

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D211/2008

**CATCHWORDS**

Appeal against decision of VMIA – whether defects subject of decision in earlier proceeding

<b>APPLICANT</b>	Robert Ware
<b>FIRST RESPONDENT</b>	Victorian Managed Insurance Authority
<b>SECOND RESPONDENT</b>	Fasham Johnson Pty Ltd
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	14 May 2008
<b>DATE OF ORDER</b>	27 May 2008
<b>CITATION</b>	Ware v Victorian Managed Insurance Authority (Domestic Building) [2008] VCAT 919

**ORDER**

- 1 The decision of the first respondent dated 4 March 2008 is affirmed.
- 2 Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs before Deputy President Aird for one hour.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicant	Mr Ware, in person
For First Respondent	Mr B. Powell of Counsel

For Second Respondent

Mr C. Moyle, solicitor

## REASONS

1 The applicant owner, Mr Ware, seeks a review of a decision of the first respondent (VMIA) to reject his claim under the relevant policy of warranty insurance, in relation to leaking windows. The two items relating to windows are described in his Notice of Complaint and Statutory Declaration dated 17 July 2007 (the date they were first noticed is noted before the description):

2. Oct/06 Leaks in Western side windows during heaving rain and wind.
8. July 06 Window 14 water damaged.

He does not seek a review of VMIA's decision to reject six other items claimed.

- 2 The builder is a second respondent to the application as required by the Domestic Building List Practice Note – PNDB1 (2007), and s60 of the *Victorian Civil and Administrative Tribunal Act 1998*, as a person whose interests are affected by the outcome of the proceeding.
- 3 VMIA rejected the claim on the grounds that the issues in relation to the leaking windows (and the other items which are not the subject of this application) had been determined by the tribunal, in an earlier proceeding, on 19 July 2004. The builder, which was the applicant in that proceeding, was awarded damages in the sum of \$83,138.18 following a finding of repudiation and wrongful termination of the building contract by the owners. The owners were awarded the sum of \$24,815.00 on their counterclaim, for rectification works found by the tribunal to be reasonable and necessary. Following the finding of repudiation and wrongful termination there was no award for completion works.
- 4 Mr Ware appeared on his own behalf and called Mr Elliott, a builder, as a witness. Mr Powell of counsel appeared on behalf of VMIA and Mr Moyle, solicitor, appeared on behalf of the builder. A bundle of relevant documents was prepared and tendered by Mr Powell, through Mr Ware. Neither VMIA nor the builder called any witnesses.

### Background

- 5 Mr Ware presented a carefully prepared written submission which he spoke to. It is clear that he believes he has been badly let down by the builder and it is helpful to understand some of the background. Mr Ware and his former partner, Ms Saunders, entered into a building contract with the builder for the construction of a new home in August 1999. Construction commenced in February 2000. During the construction period, Mr Ware engaged Mr Elliott, a local builder to provide him with technical advice. In July 2001 Mr Julian Davies was appointed as an independent expert to determine what rectification works were required. Mr Ware says that Mr

Davies made 228 Determinations of which 225 required rectification works to be carried out.

- 6 In April 2002 the contract was terminated. In June 2002 the owners entered into a building contract with Mr Elliott to carry out certain completion and rectification works to enable them to obtain an Occupancy Permit (in late 2002) and move into their new home (in September 2002).

**The windows**

- 7 Neither VMIA nor the builder called any evidence so the only evidence I have before me is the sworn evidence of Mr Ware, and of his witness, Mr Elliott. Mr Elliott was the rectifying/completing builder. I accept that he is not an independent expert, and have considered his evidence in the context of his role as the rectifying/completing builder.

- 8 Mr Ware gave sworn evidence that the leaks, now complained of, did not appear until 2006. He drew a diagram on the whiteboard to assist in explaining the defects in the windows which he believes were dealt with in the earlier proceeding (‘the earlier defects’), and, what he says are the ‘new’ defects. He said the earlier defects were caused by the gapping at the brick timber interface, and lack of flashing. Both he and Mr Elliott confirmed that the wind moulds were removed, the windows flashed and new wider wind moulds installed and painted, and that no works were carried out to what Mr Ware described as the interface between the glass and timber window frames.

- 9 The counterclaim was based on a report from Buildcheck which included a Schedule of Incomplete and Defective Works. Allowances for various items of defective work were by reference to the item numbers in the Schedule. Item 5.1 provides:

Item/Defect	Current Situation	Buildcheck Comments
Windows not as per manufacturers specification	Work incomplete, however no evidence of side flashings and gaps evidence between brickwork and wind moulds – in particular W6. (various windows identified)	Remove wind moulds, bed in sealant during re-installation. Sill flashings turned up on inside to be re-fixed and straightened where bent (eg W8). <u>Remove sill bead and re-seal with bedding bead sealant</u> (emphasis added)

- 10 This item was included in the owners’ counterclaim in the earlier proceeding and although initially denied by the builder, it was conceded as a defect and an amount of \$1,290.00 allowed by the tribunal. Mr Ware agrees that the rectification works included completion of item 5.1 ‘*remove wind moulds between frame and brickwork*’ but submits the works required by 5.1 were not concerned with the interface between the frame and the glass. VMIA relies on the last sentence under the heading ‘Buildcheck Comments’, which I have underlined, as confirming that it was

recommended by Buildcheck that the interface between the frames and the glass be resealed.

- 11 There are numerous references to leaking windows in the Buildcheck report and in the Schedule. Of particular relevance is item 13.2 which provides:

Item/Defect	Current Situation	Buildcheck Comments
Windows leak at mullion/sill junction	Not rectified	Ensure all glazing beads are correctly sealed to glass and that mullion/sill junction is adequately sealed.

- 12 The works carried out by Mr Elliott under his contract are as set out in the last three pages of the contract documents headed “RECTIFICATION WORKS & C of O COSTING (‘the costing schedule’). This costing schedule refers to those items which are included in the works by reference to the Buildcheck item numbers but does not include all the Buildcheck items. Mr Elliott said that, although item 13.2 is not included in the costing schedule, the seals were checked and being intact no work was carried out other than to W11. However, there were some other works which Mr Elliott said he had carried out which Mr Ware subsequently disagreed had been done. On balance I consider Mr Elliott’s evidence to be unreliable in relation to the extent of the works.
- 13 Further, Mr Elliott confirmed that the windows leaked in 2002 noting that the windows were in a ‘*disgraceful state with leaks everywhere*’, but said he was unable to swear whether or not there were any glazing leaks at the time. He said he carried out the rectification works, in 2002, by a method of elimination, and that he was unable to say whether the current leaks were evident at that time. In his letter dated March 28, 2008 addressed to the tribunal, a copy of which accompanied the application, he states:

On 27/6/02 I entered into a contract with Mr Ware for rectification work...and to bring the dwelling to a stage where a Certificate of Occupancy could be issued. At that time, remedial work was undertaken to the extent specified in the BuildCheck report. This included substantial work on the timber window frames/brickwork interface; removing wind moulds and fitting wider ones (sealing behind these during installation), and sealing gaps under sills for fire protection.

This work appears to have resolved a certain amount of moisture and draught problems. However, during an inspection of the property on 17/03/08, there was clear evidence of a continuing problem with moisture penetration on all west facing windows, especially W14.

It appears that under certain condition, moisture is still able to penetrate behind the glass, i.e. the silicone seal between the glass and the timber frame appears to have failed. I understand that these frames remained unglazed and open to the elements for a period of approximately 8 months, whilst Builder and Owner were in dispute.

During this time, and even afterwards, the natural timber was never painted or sealed prior to glazing. The glazing was simply fitted into the weathered timber windows. (The window manufacturer and the glaziers are two separate companies). It appears that this has contributed to the failure of the glazing seal over time. It is quite likely that the joints in the timber frames also deteriorated during this dispute period. The joins between transoms and mullions may well allow moisture to penetrate behind the glass.

- 14 Mr Ware repeatedly said during the hearing that he could understand that a consideration of the Buildcheck Schedule and the tribunal's decision in the earlier proceeding, that it might appear as though these items had been included. Having regard to the decision of the tribunal in the earlier proceeding, and to Mr Elliott's evidence as to the state of the windows in 2002, and the contents of his letter of 28 March 2008 about these being continuing problems, I am not persuaded, on balance, that these have not merged in the earlier judgement as determined by VMIA. In the earlier proceeding, an award of damages was only made in respect of those items which the builder conceded were defects or which the tribunal found to be defects. As noted above item 5.1 was conceded by the builder. However, no allowance was made in respect of item 13.2. At paragraph 13 Senior Member Cremean stated:

I do not allow any other items appearing in the Buildcheck Report. Mostly, they are of a completion or finishing off nature. And, of course, after its contract was terminated, the Applicant was unable to return to do any completion or finishing off works. As well, some of the items in the Buildcheck Report, which otherwise I might have allowed, I have disallowed as covered by the Applicant's conceded items (especially 5.1)...

- 15 It is unfortunate in all the circumstances that Mr Ware did not arrange for all of the recommended items in the Buildcheck report to be attended to. Item 5.1 required '*Remove sill bead and re-seal with bedding bead sealant*' and Item 13.2 identified '*windows leaking at the sill/mullion junction*' yet the recommended works were not carried out.
- 16 I will therefore affirm the decision of VMIA. I will reserve the question of costs but draw the parties' attention to the provisions of s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998* and also note that the estimated cost of rectification is less than \$10,000.00.

**DEPUTY PRESIDENT C. AIRD**