reasonably foreseeable pure economic loss. He relied on *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at paragraphs [4], [33], [71], [101] and *Woolcock* (supra) at paragraphs [21], [22], [76].

91. Mr Barrett conceded the general rule stated above may be displaced when the 'salient features' of the relationship between the parties take the relationship out of the 'ordinary' and make it 'special'.

92. Mr Barrett submitted that where there is not an established category in which a duty of care to avoid economic loss to others has been recognised, such as in the present applications, then what is likely to be decisive and, always relevant, is whether in all the circumstances of the case, the plaintiff is vulnerable.[66]

---

65 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd & Anor* (2004) 216 CLR 515 at 529; *Bryan v Moloney* (1995) 182 CLR 609 at 617.

66 *Perre v Apand* at [10]-[11], [104], [108]; *Woolcock* at [23]-[24], [31]-[33], [80].

93. In *Perre v Apand Pty Ltd* (1999) 198 CLR 180, at 225, McHugh J said, inter alia:

> … In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.

94. Mr Barrett referred to *Moorabool Shire Council v Taitapanui* [2006] VSCA 30. In that case all members of the Court accepted the explanation of the concept of vulnerability stated by the High Court in *Woolcock* (supra) 530-531 where the court said, inter alia:

> Since *Caltex Oil*, and most notably in *Perre v Apand Pty Ltd*, the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. 'Vulnerability', in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, 'vulnerability' is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant. So, in *Perre*, the plaintiffs could do nothing to protect themselves from the economic consequences to them of the defendant's negligence in sowing a crop which caused the quarantining of the plaintiffs' land. In *Hill v Van Erp*, the intended beneficiary depended entirely upon the solicitor performing the client's retainer properly and the beneficiary could do nothing to ensure that this was done. But in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, the financier could itself have made inquiries about the financial position of the company to which it was to lend money, rather than depend upon the auditor's certification of the accounts of the company.

95. Calling in aid these principles, Mr Barrett submitted that it is not enough for Homes to contend it was exposed to risk. It must be established that by reason of ignorance or social, political or economic constraints, it was unable to protect itself in all of the circumstances existing here.

96. Looking at the evidence in these applications, Mr Barrett submitted Homes was not relevantly vulnerable to risk because of a number of factors. Firstly, he submitted, the terms of the contract pursuant to which Civil Test was engaged did not require Civil Test to make any recommendation for or in relation to the type of footings to be used. I

reject that submission. However, I accept Homes did not rely on Civil Test in any event. It engaged Adams Consulting as the design engineer responsible for selecting and designing the footings, albeit based upon geotechnical information provided by Civil Test. In my view, ultimate responsibility here for the design of the footings rested with Adams Consulting. Homes relied upon Adams Consulting as is evident from the meetings which took place preparatory to the design of the waffle slab.

97. Secondly, Mr Barrett submitted Homes could have inserted into the terms of any contract with Civil Test a provision that set out the nature of the obligations Civil Test had to recommend footings. It did not do so but chose to engage another person, Adams Consulting, to select and design appropriate footings.

98. Thirdly, Mr Barrett submitted that the risks associated with the geotechnical reports prepared by Civil Test were explained in detail in the body of the first report. To the extent that Homes relied upon information provided by Civil Test, that information was heavily qualified and subject to alteration in various circumstances. I agree with that submission. The submissions of Homes concentrate on the second Civil Test report which cannot be read in isolation. It must be read in the context of what preceded it in the first report.

99. Finally, Mr Barrett submitted that to the extent there were risks associated with abnormal moisture conditions, Civil Test informed Stonehenge of those risks in the first report and by inclusion of the CSIRO Information Sheet 10-91.

100. I accept that in the circumstances here, Homes was not vulnerable. It was an experienced building company that had available to it resources to check any advice or recommendation provided to it by Civil Test. It put in place an experienced civil design engineer to seek opinions from geotechnical experts and advise it about those opinions. Ultimately, Homes employed Adams Consulting to recommend and design the foundations for the dwellings. Homes relied on Adams. It thus cannot be said to have been vulnerable in the relevant legal sense.

101. Mr Barrett submitted further, that any reliance by Homes on any recommendation in the Civil Test reports was unreasonable reliance given that Homes appears, on the evidence, to have acted in a way that completely ignored the express qualifications of the first Civil Test report. As I have found, Homes ignored all of the warnings concerning abnormal moisture conditions by planting vegetation too close to the front of each dwelling and by failing to properly drain each dwelling and it installed plumbing beneath the foundations of each dwelling that was defective and leaked.

102. In all of the circumstances shown by the evidence in these applications, I find Civil Test did not owe a duty of care to Homes. Importantly, Homes retained an experienced civil design engineer, Adams Consulting, to design the foundations for the dwellings. Whilst Adams had available to it a soil report and recommendations from Civil Test, Homes was protected by the advice of Adams which it relied on.

103. I deal next with the question of whether or not Civil Test owed a duty of care to the owners and the previous owner, Estates.

104. I agree with the submission of Mr Barrett that the same principles set out above apply to the (contingent) claim by the applicants against Civil Test for what is regarded at law as claims for pure economic loss. Civil Test did not owe a duty of care to the applicants as subsequent owners from Estates unless Civil Test owed a duty to the first owner, Estates.[67] Civil Test did not owe a duty of care to Estates because it had the ability to, and did, protect itself by retaining Adams Consulting to recommend and design the foundation system for the dwellings.

105. I conclude Civil Test did not owe a duty of care in all of the circumstances established by the evidence here to the owner applicants, Homes or Estates.

II. Did Civil Test breach any duty of care and/or agreement and if so did such breach cause any loss and damage and if so what and to whom?

106. I have concluded, as a finding of fact, that there was no contract between Civil Test and Homes. In making that finding, I concluded Civil Test contracted with Creative which is not a party to any application here.

107. Further, I have determined as a question of law, that Civil Test owed no duty of care to the owner applicants, Homes or Estates.

108. Accordingly, there is no need for me to answer this question.

III. Did Homes owe a duty of care to the owners, and if so, what was the scope of that duty?

109. The applicants and the insurer reminded me in submissions the Owners' claims against Homes are claims for breach of the statutory warranties.[68] They are not claims for breach of a common law duty of care.

110. Notwithstanding that the applicants and the insurer submit that as a domestic builder, Homes would probably also owe the Owners a separate

---

67 *Woolcock (supra)* per Gleeson CJ, Gummow, Hayne and Heydon JJ at paragraphs [14], [15], [17].

68 Further Amended Points of Claim dated 24 November 2010 at paras 6 and 7.

duty of care of the kind that was recognised by the High Court in *Bryan v Maloney* (1995) 182 CLR 609.

111. Surprisingly, Mr Lithgow, who appeared as counsel for Homes, did not address submissions to this question. I assume he does not dispute that which was advanced by Mr Laird who appeared as counsel for the applicants.

112. *Bryan v Maloney* is a case not unlike these applications. There, the High Court decided that a builder of a house owed a subsequent purchaser a duty to take reasonable care in the construction of the house and was liable to her in damages for an amount equal to the decrease in its value resulting from the inadequacy of the footings and its consequences. In obiter, at page 625 the Court said, inter alia:

> It is in the context of the above-mentioned relationships of proximity that one must determine whether the relationship which exists between a professional builder of a house, such as Mr Bryan, and a subsequent owner, such as Mrs Maloney, possesses the requisite degree of proximity to give rise to a duty to take reasonable care on the part of the builder to avoid the kind of economic loss sustained by Mrs Maloney in the present case. It is likely that the only connection between such a builder and such a subsequent owner will be the house itself. Nonetheless, the relationship between them is marked by proximity in a number of important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly *the* most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kind sustained by Mrs Maloney, to the owner of the house at the time when the inadequacy of the footings first becomes manifest. When such economic loss is eventually sustained and there is no intervening negligence or other causative event, the causal proximity between the loss and the builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership.

113. In my judgment, the principles applied in *Bryan v Maloney* do apply in this case such that Homes did owe a duty of care to the owners to take reasonable care to construct the houses with adequate footings having regard to the known soil profile at the site and which would not fail during the reasonably expected lifetime of the house causing economic loss to the owners.

IV. Did Homes breach any such duty of care and, if so, did such breach cause any loss and damage and, if so, what and to whom?

114. Earlier, I found on the evidence, there were a number of causes of the foundation movement. Firstly, the drying out action caused by the trees, shrubs and ground cover to the soils at the front of each dwelling. Secondly, the effect of drying out to non-consolidated soil at the front of each dwelling meant the soils beneath did not provide adequate support to the slabs. Thirdly, plumbing failures in the sewerage and stormwater systems at the rear of the dwellings in various forms lead to the creation of abnormal moisture conditions at the rear of each dwelling initiating localised heave and movement at the rear of the dwellings. As a result of these factors at work, the foundation slab on each dwelling moved in the way depicted by Mr Brown in his drawing at Tribunal Book 142.

115. I also accepted the submissions of counsel for the applicants, Mr Laird, that Homes built these dwellings in full knowledge of the difficulties with the site. The first Civil Test report correctly classified the site as a 'P' site and warned of the presence of uncompacted fill. Homes had the benefit of confirming what it had already been told when it encountered rock whilst excavating for plumbing works. It was told in the first Civil Test report that removal of the fill was the preferred option. It chose a cheaper alternative.

116. Further, Homes had been warned of the dangers at the site of abnormal soil conditions. Notwithstanding that warning, Homes constructed the dwellings with small gardens and furnished them with plants and shrubs. In so doing, it was no doubt mindful subsequent owners would likely water the plants and, that the plants would grow. Further, it failed to take any steps to drain the site of the dwellings and it did not take care to make absolutely sure the plumbing fittings installed beneath the slabs towards the rear did not leak.

117. Mr Laird submitted that Homes did breach its duty of care owed to the owners because it ignored all of the warnings about the soil profile for the site of the dwellings it had received in the first Civil Test report and constructed each of the dwellings with unsuitable footings, landscaping and drainage and with defective plumbing.

118. I agree with Mr Laird's submissions on this point.

119. The breach of duty by Homes caused loss and damage to the Owners, being the cost of remedying the defects to the dwellings yet to be determined.

120. I note that Mr Lithgow did not make any submissions on this question.

V. Were the Owners entitled to indemnity under the policies in relation to the defects in light of ss 5(1)(e), 6(f) and 30 of the Act and the decision of Hargrave J in *Barton v. Stiff* [2006] VSC 307?

121. This question arises in this way. The insurer has paid out the individual dwelling owners under the terms of a Domestic Building Insurance Policy.[69] Under the terms of the insurance policy, a 'claim' means 'written notice of any failure of the Builder to comply with the terms of the *Domestic Building Contracts Act* or any defect'.[70] For the purposes of the insurance policy, 'defective' in relation to Domestic Building Work means either a breach of a warranty referred to in s 2.1(a) of the policy or a failure by the builder to maintain a standard or quality of building work performed by the builder.[71]

122. Section 2 of the insurance policy provides for circumstances in which the insurer will indemnify the insured in respect of Domestic Building work which is defective. It includes cover where a builder has breached the warranties provided for in s 8 of the Act.

123. The insurance policy also defines what is meant by the expression 'Domestic Building Work'. Relevantly, the expression specifically excludes:
    (a) design work carried out by an architect or building practitioner registered under the Act as an engineer or draftsperson;
    (b) any work involved in obtaining foundations data in relation to a building site.[72]

124. Section 5 of the Act provides for 'Building work to which this Act applies'. Relevantly, s 5(1)(e) provides for the Act to apply to 'any work associated with the construction or erection of a building'. The definition of 'Domestic Building Work' in the insurance policy largely replicates s 5 of the Act.

125. Section 6 of the Act sets out 'Building Work' to which the Act does not apply. Relevantly, it does not apply to:
    (a) design work carried out by an architect or a building practitioner registered under the *Building Act* 1993 as an engineer or a draftsperson;
    (b) any work involved in obtaining foundations data in relation to a building site.

69 TB 24.
70 TB 26 definition of 'claim'.
71 TB 26 definition of 'defective' in relation to Domestic Building Work.
72 TB 27 exclusions from Domestic Building Work.

126. As can be seen, exclusions 6(e) and 6(f) from the definition of 'Domestic Building Work' in the insurance policy mirror ss 6(e) and 6(f) of the Act.

127. Section 30(2) of the Act requires a builder 'before entering into the contract' to obtain foundations data in relation to the building site.

128. In its points of claim in each of the appeal applications, Homes pleads that the decision by the insurer to indemnify the individual dwelling owners under the terms of each policy was wrong 'in fact and law'.[73] The particulars are then set out as to how this is so. In summary, Homes pleads that the building work which it carried out was based upon the recommendations and design criteria provided by Civil Test and neither of those things is 'domestic building work' within the policy or the Act.

129. The decision of the Supreme Court in *Barton v Stiff* [2006] VSC 307[74] is authority for the proposition that the statutory warranties are warranties that the builder will provide materials and completed dwellings that will be proof against the conditions likely to be encountered at the site.

130. In *Barton v Stiff* at [39] Hargrave J considered the extent of the warranty of fitness for purpose in a domestic building contract. He said:

> In this case, there is no cataclysmic event. However, the reasoning in *Independent Broadcasting* is, in my view, applicable. If this is not the case, it would be tantamount to finding that the contract provided for the builders to be insurers of the house. The parties could not have intended this. I hold that the warranties of fitness for purpose in this case required the builders to provide materials, and a completed house, which would be proof against any groundwater conditions likely to be encountered at the land. As the presence of salty groundwater at the land was 'highly unusual', the failure of the bricks for this reason does not constitute a breach of those warranties.

131. Under the statutory warranties and the test in *Barton v Stiff*, Homes was required to provide materials and completed dwellings that would be proof against these factors, because they were all likely to be encountered at the site and therefore were entirely foreseeable.

132. In my judgment, the arguments advanced by Homes seeking relief in the appeal applications are without merit. Neither exclusion (e) to the definition of 'Domestic Building Work' in the insurance policy or s 6 (e) of the Act have no application here. Civil Test was neither an architect or a building practitioner relevantly registered as a draftsperson.

133. Exclusion 6(f) to the definition of 'Domestic Building Work' in the insurance policy and s 6(f) of the Act also have no application in my view.

---

[73] Points of Claim in the Appeal Applications paragraph 9.

[74] At paras 6, 38 and 39.

The exclusion relates to any work involved in 'obtaining foundations data'. 'Obtaining' is an adverb meaning 'to come into possession of, to acquire or get'.[75] The exclusion protects the insurer from indemnifying in relation to work involved in acquiring or getting the foundations data. The exclusion does not protect where the builder clearly ignores what is contained in the data it obtains. Although Homes may have constructed the dwellings on a waffle slab that was recommended, the soil conditions beneath that slab did not change. The warning not to subject the soil at the site to abnormal moisture conditions was either ignored by Homes or at the very least not had proper regard to.

134. Here, the evidence which I have accepted, is that the foundations of the various dwellings here failed because Homes ignored what it was told in the first Civil Test report. There is no question here that report was wrong in any way. Homes failed to build each dwelling in a way that was proof against the conditions likely to be encountered at the site. It planted vegetation in the front yards of the dwellings. It failed to properly drain the site and it constructed the dwellings with faulty plumbing. Each of these facts meant it was directly responsible for introducing abnormal moisture conditions at the site. The result was that the foundations which it laid failed. I reject the submissions of Homes that it constructed these dwellings in a proper and workmanlike manner and with reasonable care and skill. It clearly did not.

135. The owners were entitled to indemnity under the policies of insurance in relation to the defects.

VI. Are the claims that Wesfarmers and the owners bring against Homes apportionable claims within the meaning of the *Wrongs Act* 1958?

136. Mr Laird submitted that the claims made against Homes in the primary proceedings are brought under the statutory warranties in the case of the Owners and in contract in the case of Wesfarmers. He correctly, in my view, submits that claims brought under the statutory warranties contained in the Act and the claim in contract are not apportionable claims within the meaning of the *Wrongs Act* 1958.[76]

137. With respect, that submission must be correct. Part IVAA of the *Wrongs Act* 1958 requires a court or tribunal when apportioning a claim, to assess from the facts, the degree of responsibility or liability between concurrent wrongdoers. That can be done in the context of a negligence claim but not in a claim in contract or where the claim is based in breach of warranty.

---

75 Oxford Dictionary.

76 *Serong v Dependable Developments Pty Ltd (Domestic Building)* [2009] VCAT 760 at paras 66 and 349*; Lawley v Terrace Designs Pty Ltd (Domestic Building)* [2006] VCAT 1363 at para 318.

138. In my judgment, the claims that Wesfarmers and the owners bring against Homes are not apportionable claims within the meaning of the *Wrongs Act* 1958.

139. I note that Homes made no submissions contrary to those advanced by the applicants on this question.

VII. Were the owners entitled to indemnity under the policies?

140. For the reasons I have expressed above, the answer to this question is yes.

VIII. Is Wesfarmers entitled to seek re-imbursement from Homes under the policies?

141. Clause 3.6 of the policies gives the insurer a right of recovery against the builder.[77] Because of this, and for the reasons I expressed above, the answer to this question is also yes.

Judge Lacava
Vice President

[77] TB 31