VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D206/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building insurance – whether insolvency of builder to occur during period of insurance; construction of insurance policy; *contra proferentum*, election

APPLICANTS	Colin Richard Bachmann, Doris Margarete Bachmann
RESPONDENT	Calliden Insurance Limited (formerly Australian Unity General Insurance Limited) ACN 004 125 268
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	7 December 2010
DATE OF ORDER	10 January 2011.
CITATION	Bachmann v Calliden Insurance Limited (Domestic Building) [2011] VCAT 11

ORDER

1 The decision of the respondent dated 24 February 2010 is annulled.

2 I find and declare that the respondent is liable to the applicants in respect of the applicants' claim dated 3 September 2007 made under a policy of insurance dated 10 October 1993 and numbered AUVIC 2835.

3 The costs of and associated with the hearing on 7 December 2010 are reserved.

4 The proceeding is referred to an administrative mention on 14 February 2011 by which time if no party advises the Tribunal in writing that they require any residual matters to be determined by the Tribunal, the proceeding will be struck out with a right to apply for reinstatement.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants:	Mr M Thompson SC with Mr J Robinson of counsel.
For the Respondent	Mr C Caleo SC.

REASONS

1. This proceeding concerns an application made by Mr and Mrs Bachmann (**'the Owners'**) against Calliden Insurance Limited (**'the Insurer'**) seeking a review of a decision made by the Insurer on 24 February 2010 or alternatively, an order otherwise resolving the dispute between the Owners and the Insurer, pursuant to s59A of the *Domestic Building Contracts Act* 1995.

Background

2. The Owners are the registered proprietors of a property located in Pakenham (**'the Property'**). They purchased the Property pursuant to a contract of sale dated 1 July 2004 and took possession of the Property on 12 August 2004.

3. The Property comprises a residential dwelling (**'the Dwelling'**), which was constructed by Mr Ernes Imer as owner-builder and vendor to the contract of sale (**'the Builder'**).

4. Pursuant to s135 of the *Building Act* 1993, the Builder purchased warranty insurance from Australian Unity General Insurance Ltd, now being the Insurer, effective from the date of the contract of sale and for a period of 6 years from 3 April 2003, being the date when the occupancy permit in respect of the Dwelling was issued (**'the Insurance Policy'**).

5. The Insurance Policy provided indemnity to the Owners in respect of loss or damage suffered by them arising from a breach of any of the warranties implied into the contract of sale by s137C of the *Building Act* 1993.

6. Clause 1 of the Insurance Policy expressed that indemnity as follows:

> The Insurer will indemnify the Insured in respect of loss or damage arising as a result of a Prescribed Cause occurring during the Period of Insurance in circumstances where the Owner Builder dies, becomes Insolvent or Disappears.

7. On 10 November 2004, the Owners first lodged a claim under the Insurance Policy with the Insurer.

8. By letter dated 6 December 2004, the Insurer denied liability in respect of the Owner's claim on the basis that the Builder had not died, disappeared or become insolvent.

9. The Owners then prosecuted their claim directly against the Builder in the Tribunal. This culminated in the Tribunal making an order on 19 June 2007 against the Builder in favour of the Owners for $4,261.42.

10. Mrs Bachmann gave evidence that throughout the period 2004-2007 she only ever saw the Builder on two occasions. She said that he did not appear at the day of the Tribunal hearing on 19 June 2007 (although he

was represented by his father) and that she had, at that time, understood that he had moved overseas with no plan to return to Australia.

11. On 3 September 2007, the Owners lodged another claim with the Insurer. On this occasion, the Owners contended that the Builder had now disappeared.

12. By letter dated 8 October 2007, the Insurer indicated that it had substantially accepted the Owner's claim. That letter stated, in part:

> We have inspected the property considered the information and respond to your claim as detailed below.
>
> The decision is based upon information held by us. We reserve the right to review this information should further information or documents come into our possession.
>
> The following items are accepted.
>
> …..
>
> As the owner builder cannot be located, we will be arranging for Ray Martin of Build Assess to revisit the site with two registered builders and ask that they provide quotations as per the attached schedule of works.

13. However, prior to the Insurer making any determination as to the quantum of the Owner's claim, it advised the Owners by letter dated 20 February 2008 that the Owner's claim was rejected. That letter stated, in part:

> As explained previously your policy will only respond on the Death, Disappearance and or insolvency of the owner builder, at the time of lodging your claim with Caliden Insurance you advised us that he was overseas, such as we carried out an Inspection of your property and organised for some urgent repairs. In the meatime for Caliden to formally accept your claim we must determine that he indeed will not be returning to the country deeming him disappeared.
>
> Our Investigators have advised us that after extensive enquiries the owner builder has returned and is residing at … Rowville his home number being 03… as such you policy does not respond and we formally reject your claim.
>
> You have the right to seek a review of this decision by lodging an application with the Domestic Building List of the Victorian Civil and Administrative Tribunal. Any application must be made within 28 days of the date you receive this letter.

14. The Owners did not lodge an application for review of the Insurer's decision to reject their claim. Instead, they embarked on a course to prove that the Builder was 'insolvent'. By letter dated 14 September 2009, the Owners advised the Insurer that they were pursuing their claim on the basis that the Builder might soon become insolvent. Indeed, on 27 October 2009, the Federal Court made a *sequestration* order against the Builder. This was communicated to the Insurer.

15. By letter dated 14 February 2010 the Insurer responded and stated:

> Whilst it is acknowledged that your clients lodged a claim during the Period of Insurance, the insolvency of the builder has occurred 9 September 2009, being some five months after the Period of Insurance expired on 02 April 2009.

16. Consequently, the Insurer again rejected the Owner's claim, albeit on different grounds.

The Issue for Determination

17. The dispute between the parties focuses on whether the indemnity provided in Clause 1 of the Insurance Policy is to be interpreted to mean that the *Death, Disappearance or Insolvency* (**'the DDI'**) must occur within the period of insurance or alternatively whether the timing of the DDI event is at large.

Applicants' contentions

18. Mr Thompson of senior counsel, who appeared with Mr Robinson of counsel, submitted that Clause 1 of the Insurance Policy is temporally at large. He argued that it was of no consequence that the DDI event occurred outside of the period of insurance, provided the claim was made within the period of insurance.

19. Mr Thompson contended that it would have been an easy thing for the drafters of the Insurance Policy to have clearly and expressly stated that the DDI event must fall within the period of insurance, if that were intended. He argued that the clause merely stated that the loss or damage must arise as a result of a *Prescribed Cause* occurring during the period of insurance but that there was no temporal link to the DDI event having to also occur during that period.

20. Mr Thompson submitted that the clause was not ambiguous. However, if it was, then it should be construed *contra proferentum* so that the ambiguity is to be read in favour of the Owners. Mr Thompson submitted that the construction advanced by the Owners was consistent with the policy and philosophy behind the home owner's warranty scheme generally, namely that it is a policy of last resort. He said that unless a builder dies, becomes insolvent or disappears then there are no rights against the insurer. In that sense, an insured is first required to pursue their rights against the builder, with the insurer providing a safety net in the event that the builder dies, becomes insolvent or disappears.

21. Mr Thompson submitted that a mischief would occur if the Insurance Policy were construed in the manner advanced by the Insurer. He gave the example where an insured pursued rights against a builder over a period traversing the expiry of the period of insurance. If the builder then died, the purchasers would be left without rights against the Insurer. If, on the other hand, the death of the builder, fortuitously, fell within the period of insurance, then those rights could be pursued. He argued that

this result was contrary to the policy and philosophy of the insurance scheme as it no longer provided any form of indemnity of last resort.

22. Mr Thompson referred me to the relevant Ministerial Order made pursuant to the *Building Act* 1993. Clause 20 of the Ministerial Order states:

> ***Indemnity for loss***
>
> (1) The policy must indemnify the purchaser under a contract of sale in respect of loss or damage arising from a breach of any warranty implied into the contract by section 137C of the Building Act 1993.
>
> (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the owner builder (the "vendor") dies, becomes insolvent or disappears.

23. He submitted that the Ministerial Order contained nothing permitting a further reduction in the indemnity that was required under the *Building Act* 1993. He argued the wording of Clause 20(2) of the Ministerial Order was temporally at large and did not impose temporal limits on when the DDI event occurred. He further submitted that the Ministerial Order did not permit an insurer to limit or avoid the requirements of that Ministerial Order. In particular, Clause 50 (1) of the Ministerial Order states:

> ***Policy not to contain terms inconsistent with this Order***
>
> (1) A policy must not contain any provision that limits, modifies, varies, avoids or excludes any of the requirements for a policy set out in this order.

24. Mr Thompson argued that if I was against him on the interpretation of Clause 1 of the Insurance Policy, there were alternate grounds upon which the Insurer was nevertheless required to provide indemnity.

25. First, he submitted that the Insurer, in knowledge of all relevant facts, made an election between alternative courses of action under the insurance policy and thereby represented to the Owners that their claim was accepted. He argued that under the doctrine of election, the Insurer is bound by its election irrespective of whether the Owners acted to their detriment on the strength of that election.

26. Mr Thompson submitted that there was clear evidence of the Insurer having made that election. He referred to the Insurer's letter dated 8 October 2007, wherein the Insurer stated that it had inspected the property and had accepted eight items of work requiring repair. He focused on the last paragraph of that letter, which stated:

> As the owner builder cannot be located, we will be arranging for Ray Martin of Build Assess to revisit the site with two registered builders and ask that they provide quotations as per the attached schedule of works.

27. Mr Thompson argued the Insurer had clearly satisfied itself that there had been a relevant disappearance, following which it had notified the

Owners of its acceptance of their claim (in part) and proceeded to engage rectifying builders. This, he said, constituted a binding election.

28. Mr Thompson argued that once a claim is accepted and acted upon in full knowledge of relevant facts an insurer is bound. If those facts change there is no principle by which a decision to grant indemnity can be overturned. The fact that the granting letter stated: *This decision is based upon information held by us. We reserve the right to review this decision should further information or documents come in to our possession* is not to the point, he said. He submitted that the reservation could only be relevant if it showed that the decision had been made on the strength of incomplete information at the time. Here, he said, the relevant information was complete.

29. Mr Thompson argued that the Insurer was not compelled to have concluded that there had been a disappearance, however, it did. He said that in representing this decision to the Owners and retaining rectifying builders, it made a binding election. He submitted that the alternative conclusion would mean that repeated rights to withdraw indemnity might arise every time a builder "reappeared" from a period of "disappearance". Such a position, he said, was untenable.

30. Mr Thompson further submitted that there was no evidence before the Tribunal that the Builder had, in fact, 'reappeared'. He contended that it was open for the Tribunal to make that finding of fact and thereby annul the decision of the Insurer made on 20 February 2008, to the extent that it determined that a DDI event had not occurred.

31. On that note, Mr Caleo of senior counsel, who appeared on behalf of the Insurer, submitted that it was not open for me to make such a finding of fact because that would, in effect, amount to a review of the Insurer's earlier decision made on 20 February 2008. He argued that the Owner's application was filed on 23 March 2010, which was well outside the 28 day period permitted under s60 of the *Domestic Building Contracts Act* 1995.

32. He further argued that no application for an order abridging the time to seek a review of the Insurer's decision had been made and any such application would require the Insurer to put further material in opposition before the Tribunal. He argued that it would be a denial of procedural fairness for the Tribunal to entertain such an application based solely on the matters raised by the Owners.

33. I agree with Mr Caleo. An enquiry as to whether the Builder disappeared, in fact, is tantamount to a review of the Insurer's decision of 20 February 2008 - that the Builder had not disappeared. The application filed by the Owners on 23 March 2010 makes no mention of impugning the Insurer's decision of 20 February 2008 or that the Builder had not disappeared. In those circumstances, I do not consider it appropriate to adjudicate on that question of fact as part of this application.

34. Mr Robinson, who appeared with Mr Thompson also advanced several alternative arguments.

35. First, he argued that the conduct of the Insurer raised an *estoppel* by silence. He submitted that the Insurer knew that the Owners were moving to make the Builder bankrupt but at no stage, until after the period of insurance had expired, did the Insurer tell the Owners that the Builder's *insolvency* must occur during that period.

36. Second, he relied on s109(1) and (2) *Fair Trading Act* 1999 to argue that the Tribunal had jurisdiction to declare void Clause 1 of the Insurance Policy on the ground that it was an unjust term. Section 109 (1) of the *Fair Trading Act* 1999 states:

> (1) In addition to its powers under section 108, the Tribunal, in determining a consumer dispute or a trader-trader dispute, may make any order it considers fair including declaring void any unjust term of a contract otherwise varying a contract to avoid injustice.

37. Mr Robinson referred me to the decision of the Tribunal in *Chong v Mulitmedia International Services*,[1] where Deputy President Steele stated:

> In addition to the ordinary powers that the Tribunal has to resolve consumer and trader disputes under s 108, which is really to decide them in accordance with the ordinary common law of contract, there is this statutory power to vary a contract to avoid injustice.

38. Mr Robinson said that the facts of the present case were apt to illustrate the injustice of Clause 1 of the Insurance Policy, if it were to be construed in the manner advanced by the Insurer.

Respondent's submissions

39. Mr Caleo submitted that upon its proper construction Clause 1 means that the DDI event must occur during the period of the insurance. He argued that one must look at the context in which the relevant words appeared and the purpose of the clause to understand that the DDI event is linked temporally to the period of insurance.

40. He submitted that the right to be indemnified does not crystallise until the two limbs of Clause 1 are satisfied:

    (a) First, there needs to be loss and damage suffered resulting from a *Prescribed Cause*; and

    (b) Second, the loss and damage resulting from a *Prescribed Cause* needs to be in circumstances where there is a DDI event.

41. He argued that the word 'in' appearing in Clause 1 requires that the circumstances of a DDI event must be met during the same time period required for the occurrence of the *Prescribed Cause*, being the period of insurance.

[1] [2010] VCAT 1049 at paragraph 4

42. Mr Caleo submitted that the Owner's construction failed to give any weight to that contextual consideration. He argued that the Owners construed Clause 1 as if the words "in circumstances" were replaced by the word "and", which he said was impermissible.

43. Mr Caleo suggested that the interpretation given to Clause 1 by the Owners would lead to a perverse outcome. He gave the example that an insurer would be on risk for year after year, until the builder either died, become insolvent or disappeared, despite the fact that the period of insurance had expired. He asked the pejorative questions: What is to happen in the interim? May the insured rectify the defective work or must it be left in its defective state so that the insurer may inspect it in the event that a claim is ever made? Mr Caleo contended that the construction advanced on behalf of the Owners was not a businesslike interpretation of a commercial contract.

44. He referred me to the decision of Gleeson J in *McCann v Switzerland Insurance Australia Ltd*:

> A policy of insurance, even one required by statute, is a commercial contract and should be given a businesslike interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure. (footnotes omitted) [2]

45. He also referred me to *Rouleston Clarke Pty Ltd (in liq) v FAI General Insurance Corp Ltd*, a decision of the Full Court of the Supreme Court of Tasmania:

> All of the following principles to be applied when interpreting a policy of insurance, were stated by the learned judge and are not in contention. The task in construing the policy is to ascertain the objective intention of the parties from a consideration of the wording. Regard must be had to the fact that it is a policy of insurance. It must be read in its commercial setting in such a way as to fulfil and not restrain its commercial purpose.[3]

46. Mr Caleo further submitted that if there was ambiguity as to the construction of Clause 1, it was not appropriate to construe the clause *contra proferentum*. In his written outline, he stated that *while this principle of construction may, on occasion, still be useful, it is now regarded as "a rule of last resort and a principle for construction to remove ambiguities only when other more rational approaches fail"*. He referred to the judgement of Kirby J in *Johnson v American Home Assurance*:[4]

[2] (2000) 203 CLR 579 at 589
[3] (2000) 11 ANZ Insurance Cases p61-473 at paragraph 16, per Crawford J.
[4] (1998) 192 CLR 266 at 274

> Courts today accept the duty to endeavour to find the meaning, even of ambiguous expressions, from the language and logic of the document rather than by resort to maxims and other rules of thumb.

47. As to the alternative argument raised by the Owners - that the Insurer is bound by its election, Mr Caleo submitted that the argument is misplaced. He contended that it was misplaced because the alleged 'election' related to the Insurer's decision to accept the Owner's claim based on the Builder's disappearance. However, the subject of the present proceeding related to a decision made by the Insurer two years later and on different grounds, namely, that the insolvency now relied upon by the Owners as constituting the DDI event, occurred outside of the period of insurance.

48. Mr Caleo submits that no review was ever sought of the Insurer's decision made on 20 February 2009 and for the reasons outlined above, it was inappropriate to consider that now.

49. Second, Mr Caleo submitted that as a matter of principle, there cannot be an election to accept an obligation to indemnify in circumstances where the terms of the Insurance Policy do not extend cover. He referred to the New South Wales Court of Appeal decision in *National Vulcan Engineering Insurance Group Ltd v Transfield Pty Ltd*, where the Court stated:

> …acceptance by the insurer of a claim by an insured to which the policy does not extend cover cannot amount to an election.[5]

50. Third, Mr Caleo submitted that the Insurer's letter dated 8 October 2007 did not evidence the exercise of a right inconsistent with the right to deny indemnity. He argued that the words of that letter clearly preserved the Insurer's rights to review cover, should circumstances change. He said the letter dated 8 October 2007 did not purport to make an election. In particular, the letter stated:

> This decision is based upon information held by us. We reserve the right to review this decision should further information or documents come into our possession.

51. As to the issue of *estoppel*, Mr Caleo submitted that there was no evidence before the Tribunal of any reliance by the Owners on the acts or omissions of the Insurer. He argued that there was no evidence that the acts or omissions of Insurer caused the Owners to act in a way that they allege now deprived them of indemnity. Further, he submitted that there was no evidence of the Owners actually being misled.

52. Mr Caleo submitted that the argument advanced by the Owners on the question of estoppel was akin to there being some form duty to advise. He argued that the Insurer was not under any such duty.

[5] (2003) 59 NSWLR 119 at 137

53. In relation to the applicants' alternative argument based on reliance under the *Fair Trading Act* 1999, Mr Caleo argued that Clause 1 was consistent with the Ministerial Order. Accordingly, he submitted that it could not be the case that a contractual term prescribed by subordinate legislation could be said to be contrary to s109 of the *Fair Trading Act* 1999.

Finding

54. As a starting point, I make the observation that the words of Clause 1 are different to the words of the Ministerial Order. The relevant parts of the Ministerial Order state:

> **20.** ***Indemnity for loss***
>
> (1) The policy must indemnify the purchaser under a contract of sale in respect of loss or damage arising from a breach of any warranty implied into the contract by section 137C of the Building Act 1993.
>
> (2) The policy may provide that the indemnity referred to in sub-clause (1) only applies if the owner builder (the "vendor") dies, becomes insolvent or disappears.

55. Clause 23(2) of the Ministerial Order states:

> **23.** ***Period of insurance***
>
> The policy must provide the indemnities referred to in clauses 20 and 21 in respect of all other loss and damage occurring during the period commencing on the date of the contract of sale and ending not earlier than 6 years after the completion date of the domestic building work.

56. It seems that the indemnities referred to in Clause 20(1) carry through to Clause 20(2). In other words, the limitation in Clause 20(2) relates to the same indemnities referred to in Clause 20(1). The Ministerial Order allows an insurance policy to limit cover so that the indemnities only crystallise on the happening of a DDI event. Therefore, Clause 20(2) allows an insurer to impose a precondition that a DDI event must first occur before there is any obligation to indemnify. In other words, by the use of the word 'may' in Clause 20(2) of the Ministerial Order, an insurer may elect to include a DDI event as a pre-condition to providing indemnity, although there is no legislative requirement that it do so. Therefore, the Ministerial Order allows an insurer to provide one of two forms of indemnity. The first form of indemnity does not contain a precondition that a DDI must exist while the second form contains such a precondition.

57. Indeed, an insurer is permitted to offer greater indemnity than what are the minimum requirements set out in the Ministerial Order. Clause 51 of the Ministerial Order states:

> ***51. Policy can provide greater cover***

> A provision in a policy will not contravene or be inconsistent with this Order by reason only that it –
>
> (a) provides a greater insurance cover or additional kinds of insurance cover to that specified in this Order; or
>
> (b) provides for a lower excess than that specified in Division 3 of Part 4; or
>
> (c) extends cover to persons other than the insured as defined in this Order.

58. Clause 23 of the Ministerial Order then defines the period that indemnity is to be provided. It allows an insurer to limit the time that the indemnity is to exist to a minimum of 6 years after the completion date of the domestic building work in question.

59. It is arguable that the effect of Clause 23 is to limit the time that the indemnity provided by Clause 20 operates, irrespective of the form of indemnity given by an insurer. In other words, the Ministerial Order provides an insurer with an ability to define the ambit of the indemnity between one of two forms – with or without the inclusion of a DDI event as a pre-condition. Once so defined, it also allows the Insurer to limit the time that the indemnity operates. Based on that reasoning, there may be a temporal link between the happening of a DDI event and the period of insurance, although I express no concluded view on that point, given that Clause 1 of the Insurance Policy has not adopted the words used in the Ministerial Order.

60. Clause 1 of the Insurance Policy is expressed differently to the Ministerial Order. It states:

> The Insurer will indemnify the Insured in respect of loss or damage arising as a result of a Prescribed Cause occurring during the Period of Insurance in circumstances where the Owner Builder dies, becomes Insolvent or Disappears.

61. The extent of the indemnity is described by reference to the defined term *Prescribed Cause* and is limited by the defined term *Period of Insurance*. Curiously, however, the third limitation, being the requirement of a DDI event, appears after the reference to the words *Period of Insurance*.

62. Mr Caleo says that this is of no consequence because the temporal link is found in the word 'in'.

63. In my view, that temporal link is not clear. In particular, it seems to me that the word 'in' is simply the link between the *Prescribed Cause* (breach of warranties) and the necessity for a DDI event. In other words, the effect of the words *in circumstances where* is that the indemnity is only given where there is a DDI event. However, Clause 1 <u>does not link the DDI event in time</u>. It is a third limitation on the indemnity provided under the Insurance Policy that stands separate to the words limiting the indemnity by time. The words that limit the indemnity by time are linked to the indemnity but not to this third limitation, namely the happening of

a DDI event. In my view, that distinguishes Clause 1 from the relevant clauses in the Ministerial Order.

64. It is curious why in Clause 1, the words *in circumstances where the Owner Builder dies, becomes Insolvent or Disappears* do not appear before the words *occurring during the Period of Insurance*. If that were the case, then the indemnity given because of a *Prescribed Cause* and the limitation that such indemnity only crystallises upon the happening of a DDI event would both be limited by time. However, Clause 1 is not expressed in that way and in my view, a plain reading of that clause does not require the DDI event to occur during the period of insurance – it just needs to occur before the obligation to indemnify crystallises. In other words, the Insurer becomes conditionally liable if the Owners suffer loss or damage during the period of insurance because of a *Prescribed Cause*. However, that liability is inchoate because there is no obligation to indemnify until the happening of a DDI event.

65. Further, I do not consider that this interpretation of Clause 1 would lead to a 'perverse' result any more than construing the clause in the manner contended by the Insurer. In particular, claims still have to be made during the relevant period of insurance. If a claim is made outside the period of insurance, then there is no obligation to indemnify, irrespective of whether the DDI event occurred inside or outside the period of insurance. Moreover, where an insured makes a claim inside the period of insurance, the Insurer would remain at risk only if there was a DDI event. The fact that the Insurer may be on risk outside the period of insurance because the obligation to indemnify has not crystallised due to there being no DDI event is not a perverse result, as suggested by Mr Caleo.

66. Indeed, the result is not dissimilar to what occurs with an occurrence type professional indemnity insurance policy or with the building practitioner's insurance required under s 135 of the *Building Act* 1993 for work undertaken by building practitioners other than builders of domestic building work. In particular, with an occurrence type professional indemnity insurance policy, an insurer may be at risk for many years after the expiration of the period of insurance for insurable events that occurred during the period of insurance because the damage only manifests subsequent to that period of insurance. Similarly, with the building practitioner's insurance required under s 135 of the *Building Act* 1993, an insurer is at risk for insurable events that may have occurred as from a retroactive date occurring at some time prior to the period of insurance.

67. In my view, it is equally 'perverse' to construe Clause 1 in the manner advanced by the Insurer. For example, where loss and damage is suffered because of a *Prescribed Cause* but is denied because there is no DDI event, would then require the insured to prosecute a claim directly against the builder. That may result in litigation, which may prove to be

protracted and costly. It may also be the case that any favourable judgement ultimately proves to be hollow, if the builder is unable to satisfy its judgement debt. That then leaves the insured with having to seek indemnity from the Insurer, consistent with the philosophy behind the warranty insurance scheme, that it is a policy of last resort.

68. However, on the reading of Clause 1 advanced by the Insurer, if the insolvency occurred one day after the expiration of the period of insurance, there would be no recourse against the Insurer, even if the claim had been made in respect of a *Prescribed Cause* during the period of insurance. In other words, the litigation forced on by a requirement in the Insurance Policy that there be a DDI event, may well be the ultimate cause of the DDI event occurring after the period of insurance and thereby giving the Insurer a right to deny liability. In my view, that scenario demonstrates the irony of construing Clause 1 in the manner advanced by the Insurer.

69. As I have already indicated, I find that a plain reading of Clause 1 does not link the DDI event with the period of insurance. If it was the intention of the drafters of the Insurance Policy to link the DDI event with the period of insurance, then the words *in circumstances where the Owner Builder dies, becomes Insolvent or Disappears* would have appeared before the words *occurring during the Period of Insurance*.

70. For example, Clause 1 could have read: *The Insurer will indemnity the Insured during the Period of Insurance in respect of loss or damage arising as a result of a Prescribed Cause in circumstances where the Owner Builder dies, becomes Insolvent or Disappears during the Period of Insurance.*

71. Alternatively, it was open for the Insurer to have used the same words as set out in the Ministerial Order, which I have already indicated seem to link the indemnity (be it with or without the precondition that it only operates upon the happening of a DDI event) to the limitation of time. However, Clause 1 is expressed very differently to the words used in the Ministerial Order.

72. In my view, it is the words of the policy that must be construed, not the Ministerial Order, which prescribes what those terms are to be. In *Orica Ltd v CGU Insurance Ltd*, Spigelman CJ stated:

> Notwithstanding the origins of the policy in a mandatory statutory form, the policy must be constructed as a contract. That is the legal character of the relationship which the Parliament adopted.[6]

73. His Honour further stated:

> The extent of the indemnity by the insurer to the employer must be found in the language of the policy, properly construed. (*State Mines* at 261; 290) [7]

[6] *Orica Ltd v CGU Insurance Ltd* [2003] NSWCA 331 at paragraph 11
[7] Ibid

74. I accept that as a general principle, the provisions of the Ministerial Order may assist in determining the proper construction of the Insurance Policy.[8] However, that principle has limited application in the present case, given the substantial difference in wording between the Insurance Policy and the Ministerial Order and the fact the Ministerial Order expressly allows the Insurer to offer greater indemnity than the minimum requirements set out in the Ministerial Order.

75. If I am incorrect in my reasoning that a plain reading of Clause 1 does not temporally link the DDI event to the period of insurance, then I find that the wording is, at the very least, capable of two meanings.

76. In my view, and despite the strength by which Mr Caleo argued against construing the clause *contra proferentum*, any ambiguity in the clause ought to be read against its author in favour of the Owners.

77. The cases referred to me do not, in my view, extinguish that principle of construction. Indeed, Mr Caleo conceded that the principle of construction may, on occasion still be useful to resolve ambiguities when other more rational approaches fail. Further, this is not a situation where neither party can be said to have proffered the Insurance Policy, as might be argued had the policy adopted the same wording as the Ministerial Order. Had that been the case, then there may have been some force to the argument that the term should not be construed *contra proferentum*.[9]

78. Therefore, to the extent that Cause 1 is ambiguous, this is an occasion where the *contra proferentum* rule is useful and may properly be utilised as a rule of last resort, given that contextual and purposeful approaches do not resolve any such ambiguity.

79. Therefore, I find that Clause 1 does not mean that the DDI need occur during the period of insurance.

80. That being the case, it is not necessary for me to consider further the alternative arguments advanced by the applicants.

SENIOR MEMBER E. RIEGLER

[8] Ibid.
[9] Ibid.