VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D307/2004

CATCHWORDS

Builders 'Annual' Home Warranty Insurance Policy (Victoria) – misleading and deceptive conduct – whether builder required to carry out rectification works – whether builder's liability under Insurance Policy limited to the obligation amount.

APPLICANT	Greenhill Homes Pty Ltd
RESPONDENT	Allianz Australia Insurance Limited
FIRST JOINED PARTY	Carmello Tieri
SECOND JOINED PARTY	Vittorio Tieri
WHERE HELD	Melbourne
BEFORE	Deputy President, C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	19 & 20 September 2005
DATE OF ORDER	12 October 2005

[2005] VCAT 2089

ORDER

1. The application is dismissed.

2. The decisions of the First Respondent dated 17 December 2003, 26 April 2004 and 19 October 2004 are affirmed.

3. Costs reserved – liberty to apply. Direct the principal registrar to list any application for costs before Deputy President Aird.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Ms M Rozner of Counsel
For Respondent	Mr M Whitten of Counsel
For Joined Parties	Mrs C Tieri in person

REASONS

1 There have been so many amendments to the Applicant builder's claim which commenced as an appeal against a decision of the Respondent insurer that it is helpful to set out, the relief and remedies set out the Prayer for Relief to its Third Amended Points of Claim dated 21 July 2005:

(A) A declaration that its liability to the Respondent in respect of the joined parties' claim is limited to $5,000.00,

(B) Damages.

(C) Alternatively that the Policy (the Builders 'Annual' Home Warranty Insurance Policy) be rectified by the deletion of Clause 5(b) of Part B of the Policy.

(D) Alternatively, pursuant to ss108 and 109 of the Act (the *Fair Trading Act* 1999):

  (a) a declaration that Clause 5(b) of the Policy is void;

  (b) alternatively, an order that the Policy be rectified by the deletion of Clause 5(b) of Part B of the Policy; and

  (c) an order that the Respondent indemnify the Applicant in respect of the total cost of the rectification works directed by the Respondent pursuant to Clause 7(d) of the Policy, less $5,000.00.

(E) Alternatively, an order that the Respondent is estopped from reliance on Clauses 5(b) and 7(d) of Part B of the Policy.

(F) A declaration that the Second Works Schedule is void.

(G) A declaration that the issuing of the Third Works Schedule by the Respondent is an abuse of process.

2 The builder alleges it entered into an Agreement on 14 February 2001 whereby the builder's liability to the insurer, in respect of any claim made by an owner, would be capped at $5,000.00. In support of this allegation the builder relies on what it says were oral representations by Mr Stan Walczak, who worked for Dexta Corporation Ltd ('Dexta'), the underwriter

of the policy, and Rohan Jeffries who worked for the builder's insurance broker, Bradstock GIS Pty Ltd ('Bradstock') together with alleged written representations as set out in various letters and other documents, copies of which were provided to the tribunal in a folder subsequently identified as 'Applicant's documents'. Evidence was given on behalf of the builder by Mr Aldo Zumpano, director, and Ms Julie Dunbier, the builder's bookkeeper. Evidence was given on behalf of the insurer by Mr Walczak, in response to a subpoena, and Mr Rod Kempton, Senior Claims Technician of the insurer. Although the insurer had also subpoenaed Mr Jeffries he has left the employ of Willis Australia Limited, his last known address and could not be located. This was accepted by the builder. The builder was represented by Ms Rozner of Counsel, and the insurer was represented by Mr Whitten of Counsel. Mrs Tieri also attended the hearing.

Background

3 Before considering the application it is helpful to set out the background by way of a chronology.

February 2001	Date alleged agreement by the insurer that it would provide Annual Home Warranty Insurance to the builder under which the builder's liability, in respect of any claim by an owner, would be limited to $5,000.00 ('the Agreement')
20 March 2001	Date of building contract
2003	The owners contacted the builder expressing concern about the render. The builder carried out some rectification works.
9 November 2003	The owners lodged claim with the insurer.

17 December 2003	The insurer accepted the claim in part and issued the First Works Schedule directing the builder to carry out certain works which did not include significant works to the cladding and render.
26 April 2004	The insurer issued the Second Works Schedule directing the builder to carry out rectification works to the cladding and render in accordance with the report obtained by the owners from CTI Consultants Pty Ltd dated 26 February 2004
19 May 2004	The builder made application to the Tribunal appealing the second decision of the insurer on the grounds the rectification works were not its responsibility
19 October 2004	Following an unsuccessful mediation, the insurer advised the builder it had re-assessed the claim and issued a Third Works Schedule.
29 October 2004	The owners filed their expert reports including the report from CTI Consultants Pty Ltd ('the CTI Report') dated 26 February 2004 which formed the basis of the Second Works Schedule.
5 November 2005	The builder filed an expert report from Accuform Pty Ltd dated 3 November 2004 which estimates the cost of rectification works at $3,684.00.
18 November 2005	The builder filed Further Amended Points of Claim

seeking a declaration that the issuing of the Third Works Schedule is an abuse of process because the works were substantially the same as those required to be carried out by the Second Works Schedule by reference to the CTI Report, that they were issued at a time when proceedings alleging the second Works Schedule was defective were on foot, and it was issued to avoid any defects in the Second Works Schedule.

22 November 2004 — Following an unsuccessful Compulsory Conference Mr Robert Lorich was appointed as an expert under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 to report to the Tribunal by answering the following questions:

1. Are the cracks, as seen now, a defect?
2. Are the cracks likely to get worse?
3. Are they symptomatic of a more serious problem?
4. Are they likely to admit water or moisture?
5. If they admit water or moisture, what is the likely result?
6. Is the movement joint of a workmanlike standard?
7. If the cracks or movement joint are now a defect, or a symptom of a later defect, please provide a cope of works for rectification?
8. Please provide an estimation of the cost of rectification in accordance with the scope of works?

1 February 2005 — Mr Lorich delivered his report in which he concluded the builder's work was defective and that extensive rectification work was required. He estimated the cost of such works, if carried out by a rectifying builder, at $50,147.00 but, if carried out by the builder, the cost would be considerably less.

22 February 2005	The builder wrote to the insurer seeking a copy of the *'policy wording relative to this policy'* for the period 31 January 2001 to 31 January 2002, be faxed to it *'at your earliest convenience'*.
1 March 2005	The insurer faxed a copy of the Policy to the builder
3 March 2005	The builder sent a cheque for $5,000.00 to the insurer under cover of a letter from its solicitor purporting to make a claim and paying the Obligation Amount under Part B of the Policy of Insurance. This was rejected by the insurer.
12 April 2005	Following an unsuccessful reconvened Compulsory Conference the builder was given leave to file and serve Second Further Amended Points of Claim.
21 April 2005	Second Further Amended Points of Claim were filed whereby the builder's case changed significantly. Initially, the builder claimed the defects (if any) were not its responsibility. In the Second Amended Points of Claim it acknowledges the works are defective but, for the first time claims that its maximum liability is $5,000.00 and further, that if the builder was to carry out any rectification works, it would be entitled to be reimbursed for the costs of such works after deduction of the 'excess' of $5,000.00.
21 July 2005	Third Amended Points of Claim were filed wherein the builder alleges for the first time that Dexta

Corporation Limited acted as agent for the insurer in negotiations with the builder. Further, it is alleged that Mr Rohan Jeffries, Bradstock GIS Pty Ltd and Willis Australia Limited were acting as agents for Dexta and the insurer in that they conducted negotiations with the builder for insurance to be provided by the insurer through Dexta. The pleadings in relation to the insurance cover, the 'excess' of $5,000.00 and the policy are expanded upon. The builder also claims it was not provided with a copy of the Policy of Insurance until 1 March 2005, that Clause 5(b) of Part B of the Policy ('the Exclusion Clause') is not consistent with the Agreement and that it was included under a mutual mistake of fact.

In the alternative, the builder also alleges misleading and deceptive conduct whereby it is alleged that it was represented to the builder that its liability for any claim in relation to defective work would be limited to $5,000.00.

20 September 2005 — During delivery of final submissions on behalf of the builder, leave was sought to amend the claim to include an application for rectification of the Policy by deletion of clause 7 (d) of Part B.

DISCUSSION

4 This is an unfortunate situation for the owners. Whilst it is not uncommon for owners to find themselves legitimately embroiled in a proceeding where

the builder is appealing an insurer's decision on liability, and it is appropriate they be a party as their interests are clearly affected (s60 of the *Victorian Civil and Administrative Tribunal Act* 1998), in this case liability was effectively settled when Mr Lorich's report was delivered in January 2005. Up until that time, the builder's appeal had been on the basis of a denial of liability only. However, following receipt of Mr Lorich's report it obtained a copy of the policy of insurance ('the Policy'), and sought a declaration from the tribunal that its maximum liability to the insurer is $5,000.00. The builder's amended Points of Claim in relation to this issue were filed on 21 April 2005. Although liability was no longer an issue from that date, rectification works are still to be carried out. I will consider the various claims made by the builder in turn.

Misleading and Deceptive Conduct

5 In support of its allegation that it was represented to it that its liability in respect of a claim for defective works would be limited to $5,000.00 the builder relies on:

(i) An undated letter from Mr Walczak on Dexta's letterhead to Mr Zumpano which poses the following questions:

> If you answer yes to any of the following, then we have the right product for you.
>
> - Do you want to limit your liability in the unfortunate event that a claim is made against you for defective workmanship?
> - Do you understand that under the 'job specific' type of home warranty insurance, the Insurer has the right to recover every cent paid on a claim from you, which could be as much as $100,000.00 (plus costs incurred)?
> - Do you want to avoid the inconvenience and the considerable amount of time and money wasted when purchasing a separate insurance policy job by job?

- Do you want to complete only one application form and be certain of insurance cost and availability for 12 months?

and

(ii) An undated document entitled "Greenhill Homes Pty Ltd – Domestic Victorian Annual Policy – Quotation Options" for estimated turnover of $7m from Dexta (and a similar document for an estimated turnover of $10m.) and in particular to the following boxed paragraph:

> NB. Whichever option you choose from below, **this will be the maximum you will pay in the event of any one single claim** (remember, under your current job specific arrangements, the insurer has the right to recover from you, any claim paid up to the maximum limit of indemnity under the policy of $100,000.00) during the 6 ½ year warranty period, provided by the policy. (Emphasis added)

6 The builder also relies on what it describes as oral representations it says were made by Mr Walczak in discussions with Mr Zumpano. Mr Walczak gave evidence that after sending out a number of letters, similar to the 'undated letter' referred to above, he had subsequently met with a 100 or so builders. Although he could not remember exactly what he had discussed with Mr Zumpano, he confirmed that in his usual spiel he told builders that, their liability in respect of any claim by an owner would be capped at $5,000.00 and that, although they would be required to rectify any defective work, they could seek reimbursement from the insurer for all amounts expended over $5,000.00.

7 Mr Zumpano gave evidence that the builder had previously had similar insurance with FAI but that the excess under that policy had been increased to $10,000.00. He said he had therefore been interested in taking out this policy where there was the option of paying a higher premium and selecting a $5,000.00 excess. He said that Mr Walczak told him that the most the builder would ever have to pay on any claim was $5,000.00. Whilst Mr Zumpano's recollection of the discussion differed slightly, he stated a number of times that he was told he would have to pay no more than

$5,000.00. He did not give any evidence that he had been told the builder would not be required to rectify any defective works.

8 By facsimile dated 20 December 2000 from Mr Walczak to Mr Zumpano, Dexta forwarded a copy of the application form for Warranty Insurance which, I accept, was accompanied by what can best be described as an Information Sheet headed 'Home Warranty Insurance Policies'. Under the heading 'Important Notice' Dexta advises:

> **Types of Policies Available**
> Dexta offers two policy types. Please read the following outlines carefully before completing the attached Application Form and choose which policy type best suits your needs.
>
> **Annual**
> This policy type covers all contracts entered into by the Contractor during the policy period. The Insurances applies for the full defects warranty period required by the relevant legislation …
> …
>
> The contractor agrees to repay an agreed amount in respect of each claim (the 'Builders Obligation Amount') and the Insurer waives its subrogation rights in respect of any greater amount paid by the Insurer. This works like an 'excess' and **effectively protects the contractor from repaying any large insurance claim**. (emphasis added)
> …
>
> **Job Specific**
> This policy applies to a specific contract for work on one residence only. Policies are purchased as required and the contractor remains **fully liable to reimburse the Insurer for any claim under a policy.** (emphasis added)

9 The only evidence before me as to the oral representations is that of Mr Walczak. Although he gave evidence about his 'usual spiel' I cannot be satisfied that he told Mr Zumpano at the time of the initial discussions that the builder would be able to claim reimbursement of the cost of any rectification works over and above the $5,000.00 obligation amount or 'excess'. Further, I note that Mr Walczak was originally a witness for the builder. He confirmed he had discussions with Mr Zumpano and the builder's lawyers prior to being subpoenaed by the insurer. I understand he

is employed by Willis who still provide insurance broking services to the builder. In such circumstances I am concerned that his recollection of his initial discussions with Mr Zumpano and his usual spiel may have been unwittingly compromised. The builder did not call evidence from any other builder about the 'spiel' in support of his claim.

10 To establish the allegedly misleading and deceptive conduct of the insurer (or its agents) the builder must prove that it relied on them, and was induced by them into taking out the insurance. There is simply no evidence to support this. Mr Zumpano gave evidence that he had difficulty reading English, and had not read the documents, only being concerned with the 'numbers' – the premium and 'excess' amounts. As indicated above, I am not satisfied that he was told by Mr Walczak that the builder would not be required to rectify its own defective work, or that, if it did, it could seek reimbursement of the cost of such work, over and above the excess, from the insurer. Therefore, I cannot find, on the evidence before me, that the builder had any regard to, or placed any reliance on, the so-called representations.

11 Mr Zumpano gave evidence that the builder had not received a copy of the Policy until a copy was provided, by the insurer, on or about 1 March 2005, in response to the builder's written request dated 22 February 2005. I am asked by the insurer to accept that as the so-called 'Builder's Insurance Package' was sent by Dexta to Bradstock under cover of a letter dated 9 February 2005, addressed to Mr Jefferies, the Policy must have been forwarded to the builder, as it obviously had the Certificates of Insurance, one of which was provided to the owners. However, there is simply no evidence as to what exactly was forwarded on to the builder by the broker. The only person who could have given evidence about this was Mr Jefferies and he could not be located. In any event, even if the package was sent to the builder, I accept Mr Zumpano's evidence that he had not seen it.

12 Although the builder now seeks to rely on the so-called Agreement which it alleges was made in February 2001, its conduct is not consistent with a genuine belief that such an agreement had ever been made. Rather, Mr Zumpano gave evidence that he did not believe the builder was 'covered' until Mr Walczak told him in conversation at the Grand Prix in 2003 that the builder's maximum liability was $5,000.00. However, that conversation seems to have been in relation to the FAI insurance policy previously held by the builder, and not in relation to the current policy. Mr Walczak's evidence was that he had no recollection of a discussion about the 'policy coverage'.

13 It is difficult to conclude, on the evidence before me, that the builder ever seriously believed it was not obliged to rectify its own defective works, that it could simply elect to pay the 'excess' of $5,000.00 and the insurer would take care of the rectification works. The obligation by a builder to rectify defective works is a statutory obligation imposed by s8 of the *Domestic Building Contracts Act* 1995 which are implied into every major domestic building contract. The builder's conduct prior to the delivery of the s94 report by Mr Lorich is not consistent with that of a builder who truly believed it had no obligation to rectify.

14 Although Mr Zumpano said that he had raised the issue of the $5,000.00 'excess' at the commencement of the proceeding there is no evidence to support this. The initial Points of Claim do not refer to it, and in fact there is no reference to it until the Second Further Amended Points of Claim dated 21 April 2005. If this was a genuine concern or belief held by the builder, one might reasonably have expected it to have been raised in the first three attempts at putting its case. It could have pleaded in the alternative that, if found liable for the works, its liability, for the cost of the rectification works, was capped at $5,000.00.

15 Mr Zumpano gave evidence that, despite repeated requests, the builder had not received or been able to obtain a copy of the Policy. However, the only formal request for a copy of the Policy appears to be the one made by letter dated 22 February 2005, which the insurer responded to promptly - on 1 March 2005.

16 On 18 March 2005 the builder's solicitors wrote to the insurer's solicitors, omitting the formal parts:

> *I refer to my letter dated 18th March 2005 and to that of my client addressed to your client dated 3rd March 2005.*
>
> *In accordance with the requirements under the insurance policy I now enclose my client's cheque in the sum of $5,000.00 being the obligation amount payable pursuant to the insurance contract.*
>
> *Please note that this amount is sent in accordance with the Terms of the Insurance Contract and that your client is in no way authorised to apply that amount other than strictly in accordance with the Terms on that policy.*

17 Copies of the correspondence referred to in the first paragraph of this letter were not provided to me. It is clear from this letter than the payment of the $5,000.00 was being made under the insurance policy. There is no reference to nor reliance on any other 'agreement'. This conduct does not support the builder's allegations that in some way its rights and obligations are as set out in the Agreement rather than the Policy or that the Policy does not accord with the Agreement made by the parties. Rather it must be taken as an implicit acknowledgement that the insurance contract is as set out in the Policy.

Is the builder's obligation to the insurer limited to $5,000.00?

18 It is helpful to set out the relevant extracts from Part B of the Policy:

> Subrogated rights of the Insurer
> …

3. Upon the Insurer accepting liability in respect of a claim under this policy, the Insurer is subrogated to any rights of the Building Owner against any party, including but not limited to the Builder, whether or not the Building Owner will or has been fully or partly indemnified or whether or not any payment has been made by the Insurer.

4. The Insurer will not enforce its right of subrogation to recover from the Builder:

   (a) any sum which exceeds the Builders Obligation Amount stated in the Schedule in respect of a claim for which the Insurer has accepted liability, including any costs and expenses incurred by the Insurer,

   (b) where the Builder bears the total cost of rectification of all or any defects that are the subject of a claim.

   PROVIDED THAT:

   (c) within 30 days of demand by the Insurer, the Builder pays to the Insurer the Builders Obligation Amount stated in the Schedule or such lesser amount for which the Insurer has accepted liability in relation to the Building Owner's claim, including costs and expenses incurred by the Insurer in relation to such claim; and

   (d) the Builder complies with the terms, conditions, limitations and exclusions of this policy applicable to the Builder (which are conditions precedent to the Builder's right under this subclause (4)).

5. The Insurer will, where the Builder rectifies all or any defects that are the subject of a claim by a Building Owner, pay to the Builder the amount by which the total cost of rectification exceeds the Builders Obligation Amount stated in the Schedule;

   PROVIDED THAT:

   (a) The Builder obtains the prior written approval of the Insurer to undertake the rectification work;

   (b) The Insurer will not pay for the cost of the Builder completing its obligations under the Major Domestic Building Contract including but not limited to any defects liability or maintenance period or similar provisions and compliance with the warranties implied by Section 8 of the DBC Act; and

   (c) These provisions are subject to the Building Owner's right to refuse access to the Builder as provided for in clause 1(d) of Claim Procedures.

and

7. The Builder must:

   (a) take all reasonable precautions to avoid or minimize additional loss or damage;

   (b) allow any person nominated by the insurer reasonable access to the relevant building site to inspect, rectify or complete the domestic building work;

   (c) not undertake or cause to be undertaken any rectification works without the Insurer's prior written approval;

   (d) promptly comply with the Insurer's reasonable directions in relation to the completion or rectification of any work under the Major Domestic Building Contract;

   (e) not admit, exclude or limit its rights against any person or settle or defend any claim without the prior written approval of the Insurer who shall be entitled to be subrogated to the rights of the builder. The Insurer may for its own benefit prosecute any claim for indemnity or damages to recover amounts paid or otherwise against any person.

19 The Policy and the other documents relied upon by the builder refer to the maximum a builder ***will pay*** (emphasis added) in respect of any claim being $5,000.00. The first paragraph on each of the quotations provides: *'remember, under your current job specific arrangements, the insurer has the right* ***to recover from you, any claim paid*** *up to the maximum limit of indemnity under the policy of $100,000.00'* (emphasis added). Further, the document headed 'THERE IS A BETTER WAY TO ARRANGE YOUR HOME WARRANTY INSURANCE' provides in the boxed comment next to the boxed heading 'Protection':

> 'Unlike purchasing job specific insurance Dexta offers you a choice of excess options $5,000.00, $10,000.00, $25,000.00 or $50,000.00. This allows you to 'cap' any potential liability in the unlikely event of a claim. This major benefit offers major protection to your balance sheet. It also protects you with the knowledge that no single claim is going to affect your bottom line profit beyond the amount that you choose.
>
> *Remember: under the 'job specific' type insurance the Insurer has the right to cover from you every cent* ***paid on a claim*** *which could be as much as $100,000.00 plus costs incurred*.(emphasis added).'

20 By facsimile dated 5 February 2001 Dexta in a facsimile from Stan Walczak advised Mr Zumpano:

> Also, as discussed last Friday we are prepared to provide cover based upon the $5,000.00 excess option for a total premium of $30,000.00. Before we can issue your certificates we require completion of the Deeds of Indemnity subject to the $5,000.00 as agreed. I am sending this direct to you as Rohan Jeffries is unavailable today and his office is unsure as to his dialogue with you regarding this matter.
>
> If you have any questions regarding completion of the deeds please call.

21 The Deed of Indemnity was subsequently executed by Charnley Glen Pty Ltd which is noted in the Schedule as 'trustee for the Alrose Trust and the Zumpano Family Trust (herein referred to as the Indemnifier)' Of particular relevance here is Clause 2 of the Deed of Indemnity which provides:

> The Indemnifier unconditionally and absolutely agrees to indemnify and keep indemnified the Insurer for all **loss, damage, costs, charges or other liabilities incurred or paid as a result of any claim** arising under the Policy and all amounts which the Insurer **must be and is liable to or may become liable to pay under the said policy (whether or not the Insurer has paid any amount)** in all cases, whether or not the claim arises or is made before or after the date of this deed PROVIDED ALWAYS that the amount of such indemnity shall be no greater than $5,000.00 per claim. (emphasis added)

22 It is submitted on behalf of the insurer that the Policy provides a means to enable the builder to limit the insurer's rights of recovery against it should it be required to indemnify the owners and payment is made to them. In my view it is clear – the excess will apply only when the insurer has made or committed itself to make payment to an owner on a claim, and seeks recovery of that payment from the builder.

23 I am satisfied there is nothing in the undated letter from Mr Walczak, the two undated quotations or the Policy that could be construed as absolving the builder from complying with its statutory and contractual obligations to

rectify its own defective work or affording the builder with any protection from liability to do so.

Does 'Moutidis' apply?

24 Although on the face of it the situation in *Moutidis v HGFL* [2003] VCAT 1347 seems remarkably similar I am satisfied there are distinct factual differences. In *Moutidis* Bowman J ruled that the builder's liability under a similar policy of insurance was limited to $10,000.00 being the excess he had selected. In that case the builder was provided with a quotation outlining different premiums depending on the level of excess chosen. It was accepted that the builder had been told by the insurer's agent that *'if there was a claim he would have to pay the amount of the excess'*. A Deed of Indemnity was executed providing that the amount of the indemnity was limited to $10,000.00. The builder subsequently received the insurance policy but did not read it so was not aware that it contained what His Honour described as a 'rigorous exclusion clause' whereby the builder would be liable pay the full amount of the liability - $100,000.00 – where the building contract was terminated due to the failure of the builder to complete the building works. The insurer did not draw the builder's attention to the exclusion clause nor the differences between the policy wording and what he had been told by the insurer's agent or what was set out in the quotations and the Deed of Indemnity.

25 However, unlike in this case, in *Moutidis* Bowman J was satisfied that the builder had relied on the written and oral representations in entering into the contract of insurance, and that the policy provisions did not accord with his reasonable belief of the terms and conditions of that contract of insurance. For the reasons set out above, I cannot be satisfied there has been a similar reliance, in this case, particularly, in circumstances where the builder has relied on the Policy for making the payment of the 'obligation amount', and

not any previous agreement. Also in *Moutidis* it was accepted that this was a new type of policy

> *'with which the builder was unfamiliar. The Applicant had not used it before'* (para 5)
>
> and
>
> *'...Further, the uncontested factual basis upon which I am determining these questions establish that the particular condition could not even be described as one usually attached to such policies. This was a new form of insurance for builders, and the structure and content of the policy are different from that previously in use.*(para 35)

26 In this case, Mr Zumpano confirmed under cross-examination that the builder had previously had similar insurance with FAI. He said that he had never seen a copy of that policy, nor had he made a similar claim under it. The builder had always adopted a commercial approach to the resolution of any claims which, he said, had all been less than the 'excess' (although there was no evidence in relation to any other claims to support this) and further, he had been advised by a previous lawyer that this option was not available under the policy. That advice was not tendered in evidence.

27 I was referred to a number of authorities by Counsel for both parties, all of which, in relation to 'insurance contracts', were considered in detail in *Moutidis.* It seems unnecessary to generally consider them again here other than to confirm that I respectfully agree with His Honour's analysis and application of those authorities.

28 Whilst I accept that where there is any seeming inconsistency or ambiguity the Policy should be construed *contra proferentum* I am not so satisfied here. It is clear on a careful consideration of the Policy wording that the builder is obliged to comply with its statutory and contractual obligations to the owners, and carry out all necessary rectification works as and when directed by the insurer.

29 Mr Kempton gave evidence, on behalf of the insurer, that no other builder had sought to pay the obligation amount nor recover monies expended over and above the obligation amount in carrying out rectification works. One might have expected similar demands had there been a general misunderstanding about the nature and extent of the insurance coverage.

Should clauses 5(b) and 7(d) of Part B of the Policy be deleted?

30 The builder seeks a declaration that clauses 5(b) and 7(d) are void or alternatively rectification of the Policy by deletion of those clauses on the grounds they were included by mutual mistake of fact. There is simply no evidence to support this, and in any event, for the reasons set out above, I do not consider the obligations set out in clauses 5(b) and 7(d) to be inconsistent with the Agreement.

31 It is submitted on behalf of the builder that, if it is required to carry out rectification and completion works as directed by the insurer at its cost, it will not obtain any benefit for the payment of the additional premium and the so-called capped liability is illusory. I reject this. It is clear from clauses 5(b) & 7(d) that the builder must comply with the insurer's reasonable directions to carry out completion or rectification works. However, should the insurer be required to indemnify an owner for any other of the items (other than completion or rectification works) as set out in Part A of the Policy the builder's liability will be capped.

32 I should note in passing the submission on behalf of the builder that even where a party to a contract fails to read the relevant documents, such party, in this case, the builder, can rely on them as evidence of the contractual intention of the parties when the contract was entered into. I was not referred to any authority to support this curious submission and it is rejected.

33 Further, it is, in my view, important to remember that the purpose of warranty insurance is to afford protection to home owners should a builder be unable to fulfil its statutory and contractual obligations. It is not to enable a builder to carry out works in breach of those obligations and then to leave it to the insurer to 'make good'. A builder cannot be rewarded for failing to carry out works in a proper and workmanlike manner. This is clearly not the intent and meaning of the terms and conditions of the Policy which I reiterate I am satisfied the builder relied on in tendering the payment of $5,000.00.

The Works Schedules

34 Having determined the builder is obliged to carry out the necessary rectification works I now consider the builder's claims in relation to the Second and Third Works Schedules. It is submitted on behalf of the builder that the Second Works Schedule should be declared void, because (from paragraph 8.4 (and the misnumbered sub-paragraphs) of the Third Further Amended Points of Claim:

> 8.4 The Second Works Schedule is defective because it fails to specify:
>
> 6.5.1 the work to be performed
> 6.5.2 the manner in which the work is to be performed; and
> 6.5.3 the areas of the Premises to which the work is to be performed.

35 I accept the submission on behalf of the insurer that, at no time, did the builder indicate it did not understand the nature of the CTI report or the works to be carried out. I am aware that it is the usual practice of the warranty insurers to direct a builder to rectify defective works, but not to specify the method of rectification. Whilst the Second Works Order may, on the face of it, seem to be lacking in clarity I am satisfied the defects it was being directed to rectify would have been abundantly clear to the builder on considering the CTI Report.

36 The builder alleges that the issuing of the Third Works Schedule is an abuse of process because (from paragraph 8.7 of the Third Further Amended Points of Claim):

> 8.7 The issuing of the Third Works Schedule by the Respondent is an abuse of process of the Tribunal in that:
>
> 8.7.1 The Third Works Schedule directs the Builder to rectify defects to the Premises that are substantially the same as the alleged defects identified in the CTI Reports relied on in the Second Works Schedule.
>
> 8.7.2 The Respondent issued the Third Works Schedule at a time when these proceedings alleging the Second Works Schedule is defective were still on foot;
>
> 8.7.3 The Third Works Schedule was issued by the Respondent for the purpose of avoiding the defects in the Second Works Schedule by the Application in paragraph 6.5 above.

37 This is a curious allegation in circumstances where on the one hand the builder seeks a declaration that the Second Works Schedule is void because it lacks clarity and direction as to the nature and method of the required rectification works, but, on the other, alleges that the Third Works Schedule is an abuse of process because it relates to the same defects as those identified in the CTI Report. To make this allegation is confirmation that it did not have any difficulty identifying what was reported by CTI as being defective works.

38 The Third Works Schedule was sent to the builder under cover of a letter of 19 October 2004 from its solicitors. It is quite clear that this is a revised direction, resulting from the re-assessment of the claim following the unsuccessful mediation on 12 August 2004, presumably to clarify any perceived uncertainty or lack of clarity in the Second Works Schedule. I am satisfied this is entirely appropriate and cannot be regarded as an abuse of process.

Unconscionable conduct and estoppel

39 Although pleaded by the builder there was no evidence or submissions on its behalf in relation to either of these grounds. In any event a careful consideration of the various versions of the builder's Points of Claim fails to reveal any pleadings setting out the legal and factual basis upon which the insurer should be estopped from relying on the Policy. It is not sufficient to merely plead an estoppel 'in passing' as it were. I therefore make no findings in relation to them other than to once again note I have found the builder sought to rely on the Policy in tendering the $5,000.00 and it would be unusual indeed for a party seeking to rely on a document to succeed in denying the other party the opportunity to do so.

Conclusion

40 For the reasons set out above I am satisfied that the builder is obliged to fulfil its statutory and contractual obligations to carry out the rectification works. The various decisions of the insurer must therefore be affirmed.

41 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT, C. AIRD