

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D659/2006

CATCHWORDS

Domestic Builders Warranty Insurance – when it applies – meaning of ‘disappeared, insolvent’, Ministerial Order S 98 of 2003 – whether Tribunal can or should order insurer to inspect in absence of liability to indemnify under terms of policy

APPLICANT	George Kweifio-Okai
RESPONDENT	Vero Insurance Limited
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	30 April 2007
DATE OF ORDER	7 May 2007
CITATION	Kweifio-Okai v Vero Insurance (Domestic Building) [2007] VCAT 751

ORDER

1. The application is dismissed.
2. Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird – allow one hour.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	In person
For Respondent	Ms S. Kirton of Counsel

REASONS

- 1 By contract dated 20 March 2005 the Applicant engaged AR & B Prestney Constructions Pty Ltd for renovation works at his property. Subsequently, on 7 April 2005 the Respondent insurer issued a Certificate of Warranty Insurance which identified AR & B Prestney Constructions Pty Ltd as the builder. The relevant policy of insurance is subject to the provisions of Ministerial Order S 98 of 2003. Clause 8 of the Ministerial Order makes it clear that the purpose of the insurance is to indemnify the owners in respect of any loss or damage they may suffer as a result of a breach by the builder of its obligations under the domestic building contract or the statutory warranties set out in s8 of the *Domestic Building Contracts Act 1995*. An insurer may also include a provision in any policy of warranty insurance that the indemnity will only apply if *'the builder dies, becomes insolvent or disappears'*.
- 2 Clause 3.1 of the relevant policy provides that:

Subject to the terms of this policy, including the exclusions, we will cover you if the builder becomes insolvent, dies or disappears and you suffer...
- 3 On 15 June 2005, the Applicant wrote to the Respondent the following 'Without Prejudice' letter:

I make claims with respect to renovation work carried out by AR & B Prestney Constructions Pty Ltd...

The claim relates:

 1. persistent leakage of water from a faultily (sic) installed first floor shower recess into a bedroom below.
 2. reinstallation of an automatic storm drainage pump removed from back of the house during renovations.
 3. Reinstallation of kitchen faucet.

I will appreciate if in the first instance you can arrange for a site visit for further clarification.
- 4 On the same day, the Respondent wrote back to the Applicant advising:

We received correspondence on 15/06/2006 in relation to works at the above property.

On 1 July 2002 new legislation came into force which stated there are only three triggers by which an owner/beneficiary can lodge a claim for home warranty insurance. These three triggers are:

 1. Death of the Builder
 2. Insolvency of the Builder
 3. Disappearance of the Builder

Please find attached a company search ...which has revealed that the company is registered and the builder holds a current licence.

A review of your claim has revealed that you have not met the policy requirements and unfortunately, you are not able to lodge a claim.

There are other remedies available to you under the building contract. The contract stipulates the procedure to be followed in respect to non-compliance. You may wish to notify the Building advice and conciliation (sic) if you experience further issues with the builder.

The information you have sent to our office has been placed on file and can be used at a later date if you become eligible to make a claim. A copy of the policy has been included with this letter for your information.

- 5 The Applicant wrote to the Respondent on 1 September 2006 once again advising it about alleged defects, that he had been unsuccessful in attempts to contact the builder and requesting:

...I therefore kindly request you send

1. an inspector to inspect the defective works
2. a claim form for me to initiate claims on the warranty

- 6 On 4 September 2006 the Respondent again wrote to the Applicant enclosing a further copy of its letter of 15 June 2006.

- 7 On 15 September 2006 the Applicant made application to this Tribunal seeking the following orders:

1. that the builder insured by Vero Insurance Limited to undertake renovation work at the above address to be deemed to have technically disappeared
2. that Vero Insurance Limited be directed in the first instance to send an inspector to the above site to inspect defective work mainly of a plumbing nature.

- 8 Following an unsuccessful mediation, the proceeding was referred to a directions hearing where directions were made setting the matter down for hearing. Orders were made for the filing of affidavits and Statements of Facts and Legal Submissions. The Respondent was ordered to file its material first so that the Applicant would understand the basis upon which the Respondent maintained that the policy did not apply.

Does the policy apply?

- 9 The Respondent contends it has no liability under the relevant policy unless it can be established that the builder is 'dead disappeared or insolvent'. The builder is a corporate entity and the only two triggers which apply to it are whether it has disappeared or is insolvent. The Respondent has conducted a company search which reveals that the builder is still registered. It has also conducted a search of the Building Commission records which reveals that Mr Prestney, the director of the builder, holds a current licence.

- 10 There is no evidence that either the builder or Mr Prestney (if there is any argument that he was the 'builder' and I make no finding in this regard)

have disappeared within the meaning of the Policy. 'Disappeared' is defined in the Policy as having the same meaning as under the Ministerial Order: *'cannot be found after due search and enquiry'*. Although the builder has failed to respond to correspondence from the Applicant it is apparent that it, and Mr Prestney can be *'found'*. Ms Gorenstein, the Respondent's solicitor, has exhibited to her affidavit of 19 February 2007, a copy of a file note of a telephone conversation she had with Mr Prestney on 23 November 2006 after she telephoned him on his mobile phone. She recorded that Mr Prestney advised her that the company was still operating although *'...not doing a lot in the building industry (feels burned by this project) but is still registered and doing other things. He and company are still around.'*

- 11 The Applicant has asked me to find that, in the circumstances, although he seems to concede that the builder has not disappeared in the terms of the policy, that it has nevertheless 'technically disappeared' because it refuses to respond to his correspondence or to make itself available to attend to the defects. I am unable to make this finding.
- 12 Similarly there is no evidence that the builder is insolvent which is defined in the Ministerial Order to mean:
 - (a) In the case of a natural person, insolvent under administration as that expression is defined in the *Corporations Act 2001*, or
 - (b) in the case of a body corporate, subject to external administration under the *Corporations Act 2001*
- 13 It appears to be conceded by the Applicant that the builder and its director, Mr Prestney, are solvent. I have therefore not found it necessary to set out the definitions as set out in the *Corporations Act 2001*. However, the Applicant asserts that the builder is 'technically insolvent' because, as recorded in Ms Gorenstein's file note of her conversation with Mr Prestney she records that he told her *'...company not doing a lot in the building industry, feels burnt by this project.'* However, I note she also records that Mr Prestney went on to say *'...but is still registered and doing other things'*. There is simply no evidence to support any finding of insolvency.
- 14 It seems from the evidence given by the Applicant, and from Ms Gorenstein's file note of her conversation with Mr Prestney, that the relationship between the Applicant and the builder is acrimonious. Whilst this is unfortunate, and I can appreciate how frustrating and difficult it must be for both of them, it does not enable me to find the Policy responds in circumstances where it clearly does not.

Should the Respondent be ordered to carry out an inspection?

- 15 The Applicant also asks that the Tribunal order and direct the Respondent to carry out what he called a 'Without Prejudice' inspection of the alleged defects even though the Policy may not presently respond to his claim. When I asked him what he hoped would flow from any inspection, he said

that it was his intention, once the Respondent had inspected and observed the nature and extent of the damage, to try to persuade the Respondent to make a 'humanitarian' decision to accept his claim. I am not persuaded that there is any basis upon which the Tribunal can or should order and direct the Respondent to carry out an inspection in circumstances where the Policy does not respond and the Respondent has no current liability to indemnify the Applicant.

Allegations of misleading and deceptive conduct

- 16 The Applicant also alleges that he was induced to enter into the building contract with the builder by the misleading and deceptive conduct of the Respondent in, as I understand it, representing that the builder was capable of carrying out the works competently, by issuing the Certificate of Insurance. I accept that the builder was obliged to provide evidence of Warranty Insurance to the Applicant which it did after the contract was signed. The Certificate of Insurance was issued on 7 April 2005, some eighteen days after the building contract was signed. It seems to me that the Applicant has misunderstood the role of insurers in relation to domestic builders' warranty insurance – they simply agree to indemnify an owner, upon the policy being triggered as discussed above, in relation to the performance by the builder of its contractual and statutory obligations. An insurer, in issuing a Certificate of Warranty Insurance, does not warrant that the builder is capable of performing those obligations.

Conclusion

- 17 Whilst it may well be that there are defects in the subject property, about which I make no finding, in respect of which the Applicant may have a claim against the builder, this does not enable me to find that the Policy applies in the absence of one of the triggers being satisfied, or to otherwise order the Respondent to carry out an inspection of the property.
- 18 Although the Applicant has indicated he is reluctant to avail himself of processes such as those offered by Building Conciliation and Advice Victoria ('BACV') or to make a claim directly against the builder in this Tribunal, this is a matter for him, and not one which can influence my decision in any way. It is not unusual for matters to come before this Tribunal where the relationship between an owner and a builder has completely broken down, and is acrimonious to say the least. This does not prevent the Tribunal from determining the issues in dispute.
- 19 I will reserve the question of costs with liberty to apply, being mindful always of the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C. AIRD