VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D616/2008

CATCHWORDS

Application for review of decision of warranty insurer, whether there has been deemed acceptance of the claim, extent of indemnity, whether legal costs of earlier proceeding are covered under the policy, whether legal costs are loss and damage.

FIRST APPLICANT	Deon Kenneth Isaacs
SECOND APPLICANT	Sonya Tissera-Isaacs
RESPONDENT	Vero Insurance Limited (ACN: 005 297 807)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	9 December 2008
DATE OF ORDER	4 March 2009
CITATION	Isaacs v Vero Insurance Ltd (Domestic Building) [2009] VCAT 358

ORDER

1. The respondent must pay the applicants the sum of $52,212.98.
2. The application is otherwise dismissed.
3. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr S. Smith of counsel
For Respondent	Mr A. Laird of counsel

REASONS

1 The applicant owners, Mr and Mrs Isaacs, entered into a contract with JHL Design Pty Ltd for the construction of a new home in October 2004. This was not a happy arrangement and disputes arose between the parties resulting in the owners' instituting proceedings against the builder in this tribunal in D514/2006 ('the earlier proceeding').

2 In the earlier proceeding the owners claimed $95,789.46 plus interest and costs against the builder. The builder claimed $65,000.00 by way of counterclaim. As required under the relevant policy of warranty insurance ('the policy'), the owners gave the respondent insurer (the respondent in this proceeding) notice of the earlier proceeding in late July, early August 2006.

3 Following a 17 day hearing, the following orders were made on 5 November 2007:

1. The respondent must pay the applicants the sum of $52,212.98.
2. Claim and counterclaim otherwise dismissed.
3. The respondent must pay the applicants' costs of this proceeding (including all reserved costs) to be taxed in default of agreement in accordance with County Court Scale D.

On 13 November 2007 the owners advised the insurer of this decision.

4 The builder did not pay the amount ordered and on 19 March 2008 an external administrator was appointed. The circumstances surrounding the appointment of the external administrator are not known to me. On 2 May 2008, the owners lodged a claim with the insurer under the policy, seeking to recover the amount of the judgement sum and their legal costs of $184,611.97.

5 On 23 July 2008 the insurer's solicitors wrote to the owners setting out a response to their claim. The status of that letter, and in particular whether it contains a decision is a matter in contention. On 22 August 2008 the applicants lodged an application with this tribunal seeking the following orders, as set out in the prayer for relief in the Points of Claim, which accompanied the application.

I The sum of $200,000;

II Damages including exemplary damages pursuant to Section 53(2)(b)(ii) of the ***Domestic Building Act 1995*** (sic)**;**

III The Respondents pay the Applicant's costs of and incidental to this proceeding;

IV Such further or other orders as the Tribunal deems fit.

6 On 16 October 2008 directions were made for the filing and service of Points of Defence and a Reply and the proceeding was set down for hearing on 8 December 2008. At the hearing the applicants were represented by Mr

S. Smith of Counsel who had appeared for them at the hearing of the earlier proceeding, and the insurer was represented by Mr A. Laird of Counsel. Written submissions were provided by both and the insurer also produced a Tribunal Book of relevant documents which has been very helpful.

The scheme of domestic builders' warranty insurance

7 Counsel for the owners has produced extensive written submissions about the background to, and the current scheme of domestic builders' warranty insurance. Whilst thorough it does not assist me in determining the extent of the indemnity available under the policy.

8 Mandatory domestic builders' warranty insurance was introduced in 1995. Initially, indemnity was provided under what have become known as 'first resort policies' under which owners could make a claim without first seeking recourse from the builder. Insurers became increasingly reluctant to provide warranty insurance for a number of reasons, including the collapse of HIH, and a number of insurers exited the market. Ministerial Order S82 (20 May 2002) came into effect on 1 July 2002. Clause 8(3) provides:

> The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies of the builder dies, becomes insolvent or disappears.

Although revoked and replaced by Ministerial Order s98 of 2003 there was no change to this provision.

9 Consistently with the approach taken by other insurers offering warranty insurance, the insurer has included this limitation in clause 3.1 of the relevant policy. These policies have become colloquially known as 'last resort' and/or 'ddi' (dead, disappeared or insolvent) policies.

10 Where an owner or a builder is dissatisfied with the insurer's decision they can apply to this tribunal for a review of the decision. Where an owner is successful in any application for review under the first resort policies, they are able to claim from the insurer their reasonable legal costs and associated expenses of enforcing the claim. The indemnity available under the first resort policies is capped at $100,000.00 plus the reasonable legal costs and expenses of enforcing the claim. Under the last resort policies, the indemnity is capped at $200,000 including an owner's reasonable legal costs and expenses associated with a successful claim.

Has there been deemed acceptance of the owners' claim?

11 In their Points of Claim, filed with the application for review of the insurer's decision on 22 August 2008, the owners plead that they received a letter of rejection of their claim on or about 28 July 2008 dated 23 July 2007 (which I think should read 2008). But in their Reply, filed on 27 November 2008, they allege that the letter of 23 July 2008 is not a decision, that the insurer failed to determine their claim within the required 90 day period and is therefore deemed to have accepted it.

12 Clause 29 of Ministerial Order s98 of 1993 provides:

> The policy must contain a provision to the effect that if the insurer has not determined the claim as to liability within 90 days of receipt of the claim, then, unless the insurer obtains an extension of time from the insured or the Tribunal, the insurer is deemed to have accepted liability for the claim.

A provision to this effect is contained in clause 9(b) of the relevant policy.

13 On 23 July 2008, within the 90 day period (the claim having been lodged on 2 May 2008), the insurer's solicitors wrote to the owners setting out the insurer's position in relation to indemnity. There are two parts to this letter which is headed 'Without prejudice save as to costs'. Under the heading **'1. Incomplete/defective work'** the insurer's solicitors express a preliminary view that the policy will not apply, then offer to indemnify the owners *'the amount set out in the VCAT's orders of 5 November 2007 less any amount excluded by the terms of the policy such as interest and the cost of rectifying the fence'*. The owners are also requested to provide further information' including a copy of counsel's final submissions in the earlier proceeding, as to the calculation of the judgement sum of $52,212.98. It continues:

> 1.3 …Our client will then, under cover separate decision letter, decide the amount indemnifiable under the policy (eg the amount ordered to be paid less any excluded heads of damage or damage not subject to the indemnity given by the terms of the policy). <u>If you disagree with the separate decision letter, you will have the same avenue of appeal that is open to you in response to this decision (as per paragraph 2.5).</u> (emphasis added)
>
> 1.4 This offer is made in full and final settlement of your claim, including your claim for legal costs and disbursements incurred against the builder (discussed below) and is open for acceptance for 28 days after 25 July 2008.

14 The second part of the letter concerns the claim for legal costs. The insurer's position is clearly stated in paragraph 2.1 under the heading **'Legal costs and disbursements**:

> The policy covers reasonable legal costs and expenses associated with a successful claim against the insurer. The costs and expenses you are claiming indemnity for were incurred by you against the builder and are not costs associated with a successful claim against the insurer. Accordingly, your claim for reimbursement of legal costs is declined.

15 The insurer contends this letter constitutes a decision on the claim. However, as noted above it is in two parts. It is fair to say that the first part of this letter is confusing: after recording a preliminary view that the policy does not apply, and making the offer of settlement set out above, the insurer's solicitors indicate that, upon receipt of further information, a decision on quantum will be made and confirmed in a separate decision letter. Further, as noted above paragraph 1.3 continues:

> If you disagree with the separate decision letter, you will have the same avenue of appeal that is open to you in response to this decision (as per paragraph 2.5). (emphasis added)

16 I do not accept that this constitutes a decision on the claim for indemnity for incomplete and defective works. Referring to the settlement offer as a 'decision' does not make it a decision. It is clearly a settlement offer, open for acceptance for a limited period of time, and I find there has been deemed acceptance of the claim for incomplete and defective works. Such deemed acceptance is limited to the indemnity available under the policy.

17 However, there has clearly been a decision on the claim for reimbursement of legal costs as set out in paragraph 2 of the letter of 28 July 2008: *'your claim for reimbursement of legal costs is declined'*

18 Even if my interpretation of what seems so plain, is wrong and the insurer is deemed to have accepted the claim for reimbursement of legal costs, such acceptance is limited to the indemnity available under the policy. The insurer cannot be deemed to have accepted the claim for items to which the policy does not respond.

The claim for indemnity for incomplete/defective work

19 The only items which were not included in the settlement offer, and which the insurer contends are not covered by the policy, are interest and the 'fence'. It is common ground that the fence is defective. Further it is not separate from the house. Having heard sworn evidence from Mrs Tissera-Isaacs and considered the north and south elevations that were tendered by the owners, it is apparent that the fence is connected to the building. It seems to be more in the nature of a stone wall and the timber front gate is an integral part of the fence in the same way as a door is an integral part of the house. I find that the fence is covered by the indemnity under the policy.

20 Interest on the judgement sum is not covered by the policy by virtue of clauses 3.3(f), and 3.3 (h) (viii) and 1. However, it is unclear whether there has been any allowance for interest in the judgement sum. It seems the parties were provided with a copy of the Reasons attached to the orders of 5 November 2007 prior to those orders being made. In the second last paragraph of those Reasons the tribunal indicates that the parties are to *'make the calculations to give effect to my findings'*. Despite the insurer's request for details of the calculations of the judgement sum prior to this hearing, inexplicably, the owners through their solicitors declined to provide them with copies of any material which might assist in clarifying this. Copies of the relevant documents were provided during the course of this hearing.

21 A copy of a document headed 'Applicants' Short Minutes' dated 28 September 2007 sets out the applicants' calculations of the amounts allowed by reference to the tribunal's Reasons which total $109,442.06 with a number of additional items queried. The queried items, not

including liquidated damages, total $12,255.34. The balance left in the contract is calculated as $72,408.68.

22 John Liu, director of the builder, swore an affidavit on 5 October 2007 to which is exhibited a spreadsheet setting out his calculations. It seems, assuming my addition is correct, that he has calculated the allowances for rectification at $75,604.51 and the cost of completion (which was fully allowed) at $33,949.96 – a total of $109,554.47.

23 I was also provided with a copy of Mrs Tissera-Isaacs' affidavit sworn 31 October 2007 wherein she deposes to the balance under the contract being $63,830.88 as set out in the builder's counterclaim, or alternatively $66,417.68 based on calculations contained in the exhibits to Mr Liu's affidavit referred to above.

24 In the insurer's written submissions it is recorded that the insurer's solicitor has estimated that interest of at 'least $5,186.18' is included in the judgement sum. When added to the cost of the front fence of $1,847, the total which the insurer submits is not covered by the policy is $8,880.18. Apparently the insurer's solicitor has calculated the amount allowed for rectification works to be between $68,753.43 and $71,574.33 and the balance of the contract sum as $61,318.39. This does not correspond with any of the calculations carried out by the parties. For the reasons set out above, I do not accept that the fence is not covered, and I cannot be satisfied that there is any allowance for interest in the judgement sum.

25 The insurer is not in a position to effectively reassess quantum. This has been determined by the Tribunal and the insurer is obliged under clause 9(d) of the policy to accept the determination of the Tribunal.

26 On the basis of the information contained in the Minutes and the two affidavits I am unable to ascertain how the judgement sum was calculated. The calculations were apparently the subject of oral submissions to the tribunal as the parties were unable to agree. In my view, having regard to ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998, the only fair order is that the insurer pay to the owners the full amount of the judgement sum: $52,212.98.

The claim for legal costs

27 The owners lodged a claim with the insurer seeking their costs of the earlier proceeding in the sum of $184,611.97. These are **all** the costs which they say they have incurred including a significant claim for recompense for their own time described as 'professional daily charges'. This also includes $2,785.17 for interest on the judgement sum. As noted above interest is specifically excluded from the policy.

28 In its decision in the earlier proceeding the tribunal ordered the builder to pay the owners' party/party costs to be assessed on County Court Scale 'D'. Those costs have not been assessed and the owners maintained their claim for indemnity costs until towards the end of this hearing, when counsel conceded that their claim should be limited to party/party costs in

accordance with the earlier order. Counsel for the insurer expressed considerable concern that the case, it had been required to answer in relation to the quantum of the costs, claimed changed dramatically in the final stages of the hearing. However, I note that only a small part of the hearing was concerned with the amount claimed, particularly during cross examination of Mrs Tissera-Isaacs. The bulk of the hearing time was concerned with submissions relating to 'deemed acceptance' of the claim, and whether legal costs of the earlier proceeding are covered by the policy.

29 Counsel for the insurer has helpfully set out the various components of the costs of at paragraph 15 of his written submissions where he also notes that many of the costs claimed predate or do not relate to the earlier proceeding. This breakdown was not challenged at the hearing:

- solicitors costs $47,435.25 (which includes costs incurred prior to the application in the earlier proceeding being filed on 25 July 2006);
- counsel's fees $65,558 (including costs incurred in a proceeding in the magistrates court for an intervention order);
- experts' fees $38,105.50;
- hearing and filing fees $4,154.50;
- VCAT costs during proceeding as witnesses $427.80;
- Nanny fees during VCAT hearing $1,848;
- Professional daily charges of the owners $18,370 ($1,837 each per day);
- Parking fees $280; and
- Printing, registered letters and other miscellaneous items $6,061.05

Following the concession by counsel for the owners towards the end of the hearing that their claim should be limited to the party/party costs ordered by the tribunal in the earlier proceeding, I anticipate those costs, once assessed, will be substantially less than the $181,826.80 ($184,611.97 less interest of $2,785.17) claimed. Irrespective of the amount claimed, I am satisfied that legal costs of the earlier proceeding are not covered by the policy.

30 Clause 3.2(e) of the policy provides

> (e) We will not pay more than $200,000 under the aggregate for all claims made under this policy in respect of any one dwelling, <u>including your reasonable legal costs and expenses associated with a successful claim against us.</u> (emphasis added)

The legal costs of the earlier proceeding are not associated with a successful claim against the insurer

31 As Deputy President Cremean (as he then was) observed in *Rosenberg v HIA Insurance Service Pty Ltd (t/as Home Owners Warranty)* [2002] VCAT 1346 at [8]:

> ...there were [earlier] proceedings in the Tribunal …that resulted in orders in favour of the Applicant (then Respondent) including orders for costs … Further, I accept that as between the claim and those proceedings, the one set of premises is involved and the defects or incomplete works are the same or are substantially so. But what I am unable to accept is that there is any other relevant connection between the claim and those proceedings. I cannot see that the legal proceedings were undertaken for the "enforcement" of the claim. The Insurer was not a party to those proceedings and no issues of liability of the Insurer under the claim of 7 May 2001 were raised by the pleadings in those proceedings as I recall. Indeed, the proceedings were themselves carried on by the Applicant (as Respondent) without any reference at all the Insurer. In these circumstances, I consider it is quite fanciful to suggest that, by defending the builders claim in the proceedings and succeeding on the counterclaim the Applicant was doing anything at all to enforce her claim against the insurer of 7 May. In other words, in my view, the Applicant in these proceedings invalidly connects the proceedings in August 2001 with her claim on the Insurer in May 2001.

32 At the time the earlier proceedings were commenced, and when they were finally determined, the builder was not *'dead disappeared or insolvent'*. It could not have been in the contemplation of the parties at the time the proceedings were commenced that the proceedings were simply a means to an end – to facilitate the making of a claim under the relevant policy. The builder was not placed under external administration until nearly two years after the earlier proceeding was commenced by the owners in July 2006. The history of the dispute and the acrimonious relationship between the owners and the builder is set out in the tribunal's Reasons in the earlier proceeding. The following observation is revealing:

> The entire dispute had something of the bitterness of a matrimonial struggle…[3]

Are the legal costs of the earlier proceeding 'loss or damage'?

33 The owners contend that the legal costs incurred in the earlier proceeding are properly described as 'loss or damage' as set out in clause 3.1 of the policy which is consistent with clause 8 of Ministerial Order s98:

(a) resulting from the non-completion of the work;

(b) resulting from defective work;

(c) arising from a breach of a statutory warranty.

Further, that but for the failure of the builder to complete the works, and its breach of the statutory warranties, they would not have incurred those costs.

34 It is difficult to conceive of the legal costs of the earlier proceeding as 'loss or damage' as defined in s3(1) of the policy. The earlier proceeding was not simply concerned with a claim by the owners relating to defective and incomplete works. A summary of the parties' respective claims is conveniently set out in paragraph 2 of the Reasons where it is recorded that

the owners claim was $95,789.46 plus interest and costs, which took into account the unpaid balance under the contract of $61,093, and included a claim for incomplete works for $33,949.96. The claim for incomplete works was allowed in full. The balance of their claim was $61,839.50, of which the tribunal found the owners were entitled to damages of $18,763.02 or 29.75%. In total the tribunal found they were entitled to damages of $52,712,98 which is 55% of their total claim.

35 The builder alleged that the owners had repudiated the building contract and counterclaimed for $65,000. The builder was unsuccessful in establishing that the owners had repudiated the contract, and of the $65,000 claimed recovered $500 for work the tribunal found had been carried out and should be paid for – this was set off against the damages awarded to the owners, and the builder was ordered to pay them the sum of $52,212.98.

36 It is well established that ordinarily legal costs are not considered as loss and damage. In *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991)25 NSWLR 358 Giles J said at 365:

> If regard be had to the further claim to legal costs, …I do not think that the plaintiff can so claim those costs as damages.
>
> In *McGregor on Damages* 15th ed,(1988) par 662 it is said:
>
> 'Clearly it would make nonsense of the rules of the court as to the award of costs and the taxation of costs if the successful party could recover as damages either the costs withheld by the court or any further costs he has incurred beyond the party and party costs, whether in the same action or in a further action brought solely for this purpose. This has naturally never been allowed and it is hardly surprising that there are practically no authorities on the point….'

37 However, as I understand the submissions on behalf of the owners, I should interpret 'loss and damage' as it appears in clause 3.1 of the policy widely to include the legal costs of the earlier proceeding, because but for the incomplete and defective works, which are clearly covered under clause 3.1, the owners would not have incurred those legal costs.

38 Under clause 3(1) cover is also available for:

> (f) alternative accommodation, removal and storage costs as a result of an event referred to in clause 3.1(1), (b) or (c) inclusive; and
>
> (g) the loss of a deposit or progress payment under the contract.

39 These are items which seemingly fall within the 'but for' category described by counsel for the owners. An insured would not incur *'alternative accommodation, removal and storage costs'* but for the failure of the builder to complete the works, there being defective works or a breach of the statutory warranties. It seems to me that if it had been intended that legal costs incurred in an earlier proceeding which concerned a claim for incomplete and/or defective works, and/or a breach of the statutory warranties, be covered under the policy as 'loss and damage' they

would have been expressly included in the Ministerial Order and in clause 3.1.

40 Counsel for the owners referred me to Regulation 56 of the *Home Building Regulation* 2004 (NSW) which expressly provides that a policy of warranty insurance must indemnify a homeowner for loss or damage including:

> (3)(e) any legal or other reasonable costs incurred by a beneficiary [homeowner] in seeking to recover compensation from the contractor or supplier for the loss or damage or in taking action to rectify the loss or damage.

The extent of the indemnity is otherwise similar to that required under the relevant Ministerial Order and the relevant policy. As I observed during the course of the hearing, this does not, in my view assist the owners. Rather, it reinforces my view that the indemnity required under Ministerial Order S98 of 2003 and S82 of 2002 before it, does not include legal costs of earlier proceedings because, if it had been intended that it should, this would have been clearly specified in the Ministerial Order.

41 In any event, the legal costs claimed by the owners were not incurred solely in relation to their partially successful claim arising from the alleged defective and incomplete works. As noted above they were successful in obtaining an award of damages of approximately 55% of their total claim. Legal costs were also incurred in prosecuting the 45% of their claim which was unsuccessful and in their substantially successful defence of the counterclaim. These clearly do not fall within the 'but for' category.

An implied term?

42 It is further contended by the owners that it is an implied term of the policy that the indemnity will include the insured's reasonable legal and associated costs and expenses following or resulting from a breach of a statutory warranty or incomplete work.

43 Whether such a term should be implied was considered by the Full Court of the Supreme Court of South Australia in *Royal Sun Alliance Insurance (Australia) Ltd v Mihailoff* [2001] SASC 259 which was concerned with a similar policy of warranty insurance, although unlike the relevant Ministerial Order and policy, the insured was not required to give the insurer notice of any legal proceedings. I do not consider this impacts on the persuasiveness of this authority. Following an arbitration determined in favour of the owners, the builder went into liquidation. The unanimous decision, allowing an appeal from a single judge, holding that loss and damage covered by the policy did not include legal costs, was delivered by Prior J who said:

> It was accepted by counsel for both parties that neither the Act nor policy specifically addressed the issue whether loss included legal costs incurred in pursuing a builder for recovery pursuant to a breach of statutory warranty. A perusal of the Act and policy confirm that there is no express obligation in that regard. Accordingly if such an

obligation is to be case on the insurer it must arise as an implied obligation pursuant to the terms of the policy. In *BP refinery (Westernport) Pty Ltd v The Shire of Hastings* Lord Simon said:

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (it must be necessary to give business efficacy to the contract so that no term will be implied of the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract' [53]

44 Further, counsel for the owners submitted that it must have been intended that the policy would cover legal costs of an earlier proceeding. The Ministerial Order and the policy provide that the insurer, if notified of legal proceedings, is bound by the tribunal's findings and determination. He submitted that this must include any order for costs because one would ordinarily expect there to be an order for costs in proceedings before this List. I find this an astonishing proposition. Section 109 of the *VCAT Act* clearly provides that each party will bear its own costs unless the tribunal is satisfied it should exercise its discretion under s109(2) having regard to the matters set out in s109(3). As must be apparent from the number of written costs decisions, the tribunal is careful in the exercise of its discretion and on many occasions is not persuaded the discretion should be exercised. In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs:

> 1. The prima facie rule is that each party should bear their own costs of the proceeding.
> 2. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so having regard to the matters stated in s109(3). That is a finding essential to making an order. (emphasis added)

45 It is not, in my view, so obvious that legal costs of earlier proceedings should be covered by a last resort policy that an officious bystander would say 'of course'.

Are these costs incurred in enabling the owners to make a claim under the policy?

46 It was further submitted by counsel that the costs of the earlier proceeding were costs incurred in enabling the owners to make a claim under the policy, and, therefore as I understand it, should be covered under clause 3.2(e) of the policy which provides:

> We will not pay more than $200,000 under the aggregate for all claims made under this policy in respect of any one dwelling, including your reasonable legal costs and expenses associated with a successful claim against us.

47 I cannot agree. As discussed above, these proceedings were commenced and finalised well before the builder was placed under external administration. There is no requirement that an owner institute legal proceedings and obtain judgement before a claim can be made under the policy. To suggest that where proceedings are issued in the tribunal by an owner against a builder, they are for the benefit of the insurer' does not rest easily with the facts and circumstances of this case. As noted above, the application was lodged and the proceeding finalised long before the builder was placed under external administration.

48 It is true that the insurer was notified of these proceedings and could have sought leave to take an active part had it so wished. The suggestions by counsel on behalf of the owners as to why there is an obligation to notify the insurer when proceedings are commenced are no more than mere speculation, and do not assist me in deciding whether the policy responds to their claim for legal costs of the earlier proceeding. However, where owners fail to notify the insurer of legal proceedings involving the builder, and they subsequently make a claim under the policy, the insurer will not be bound by the decision of the tribunal, and all matters will have to be re-ventilated. It seems to me that the requirement to notify is clearly there for the benefit of insured owners.

49 Similarly in *Mihailoff* Prior J concluded:

> In the present case, the policy did not place an obligation on the insured for the benefit of the insurer. The insured were not obliged to submit their dispute to arbitration. The decision to do so was undertaken for their own benefit. This action could not be considered to be for the benefit of the insurer. [58]

50 Counsel for the owners referred me to a decision of the New South Wales Consumer Trader and Tenancy Tribunal: *Campbell v Royal & Sun Alliance Insurance Ltd t/as Home Warranty Insurance* [2003] NSWCTTT 281 where the tribunal found that legal costs, incurred by a homeowner in an earlier proceeding concerning defective works, were recoverable under a similar policy of warranty insurance. Surprisingly, he did not refer me to a later decision of the same tribunal, to which I was referred by counsel for the insurer: *Zehetner v Builders Insurer's Guarantee Corporation (Home Building)* [2005] NSWCTTT 805 where the tribunal member found:

> The Tribunal, as presently constituted, considers that the authorities relied upon in *Campbell* do not support the finding therein and should not be followed.

51 With respect I share the views expressed in *Zehetner* and in any event the decision of the Full Court of the Supreme Court of South Australia in *Mihailoff* is of greater persuasive authority.

52 I was referred to a number of other authorities which did not assist me in determining the extent of the indemnity available under the policy.

Experts' costs

53 It was submitted on behalf of the owners that even if they are unable to recover their legal costs under the policy that they should be able to recover the costs paid to their experts because they would be required in any claim to the insurer under other circumstances. This ignores the provision that because the owners have notified the insurer of the earlier proceeding, the insurer is bound by the decision of the tribunal, and accordingly expert reports are not required in support of this claim.

Conclusion

54 I appreciate this is an unfortunate outcome for the owners, and potentially for other beneficiaries under similar policies of warranty insurance. I agree with counsel for the owners that their inability to recover the costs of the earlier proceeding under the policy means that the fruits of their unsatisfied judgement are effectively lost, and that it is not surprising that homeowners are somewhat disenchanted with the current regime.

55 Unfortunately, any litigation is fraught with the risk of high costs and unrecoverable judgement sums. At least, in this instance, the warranty insurance will respond for the judgement sum. The real concern here is the apparent lack of proportionality between the claim, the amount recovered and the costs incurred. Despite a number of attempts, the parties in the earlier proceeding were unable to reach a compromise. This might be for any number of reasons about which it would be inappropriate for me to speculate. However, as is so often the case, the damages awarded by the tribunal in respect of the builder's alleged breaches were significantly less than the amount claimed, and as counsel for the insurer noted, the owners apparently spent in excess of $180,000.00 (including their own time) to recover a little more than $50,000.00.

56 Warranty insurance has never provided litigation costs insurance. Rather, under the first resort policies owners were able to recover their costs of a enforcing a claim, but not those incurred in relation to their dispute with the builder insofar as it related to items not covered under the policy.

57 I will reserve the question of costs but draw the parties' attention to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998.

DEPUTY PRESIDENT C. AIRD