

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT reference No. D620/2008

**CATCHWORDS**

Domestic building – compulsory insurance – decision to accept claim – no appeal by builder- builder failing to rectify defects – further decision by insurer assessing quantum of claim no appeal by builder – insurer pays claim and takes assignment of rights of insured – recovery by insurer as assignee of amount of insured’s claim from builder – interest -costs

**APPLICANT** Vero Insurance Limited (ACN 005 297 807)  
**RESPONDENT:** Grant Wharington  
**WHERE HELD** Melbourne  
**BEFORE** Senior Member R. Walker  
**HEARING TYPE** Hearing  
**DATE OF HEARING** 27 July 2009  
**DATE OF ORDER** 3 August 2009  
Vero Insurance Ltd v Wharington (Domestic Building)  
[2009] VCAT 1533

**ORDER**

- 1 Order the Respondent to pay to the Applicant \$237,042.80 plus interest thereon from the date of issue of these proceedings until judgment, calculated at \$23,489.92, making together the sum of \$260,532.72.
- 2 Further order the Respondent to pay the Applicant’s costs of this proceeding including any reserved costs, such costs if not agreed to be assessed by the Registrar in accordance with Scale “D” of the County Court Scale.

**Rohan Walker**  
**Senior Member**

**APPEARANCES:**

For Applicant Mr S. Waldron of Counsel  
For Respondent In person

## REASONS FOR DECISION

### Background

1. The Applicant is and was at all material times carrying on business as a provider of warranty insurance pursuant to policies of insurance issued pursuant to the *Building Act 1993* and the Ministerial Orders made under that Act from time to time. The Respondent is and was at all material times carrying on business as a builder.
2. In this proceeding the Applicant seeks to recover from the Respondent eight sums of money paid by it in settlement of claims made by persons insured by policies that it issued at the Respondent's request for domestic building work carried out by the Respondent in the construction of a number of dwellings at Patterson Lakes. In each case it seeks recovery as the assignee of the insured's rights against the Respondent.
3. All of the claims related to allegedly defective building work carried out by the Respondent in breach of the implied warranties set out in s.8 of the *Domestic Building Contracts Act 1995*.

### Hearing

4. The matter came before me for hearing on 30 July 2009. Mr Waldron of Counsel appeared for the Applicant and the Respondent appeared on his own behalf.
5. By an earlier order of the Tribunal, evidence was directed to be on affidavit. Affidavits were sworn and filed on behalf of the Applicant but there was no material filed and served by the Respondent. The Points of Defence filed on his behalf made no allegations of fact. Except as to admissions, it consisted of refusals to admit or bare denials of the matters alleged. Its effect was to put the Applicant to its proof.
6. The principal affidavit, sworn 9 February 2009, was that of Stuart Smith, a legal officer employed by the Applicant. There was also a short supplementary affidavit of Mr Smith as to some formal matters and an affidavit sworn by Josylin Saunders on 23 March 2009 deposing as to the ownership of the various properties, which was not admitted in the Respondent's Points of Defence.
7. After hearing from Mr Waldron and Mr Wharrington I reserved my decision to allow time to read the voluminous affidavit material. Having done so I find the Applicant's claim is proven.
8. I shall order the Respondent to pay to the Applicant the amount claimed, namely, \$237,042.80 plus interest thereon from the date of issue of these proceedings until judgment, calculated at \$23,489.92, making together the sum of \$260,532.72.

9. There will be a further order that the Respondent pay the Applicant's costs of this proceeding including any reserved costs, such costs if not agreed to be assessed by the Registrar in accordance with Scale "D" of the County Court Scale. The reasons for this decision follow.

### **Evidence**

10. Mr Waldron opened and relied upon all affidavits. He also called three of the experts whose reports were exhibited to Mr Smith's principal affidavit in order to prove that they were qualified to give expert opinion evidence although none of the decisions as to defective workmanship were appealed.
11. Mr Wharrington did not seek to lead any evidence and although he suggested that perhaps there might have been some double counting in the claims he was unable to point to anything to indicate that such was the case. There was nothing that I saw in the material to indicate that.
12. Mr Smith's affidavit deposes that, in each case, a decision had been made by the Applicant determining that the Respondent's workmanship was defective and the respects in which it was defective were detailed in the decision. The decision in each case was notified to the Respondent. The Respondent did not appeal any of the Applicant's decisions and in each case the time for appeal has long passed.
13. Further, although directed in each case by the Applicant to rectify the defects, in each case he failed to do so. The Applicant then paid for the work to be rectified by other builders. Decisions were then made assessing the amounts of the claims. Again, there was no appeal by the Respondent and the claims were paid by the Applicant.
14. Following payment, the rights of the insured in each case were assigned in writing to the Applicant. The Assignments are exhibited to Mr Smith's principal affidavit.
15. The amount claimed is the total of all amounts paid, including the excess borne by the various insured owners, which will be returned to them subject to recovery from the Respondent and the terms of the policy.
16. The amounts paid under the policies have been helpfully summarised by Mr Waldron and were as follows:

<u>Insured</u>	<u>Date of indemnity</u>	<u>Date of assignment</u>	<u>Amount paid</u>
Skermer	4 August 2003	4 June 2008	\$14,506.67
Plaiche	22 April 2003	7 June 2008	\$14,506.67
Batt	28 March 2003	2 June 2008	\$21,994.28
Bozzo	22 April 2003	8 July 2008	\$40,381.55
Judge	20 August 2001	4 June 2008	\$90,918.18
James	22 April 2003	21 July 2008	\$15,240.00

Lowe	26 August 2004	9 June 2008	\$25,500.00
Bevan	16 December 2003	1 July 2008	<u>\$14,095.45</u>
Total claimed			<u>\$237,042.80</u>

In regard to the amounts calculated, in some instances I arrived at a slightly higher figure from the material than that claimed but I am satisfied that at least the amount claimed is due in each case.

### **The basis of liability**

17. I am satisfied that, in each case, the Respondent's workmanship was defective in the respects identified in the Applicant's decision relative to that case from which the Respondent never appealed. As a consequence, the Respondent is liable to each of the insured owners in damages for the breach of the implied warranties set out in the s.8 of the Act. The quantum of those damages in each case is the rectification cost incurred with respect to the claim. The rights of the insured owners having been assigned to it by the deeds of assignment in evidence, the Applicant is entitled to recover the amount sought from the Respondent.

### **Interest and costs**

18. There is also a claim for interest. Damages in the nature of interest can be allowed pursuant to s. 53 of the *Domestic Building Contracts Act 1995*. Since both the Applicant and, in regard to the excess, the insured has in each case been out of pocket due to having paid out or borne these rectification costs this is an appropriate case in which to award interest from the date of issue.
19. I was also asked to award costs and to fix them. Because of the conduct of the Respondent throughout in resisting the claim and then demonstrating by his failure to produce any contrary case or seriously dispute the Applicant's case this is an appropriate case in which to award costs but I will direct that they be assessed by the registrar who is better able to assess them than I am.

**Rohan Walker**  
**Senior Member**