

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D684/2006

### CATCHWORDS

Domestic building, warranty policy, question of whether owner-builder has disappeared

<b>APPLICANT</b>	Tony Crosby
<b>RESPONDENT</b>	Australian Unity General Insurance Ltd (ACN 004 125 268)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	13 December 2006
<b>DATE OF ORDER</b>	13 December 2006
<b>CITATION</b>	Crosby v Australian Unity General Insurance (Domestic Building) [2006] VCAT 2540

The hearing proceeded as a Directions Hearing.

### ORDERS

- 1 Pursuant to s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 and of the Tribunal's own motion, Juli Markovski ("the Joined Party") is joined to the proceedings as a person whose interests are affected by the proceeding. It is directed that the Joined Party be served at Unit 1, 32 Glika Avenue, Donvale Victoria 3111 and the Principal Registrar is directed to serve a copy of these orders and of the application in this proceeding at that address as a matter of urgency.
- 2 The Joined Party is ordered to file at the Tribunal and serve upon both other parties notification of his address for service by 19 January 2007.
- 3 **The proceeding is adjourned for further hearing by Senior Member Lothian on 1 February 2007 at 10.00 a.m. at 55 King Street, Melbourne.**
- 4 The parties have leave to provide evidence as to whether the defect complained of by the Applicant is a structural defect and, should the

Joined Party fail to comply with order 2, the Joined Party's address, at the next hearing.

5 Costs are reserved.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicant Mr T. Crosby in person

For the Respondent Mr S. Waldron of Counsel

## REASONS

- 1 This proceeding is a claim by the Applicant-Owner against the Respondent-Warranty Insurer on a policy issued by it. The policy was issued with respect to work undertaken by an owner-builder and became effective upon the sale of the subject property, at Unit 2, 8 Marshall Avenue, to the Applicant. The Respondent submits that the policy is a “last resort” policy which responds if the owner-builder is dead, disappeared or insolvent. It is the contention of the Applicant that the owner-builder has disappeared.
- 2 At the commencement of the hearing I raised the possibility that the owner-builder, Mr Juli Markovski (“the Joined Party”), should be joined to the proceeding and served at the address discovered by investigation agent Ms Niomi Burton who reported that he lives at this address. How she discovered that he lived at the address is not revealed in her reports, although it is accepted that the Joined Party does own the property.
- 3 Ms Burton’s evidence that the Joined Party lives at Unit 1, 32 Glika Avenue Donvale is based on hearsay evidence from a neighbour and from the real estate agent who is, apparently, attempting to sell the property. Ms Burton admitted under cross examination by the Applicant that she obtained the evidence by lying to the real estate agent and she also admitted that she has not seen the Joined Party herself. Although the Tribunal is not bound by the rules of evidence, hearsay evidence from unnamed people can not be expected to bear much weight, and the evidence of a person who admits to lying to someone else must also be of limited probative value.
- 4 I accept the evidence of the Applicant that he has sent the Joined Party a registered letter to the address provided by Ms Burton and the letter has been returned marked uncollected. I accept his evidence that the Respondent recommended that he send the Joined Party a registered letter. I also accept his evidence that he has twice visited the premises and been told by a female that the Joined Party does not live there and that she does not know where he is. I deduce that the Applicant has made reasonable attempts to confirm the residence of the Joined Party.
- 5 The proceeding is one of vital interest to the Joined Party because, if an order is made that the Respondent must pay the Applicant, it is likely that the Respondent will be entitled to recover that sum, and possibly an amount for costs, from the Joined Party.
- 6 The submission of the Respondent is noted that if the building defect complained of is not a structural defect, it is unlikely that the warranty policy will respond to it. The question of whether the defect is a structural defect has not been determined.
- 7 Pursuant to s53 of the *Domestic Building Contracts Act 1995*, the Tribunal “may make any order it considers fair to resolve a domestic building dispute”.

- 8 In these circumstances, it is fair that the Joined Party be joined to these proceedings and that an order be made that he be served at an address which is the location of a property he owns and which, in accordance with the evidence of Ms Burton, is possibly his home address. There is no positive finding that the address is his home address.

**SENIOR MEMBER M. LOTHIAN**