

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D201/2006

CATCHWORDS

Domestic building, quantification of loss, "scam", previous determination of merits, entitlement under *Fair Trading Act*, loss assessed on the basis that warranty insurance has been lost, claim for loss of rental, consequential loss under warranty insurance, 20% cap for non-completion, mitigation, rule in *Jones v Dunkel*, Tribunal not bound by rules of evidence, behaviour of the Respondent to the Applicants, referral to the Director of Consumer Affairs.

APPLICANTS

Neill Hill, Arlieal-Isa Hill

RESPONDENT

George Bastecky

WHERE HELD

Melbourne

BEFORE

Senior Member M. Lothian

HEARING TYPE

Hearing

DATE OF HEARING

14 and 15 June and 16 July 2007

DATE OF ORDER

20 September 2007

CITATION

[2007] VCAT 1711

ORDER

1. The Respondent must pay the Applicants \$39,758.60 forthwith
2. Costs reserved with liberty to apply.
3. The Principal Registrar is directed to refer this decision to the Director of Consumer Affairs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants

Mr S. Stuckey of Counsel

For the Respondent

Mr D. Pumpa of Counsel

REASONS

- 1 My task is to determine quantum. How much, if anything, the Respondent, Mr Bastecky, should pay the Applicants, Mr and Mrs Hill (“the Hills”).
- 2 The Hills entered two contracts with World Property Investments Pty Ltd (“WPI”) a company that has been liquidated for insolvency. To get building permits, WPI needed at least one director who was registered as a building practitioner¹. It did not have one. Instead, it “borrowed” the registration of a number of registered building practitioners, one of whom was Mr Bastecky. Mr Bastecky was paid a “finder’s fee” of \$2,500.00 per customer for each such contract, although it was WPI who did the finding. This proceeding concerns the second contract between WPI and the Hills, for the building of an investment property at Lancefield.
- 3 Mr Bastecky’s role is important because he applied for the statutory warranty insurance necessary to obtain a building permit for the house at Lancefield.
- 4 Deputy President MacNamara made the preliminary determination on 22 December 2006 and described what happened as a nasty scam. The questions he had to determine were whether Mr Bastecky was the builder, and if he was not, whether Mr Bastecky was liable to the Hills in any other way. He answered “no” to the first question. In consequence, the warranty insurer has no obligation to the Hills. To the second he answered yes- pursuant to sections 11 and 159 of the *Fair Trading Act* 1999.
- 5 To determine quantum I will consider:
 - If I may consider whether the Hills had some knowledge of the “scam”,
 - Whether the Hills can claim against Mr Bastecky
 - The extent of the Hills’ loss, and
 - Whether the Hills failed to mitigate their loss.

I will also remark on Mr Bastecky’s behaviour.

HISTORY

- 6 The history of this dispute is described in more detail in the preliminary determination. The first contract, not the subject of this proceeding, was for construction of the Hills’ home at Sunbury. The second contract, the subject of this proceeding, was dated 27 February 2003. It was for the construction of the investment property at Lot 11, James Patrick Way, Lancefield for \$225,000.00.

¹ s176(4) of the Building Act 1993

7 As found by Deputy President MacNamara and admitted by Mr Bastecky, the way WPI “borrowed” Mr Bastecky’s registration was to have him sign four pages for each of the projects between WPI and the Hills. The “contract” signed by Mr Bastecky for the Lancefield property was for \$110,000.00 and dated 14 August 2003. As Deputy President MacNamara said at paragraph 15 of the preliminary Determination:

The Hills denied signing that contract and it appears that this document was prepared by WPI for signature by Mr Bastecky and included photocopy signatures by the Hills.

8 It is common ground between the parties that the building permit, applied for by Mr Bastecky, was also dated 14 August 2003. Deputy President MacNamara found Mr Bastecky applied for builders warranty insurance on the same day.

9 Deputy President MacNamara said:

In the present case it is clear that the indemnity insurer was misled by Mr Bastecky’s submission of the four pages constituting the August 2003 document into believing that there was a genuine contract for carrying out of major domestic building work between the Hills and Mr Bastecky.

10 Mr Bastecky did no building. He said that he paid half a dozen visits to the Hills’ Sunbury property and in the preliminary hearing he agreed that the Sunbury property was “far larger and more elaborate than could have been provided at a cost of \$110,000.00”. He also said in the preliminary hearing “I was not in [the Lancefield] project in any manner”.

11 When WPI ceased building, the Hills sought to claim on the warranty insurance or, when they became aware of his involvement, to have Mr Bastecky complete the job. Mr Bastecky wrote to the Hills’ solicitors on 3 April 2006, denying that he was ever the builder. The letter gave the impression that he had never signed a building contract with the Hills. He also wrote to the warranty insurer in the same terms “to cancel this policy”.

12 As found in the Preliminary Determination, work commenced in September 2003. It was incomplete at the time of the preliminary Determination and remains so.

MAY I CONSIDER WHETHER THE HILLS HAD ANY KNOWLEDGE OF THE “SCAM”?

13 Mr Bastecky has tried to re-open the issue of whether the Hills were misled. The basis of his assertion is that Mrs Hill worked for WPI between about June 2003 and September 2004 and would have been aware of its method of doing business. Had the Hills been aware of the scam - been knowing parties to it - they would have lost nothing because they would have taken the risk of building without warranty insurance.

14 I note the contract between the Hills and WPI was dated 27 February 2003, before Mrs Hill commenced work at WPI. The four-page document for the Lancefield property Mr Bastecky signed was dated 14 August 2003, during the time she worked for WPI.

15 On 14 June 2007 I ruled in part:

The Respondent may not adduce any evidence which seeks to prove that the Hills had knowledge which would negative any liability at all, nominal or otherwise, under the [*Fair Trading Act 1999*].

16 I made that ruling because Deputy President MacNamara would not have found Mr Bastecky was liable to the Hills if he found they were knowing parties to the scam. He also made the following finding, albeit when considering estoppel:

In the present case, as the Hills conceded, they had no knowledge of Mr Bastecky's involvement, in no way did they rely upon him, they relied upon WPI. [paragraph 36]

I therefore find I am not entitled to revisit the question of whether the Hills were knowing participants in the scam.

17 Even if I were so entitled, I am satisfied on the evidence of Mrs Halina Zablocki, adduced in cross-examination, that Mrs Hill could not be expected to understand that the warranty insurance arrangement was either illegal or disadvantageous to her. Mrs Zablocki was the office manager and the wife of a previous director, since bankrupted. She was called to give evidence for Mr Bastecky. She agreed that she could be expected to understand more about the business of WPI than Mrs Hill and said that she knew of nothing which was wrong with the warranty insurance while Mrs Hill was an employee. When asked about Mrs Hill's probable knowledge she said: "None of us knew it was a scam".

18 If Mrs Hill had become aware of the scam at about the date Mr Bastecky signed the four pages, it might have been prudent to investigate further with a view to ending the contract, but this would have been unlikely to improve her standing with her employer. Further, in the light of Mrs Zablocki's evidence, I accept that she was unlikely to have known.

19 Mr Pumpa submitted for Mr Bastecky that as Mrs Hill gave no evidence, I should draw an adverse inference in accordance with the rule in *Jones v Dunkel*². The Tribunal is not bound by the rules of evidence, but is bound by the rules of natural justice³ and I accept that had her evidence been critical to this question, I might have drawn such an inference. As I consider the question has already been determined and the Hills' opportunity to extract themselves from the scam was limited, I do not consider her evidence critical.

² (1959) 101 CLR 298

³ s98 *Victorian Civil and Administrative Tribunal Act 1998*

CAN THE HILLS CLAIM AGAINST MR BASTECKY?

20 Deputy President MacNamara found there is a cause or connection between the contravention of s11 of the *Fair Trading Act* by Mr Bastecky and the loss suffered by Mr and Mrs Hill. He remarked:

In the present case it may be inferred that it would be possible for the Hills to prove by evidence that there were solvent and reputable builders who could have undertaken work at Lancefield for them who would not have become insolvent part way through. On the other hand, there may have been credit issues or price issues which might have made a contract offered by one of the solvent providers less favourable than the one offered by WPI. Such issues would be relevant to the quantum of damage.

21 The question is therefore whether there was at least one solvent and reputable builder who would have been willing to build for the Hills in 2003, at approximately the same price as agreed by the Hills and WPI.

22 Mr Geoffrey Rawlins of Rawlins Constructions Pty Ltd gave evidence for the Hills. He has been a builder at all times relevant to this dispute. There is nothing to show that he is other than “solvent and reputable”. He gave evidence that he would have been willing to enter a contract in 2003 to build the Lancefield property for \$226,000.00. He was not cross-examined, but in answer to my question, said that he would have been willing to build for them if he had adequate proof that there would be payment. He would have needed to see proof of a bank loan and/or financial statements.

23 Mr Baglin, quantity surveyor, also gave evidence for the Hills. He estimated the cost of building the Lancefield property at \$222,311.00. He based it on the drawings, specification and engineering calculations. He said that there was no full bill of quantities, but he considered his indicative estimate reasonably accurate.

24 There are a few discrepancies between the amount estimated by Mr Baglin and the items in the contract signed between WPI and the Hills. For example, Mr Baglin included ducted heating when only a wall furnace was allowed for. Similarly, amounts for some of the items to be supplied were greater than the prime cost sums allowed in the contract, but Mr Baglin’s explanation was that the sums he allowed included installation.

25 I find that the sum of \$225,000.00 was reasonable for a contract to build the Lancefield house in 2003 with a reputable and solvent builder.

26 Mr Hill’s evidence is accepted that he would not have contracted with WPI if he had known about the lack of warranty insurance.

27 I am satisfied that the Hills could have built with a different solvent and reputable builder had they not built with WPI, but I am not satisfied that

they would have. This is despite the statement in Mr Hill's witness statement of June 2007 that:

Had we known that ... WPI would not have effective home warranty insurance ... [we] would have sought a licensed builder with the required insurance to build our house.

28 As Mr Hill said at the third paragraph of his witness statement of 17 November 2006:

We first became involved with WPI in early 2003. WPI offered a package of services that suited our needs. We were both in our middle years, had little in the way of assets and were renting premises in Lancefield.

29 I asked Mr Hill how it was that a couple with this history could own their home and be building an investment property. He answered that WPI facilitated the first loan for their Sunbury home. Mr Hill recounted that it was passed by the Melton manager for the National Australia Bank ("NAB"), then a Mr Rocky, Rocco or Rino Calendrella, an area supervisor, approved the loan. He said Mr John Capitan, whom he believed was associated with both WPI and Capitan Investments, suggested the Lancefield investment. Mr Hill said his response to Mr Capitan was that he and his wife "couldn't afford it" but Mr Capitan said "leave it with me". Mr Hill recalled telling Mr Anthony Calendrella, also of NAB "we can't afford this" but that he was assured tenants would repay the loan. Mr Hill said that while the concept of owning a rental property seemed "too good to be true" he did not think he and his wife had been offered a special deal. He agreed the suggestion to build the Lancefield property had come from Mr Capitan.

30 Mr Hill's nervousness about the project and the apparent working relationship between Mr Capitan and officers of the NAB convince me that they would not have built the Lancefield property without Mr Capitan's urging. These factors also lead me to doubt that the Hills would have been able to change builders if WPI's lack of registration had been discovered by about mid-August 2003 - the critical time of Mr Bastecky's involvement. The Hills have the onus of proving what they would have done if they had discovered WPI's lack of capacity to obtain insurance, and they have failed to prove that they would have built with another builder.

31 Nevertheless, Mr Bastecky enabled WPI to commence building for the Hills, therefore he must compensate them for the loss caused to them by his conduct.

32 Section 159(1) of the *Fair Trading Act* 1999 provides:

A person who suffers loss, injury or damage because of a contravention of a provision of this Act may recover the amount of the loss or damage or damages in respect of the injury by proceeding against any person who contravened the provision or was involved in the contravention.

- 33 I find that Mr Bastecky deprived the Hills of having warranty insurance when WPI became insolvent, therefore the measure of their loss is the amount that they could have recovered from the warranty insurer.

WHAT IS THE HILLS' LOSS?

Amount otherwise payable to WPI

- 34 The Hills pleaded that they have paid \$148,200.00 under the building contract with WPI. This is consistent with records obtained under witness summons from the NAB. Their Points of Claim, even as amended, are hard to follow. At paragraph 9 they claimed "The cost of completion of the works less the unpaid balance of the contract price (\$225,000.00 minus \$148,200.00 equals \$76,800.00)." \$76,800.00 is the amount which would have been payable to WPI if the work had been successfully completed. If it were their only loss, their loss would be nil. Rather, it is the amount to be deducted from any amount awarded to them.

Cost of completion and rectification

- 35 The Hill's Particulars of Loss and Damage seek the cost of completion and rectification of the works of \$106,068.60. Mr Ferguson gave evidence for the Hills. He is a registered builder and has provided a quotation to complete the work for this sum.
- 36 Mr Ferguson impressed me as a builder who might not provide the very cheapest price, but who usually uses the same sub-contractors and who does not seek to make an excessive profit. On the whole, the items in his quotation appeared reasonable.
- 37 Evidence of the cost of completion was given for Mr Bastecky by Mr Paul Spitteri, a construction manager for Quantum Homes. The Quantum Homes "contract price" for completion was \$93,000.00, which included various provisional sums discussed below, totalling \$10,700.00, therefore the work equating to the work priced by Mr Ferguson was valued at \$82,300. Mr Spitteri's evidence assisted me to some degree, but he said that he had not visited the site and admitted that he would need to undertake further investigation before he would be willing to enter a contract. On the whole I prefer the evidence of Mr Ferguson.
- 38 I make three deductions from the sums allowed by Mr Ferguson:
- 39 The first is for floor tiles. Mr Ferguson allowed \$10,260.00 for 114 square meters of tiles, which is \$90.00 per square metre, for tiles and laying. The tiles provided for in the specification were \$25.00 per square metre, and to provide tiles of similar quality he allowed \$30.00 for the tiles. He allowed \$60.00 per square meter for laying and incidental materials and I note Mr Spitteri conceded under cross-examination that \$90.00 per square metre for tiles and laying is reasonable. I allow \$90.00 per square meter and note that the area of tiling indicated by him is approximately 95

square metres. In place of \$10,260.00 I allow \$8,550.00 which represents a deduction of \$1,710.00 from Mr Ferguson's price.

- 40 The second is for vanities. The two vanities were allowed in the prime cost schedule at \$330.00 each. Mr Ferguson has allowed \$1,100.00 in total, and when cross-examined by Mr Pumpa, agreed that the price was substantially higher than the allowance and said "The Owners would need to pay the difference". I allow \$800.00 for the vanities, which represents a deduction of \$300.00 from Mr Ferguson's price.
- 41 The third is for the inclusion of a pantry in the kitchen cabinets. Mr Ferguson agreed that this should not be included and conceded that there should be a deduction of \$1,000.00 for this item.
- 42 The deductions total \$3,010.00.
- 43 There are also a number of items to consider for addition to Mr Ferguson's quotation. He did not include external concreting, landscaping, carpet, hot water service, fencing, insurance (estimated \$3,000.00) light fittings, blinds or curtains, gas bottles and a septic tank.
- 44 Having regard to the specification, I am satisfied that the contract did not call for WPI to provide gas bottles or a septic tank. Either or both might have been necessary at the time of the contract, but the details of this contract were not Mr Bastecky's responsibility. There also appears to be no specification of, or allowance for, light fittings. Item 14.4 of the specification is headed "Light Outlets" and there is a reference to page 5B, but there is no reference to light fittings on that page.
- 45 I note that the sums allowed for the other items on page 5B of the specification were:
- | | |
|--------------------|-------------|
| • Carpet | \$3,000.00 |
| • Landscaping | \$1,500.00 |
| • Drive way | \$2,000.00 |
| • Window coverings | \$1,800.00 |
| • Fencing | \$1,200.00. |
- 46 Mr Ferguson estimated \$1,600.00 to supply and fit the hot water service, but it had been included as a prime cost item for supply only at \$650.00. Mr Ferguson said that there were no hot water systems available at \$650.00. While I accept his evidence, it is not Mr Bastecky's fault that the Hills entered a contract containing unrealistically low estimates. I allow \$1,000.00 for supply and fitting of the hot water system.
- 47 In order to determine the current cost of completion of the items WPI was obliged to provide under its contract with the Hills, I allow the insurance at \$3,000.00, the hot water service at \$1,000.00 and the items in paragraph 42; a total of \$13,500.00.

- 48 The nett adjustment to Mr Ferguson's quotation is an additional \$10,490.00.

Mortgage debt and interest

- 49 In the alternative the Hills sought the amount they say they could have avoided incurring, which is further mortgage debt on the premises standing at \$231,927.19 from 9 March 2007, with interest on building costs of approximately \$33,000.00. They have failed to prove their loss on this basis.

Loss of rental income

- 50 They have also claimed further or in the alternative for loss of rental of \$37,232.14. No copy of the full warranty policy has been provided to me, but the policy schedule/certificate of insurance referred to the Domestic Building Insurance Ministerial Order No s98 of 23 May 2003 ("Ministerial Order"). Having regard to Clause 50(3)(a)(viii) which entitles a warranty insurer to exclude consequential loss, the Hills have failed to satisfy me that they are entitled to any sum for rent forgone.

Limit under the policy for completion claims

- 51 Mr Pumpa correctly submitted that, in accordance with clause 17 of the Ministerial Order, owners seeking to claim for completion are limited to 20% of the contract sum – see *Housing Guarantee Fund Ltd v Dore* [2003] VSCA 126. Little distinction has been drawn by the Hills between rectification items and completion items, but I note that there is at least some of the amount allowed by Mr Ferguson which is attributable to rectification. For example, straightening the frame is a rectification item.
- 52 In any event, the distinction is irrelevant because the relevant contract sum is \$225,000.00 of which 20% is \$45,000.00, which is more than the total sum allowed.

Amount alleged to be owing by the Hills to WPI for the Sunbury house

- 53 No evidence was given about this issue by Mr Bastecky, but during cross-examination Mr Hill was asked about a demand for payment from the administrator of WPI for \$31,490.00. Mr Hill said that he had sought a break-down of monies owed and received no response. In the absence of further evidence, this sum is not taken into account.

HAVE THE HILLS FAILED TO MITIGATE THEIR LOSS?

- 54 Mr Bastecky claims the Hills failed to mitigate their loss by not entering a novated contract with a Mr Lamprou, or a company operated by him. According to Mr Hill, Derek Jansz, whom he identified as a director of WPI, came to their door in early 2005 with a deed of novation, and said to Mr Hill, "sign it". The deed novated the contract to Mr Lamprou. Mr Hill said he shut the door in Mr Jansz' face. He said he no longer trusted

WPI or anyone associated with it and he just wanted the warranty insurer to complete the Lancefield house.

- 55 Mr Bastecky admitted under cross-examination that Mr Lamprou had been a non-executive director of WPI. I find Mr Hill's concern about the reliability of WPI and its associates was justified and I do not regard refusal to deal with a director of WPI as unreasonable.
- 56 Mr Pumpa for Mr Bastecky also submitted that the loss should be assessed in about mid-2004, rather than at 2007 prices. No support has been given for the assertion that it was reasonable for the Hills to undertake work before receiving the proceeds of this proceeding.
- 57 I find no evidence that the Hills have failed to mitigate their loss.

MR BASTECKY'S BEHAVIOUR TOWARD THE HILLS

- 58 I comment further on Mr Bastecky's behaviour towards the Hills, not because it is relevant to the determination of liability or quantum, but because it might be relevant to determination of any costs application. I also wish to bring it to the attention of the relevant authorities.
- 59 Deputy President MacNamara drew the conclusion that Mr Bastecky did not think through the consequences of his actions. At paragraph 17 he said: "[Mr Bastecky] appears to have given no thought to any apparent liability which this arrangement might have subjected him to." Evidence given in the hearing before me indicates that Deputy President MacNamara was generous in his assumption.
- 60 On 3 April 2006 Mr Bastecky wrote to the Hills' solicitor. He said, omitting the formal parts:

I would like to inform you that although my name has been registered as the builder for this home a long time ago, your clients Mr and Mrs Hill unfortunately did not proceed to build with me.

I believe they chose to build with another party.

I have never met with your clients on their land.

I have never stepped on their land and have done any works there.[sic]

I have never signed any building agreements nor plans and specification to build with your clients.

I have never received any moneys from your clients.

I have also been in touch with my insurance company to inform them of the above and I have asked them to cancel this policy.

Would you please have your client confirm these above facts via a letter to me.

The letter was copied to the Principal Registrar of VCAT, as by this date the proceeding had commenced.

61 When asked by Mr Stuckey if what he said in the letter was untrue, he said "I signed the first four sheets of paper which had a progress payment of \$110,000.00." His explanation for the words "I have never signed any building agreement" was: "In my mind, at that time, it was not a full building agreement." He agreed, under cross-examination that he had an arrangement to lend WPI his license, that he was never going to enter a contract with the Hills, that he was never going to build for them and that WPI was always going to be the builder.

62 It is useful to transcribe some of the cross-examination of Mr Bastecky which took place on the afternoon of 16 July 2006:

Mr Stuckey:

You were lending your licence to WPI, and there was never a suggestion that you were going to enter into a contract with [the Hills].

Mr Bastecky:

Correct.

Mr Stuckey:

So why in your witness statement filed 8 December 2006 did you say at paragraph 6 "The owners were to enter a contract with me and with no-one else"?

Mr Bastecky:

I don't remember saying that.

Mr Stuckey:

I suggest to you, Mr Bastecky, that you will say whatever is necessary to get you out of the unfortunate situation that the decision to lend your licence has got you in.

Mr Bastecky:

Well, obviously, yes.

63 Mr Stuckey asked if Mr Bastecky cancelled the policy because he was concerned about the consequences for himself if the warranty insurer paid out. Mr Bastecky replied: "The insurance company wouldn't pay out". He later agreed that there would have been financial consequences for himself if the insurer had paid out the claim. He answered "yes" to the proposition put by Mr Stuckey:

To avoid any risk of that, was it not, that you went and told your insurer that there had been no building contract and to cancel the policy.

Mr Stuckey continued:

And the reason for that was as far as you were concerned, it was better that the loss lies on the Hills than being transferred to yourself.

Mr Bastecky replied that he didn't know how to answer the question and did not know what the loss would be. Mr Stuckey said:

You must have understood when you decided to take a cash payment for making your licence available to WPI and having insurance arranged in your name, there might come a day when somebody would wish to call on that insurance.

Mr Bastecky:

Yes, yes of course.

Mr Stuckey:

And was it always your intention that if that should occur that you would explain there was no contract with you and the insurance would be cancelled?

Mr Bastecky:

Correct.

Mr Stuckey:

Did it ever strike you at the time or since that might be a little unfair to the people who had entered into building contracts with World Property investments?

Mr Bastecky:

Well, from my understanding, what's happened is that these clients knew exactly what was going on, and ...

Mr Stuckey:

Did you take steps to ascertain that at the time?

Mr Bastecky:

No. I only found out after WPI went broke and I was able to get copies of documentation from the receiver.

- 64 A reasonable person in Mr Bastecky's position must have known that what he was doing was not just dishonest but also likely to harm the Hills. The nasty scam extended to ensuring that if the Hills claimed on the warranty insurance, it would not be available.

CALCULATION OF DAMAGES

Cost of completion quoted by Mr Ferguson	\$106,068.60
Plus nett adjustment	<u>\$10,490.00</u>
	\$116,558.60
Less balance of WPI of contract price	<u>\$76,800.00</u>
Total payable by Mr Bastecky to the Hills	\$39,758.60

COSTS

65 The parties have liberty to apply for costs, but are reminded of the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998.

REPORT TO THE DIRECTOR OF CONSUMER AFFAIRS

66 I am alarmed by the apparent deliberation with which those behind WPI and Mr Bastecky have avoided provisions designed to protect home-owners. I therefore direct the Principal Registrar to refer this decision to the Director of Consumer Affairs.

SENIOR MEMBER M. LOTHIAN