

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
DIVISION**

VCAT REFERENCE NO. D106/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building Insurance - Whether contract of insurance made.

APPLICANTS	Michael Honan & Nyssa Dean
RESPONDENT	Vero Warranty
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	5 May 2010
DATE OF ORDER	18 May 2010
CITATION	Honan & Anor v Vero Warranty (Domestic Building) [2010] VCAT 740

ORDER

1 The application is dismissed.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For Applicants	Michael Honan & Nyssa Dean in person
For Respondent	Ken Barnett (customer service officer) & Stuart Smith (litigation/recovery officer)

REASONS

- 1 This proceeding concerns an application by the Applicants (**‘the owners’**) to review a decision made by the Respondent (**‘Vero’**) to reject their claim for reimbursement of deposit monies paid to Paulding Constructions Pty Ltd.

Background

- 2 On 18 September 2009 the owners entered into a building contract with Paulding Constructions Pty Ltd (**‘the Builder’**) for the construction of a residential dwelling to be located on their property in Lyndhurst. A deposit of \$9,621.60 was paid to the Builder in circumstances where the building contract provided that no monies, including the payment of a deposit, was payable until an insurance policy under s135 of the *Building Act* 1993 had been issued in respect of the proposed building works.
- 3 Subsequently and prior to the commencement of any building works, Ms Dean was contacted by her financial broker and advised that the Builder had gone into liquidation. She was told to contact the warranty insurer for further assistance.
- 4 The building contract referred Vero as being the relevant insurer providing warranty insurance required under s135 of the *Building Act* 1993. However, the owners were not provided with either a certificate of insurance or policy of insurance, nor is there any evidence of those documents ever having been created.
- 5 On 2 December 2009, Ms Dean contacted Vero and was advised that she was required to submit a claim form in order to make a claim against the warranty insurance policy (on the assumption that a valid insurance policy existed). A claim form was subsequently forwarded to Ms Dean. That claim form required the owners to give details of a *Policy/Certificate Number*.
- 6 On 7 December 2009, Ms Dean again contacted Vero to ascertain what the *Policy/Certificate* number was. She was told to look for a document that had numbers following the initials *RWC*.
- 7 Ms Dean was unable to locate any document with the initials *RWC* in the contract documents that she had in her possession. She subsequently contacted the Builder’s office and enquired as to the whereabouts of the certificate of insurance. A document was then sent to Ms Dean by facsimile transmission, which was entitled *Application Summary* (exhibit A-1). That document made reference to a policy number *RWC77277709*. That document also gave details of the Builder, the owners, the building contract and the relevant land address.
- 8 The owners then completed the claim form making reference to the policy number *RWC77277709* as stated on the *Application Summary* document.

- 9 On 22 December 2009 Ms Dean telephoned the Vero to enquire as to the status of her claim. She gave evidence that she spoke to a female who advised her that there had been some kind of problem with the claim because the Builder had not completed the application for insurance. She was told that Vero was consulting with its policy underwriters to ascertain whether it was on risk.
- 10 On 23 December 2009, Ms Dean was contacted by Steve from Master Menders. He advised that his building company had been engaged by Vero to take over all incomplete contracts of the Builder and that he would be inspecting the owner's property with a view to completing the Builder's contract. He stated further that he had been provided with a file from Vero.
- 11 Ms Dean advised Steve that his understanding was inconsistent with what Vero had told her. She told him that Vero had advised her that there was a problem with the warranty insurance. Ms Dean subsequently contacted Vero and spoke with a person who identified himself as Michael. She was told that no decision had yet been made by Vero as to whether it would accept the owner's claim and that the file should not have been given to Master Menders.
- 12 On 31 December 2009 Michael from Vero telephoned Ms Dean and advised that discussions were still occurring with the policy underwriters to ascertain whether Vero was on risk. At that point, she was told that Vero had discovered that the Builder had not submitted the insurance application form and it was unclear why this was the case.
- 13 On 11 January 2010, Ms Dean contacted Vero and spoke with Melissa Smith. At that point, Ms Dean was advised that the claim would be rejected because a certificate of insurance had never been issued. The decision by Vero to reject the owner's claim was subsequently confirmed in correspondence dated 15 January 2010 from Vero to the owners. In other words, the position of Vero was that a contract of insurance had never been formed.

The application for insurance

- 14 Mr Smith, the litigation/recovery officer of Vero appeared on its behalf. He called Mr Barnett, who identified himself as the customer service officer of Vero.
- 15 Mr Barnett gave evidence as to how a warranty insurance policy is effected. He stated that a builder is able to procure warranty insurance on behalf of a homeowner electronically by using a web-based program linked to the mainframe of Vero. This web-based program was available to builders who had been given user rights by Vero.
- 16 Mr Barnett said that the Builder had access to Vero's mainframe. Using the on-line application form, the Builder was able to submit an application for insurance to Vero. He stated that there were a number of steps to be taken to effect that insurance, such as completing the on-line application form

setting out all relevant details pertinent to the proposed contract of insurance.

- 17 He said that once the completed application form was filled out and submitted to Vero electronically, Vero's underwriters would assess the application and either approve or reject the application. If the application was approved, the system would notify the Builder of that approval and then allow the Builder to confirm the contract of insurance by 'clicking' on a web based button. Once the Builder 'clicked' its confirmation of the contract of insurance, the insurance premium would be automatically debited from the Builder's nominated bank or credit card account. The Builder then had access to print out a certificate of insurance evidencing the existence of a contract of insurance. Conversely, if the application was rejected, the Builder was unable to print out a certificate of insurance and no monies would be debited from the Builder's nominated bank or credit card account.
- 18 Mr Barnett gave further evidence that his search of Vero's files did not reveal that a certificate of insurance had ever been issued by Vero or generated by the Builder. Further he said that no payment had ever been made by the Builder in respect of the application for insurance and the system did not indicate that the application for insurance had ever been approved. His evidence was that his search of the system revealed that the Builder had been in the process of making an application for insurance but that the application had not been submitted to the Respondent for approval. According to Mr Barnett, had the application for insurance been submitted by the Builder and approved by Vero, then a contract of insurance would have been created between the owners and Vero. He contended, however, that without there being approval by Vero, no contract of insurance came into existence.

Issue for determination

- 19 The issue in this case is whether a contract of insurance was ever made between the parties. That cannot be the case unless there was an offer to purchase insurance and an acceptance of that offer. In other words, the question for determination is whether the application for insurance was, at some point, accepted by Vero.
- 20 In my view, it is important to consider all of the circumstances so as to determine whether, objectively and having regard to the totality of the dealings between the parties, they should be considered to have entered into a contractual relationship. In that regard, I am mindful that the courts generally look at the totality of the dealings between the parties without enquiring too closely into the formalities of offer and acceptance.¹
- 21 Ms Dean submitted that a contract of insurance had come into existence. In particular, she argued that the generation of a *RWC* number on the

¹ *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559 at 567

Application Summary indicated that a contract of insurance must have come into existence. Further, she submitted that the fact that Master Menders had been given details of the building project and had sought to effectively assess the owner's loss indicated that Vero had accepted the application for insurance.

- 22 By contrast, however, Mr Barnett gave evidence that the presence of Master Menders was explained by the fact that Vero had been given a list of all incomplete contracts previously entered into by the Builder. He stated that Master Menders had simply commenced the exercise of loss assessment in respect of all incomplete projects (of which there were many), irrespective of whether Vero would ultimately accept liability or not for any single project. Mr Barnett further stated that this process was undertaken to expedite processing of all claims. He said that the fact that Master Menders was given the owner's details did not mean that an application for insurance had been submitted to Vero or that Vero had otherwise accepted that a contract of insurance had been created. He suggested that the owner's details were given to Vero either by the Builder or by the Builder's administrator or liquidator after it fell into administration or liquidation, rather than taken from Vero's system. He stated that this scenario was more likely to be the case because there was no record of any certificate of insurance ever being issued. According to Mr Barnett, that meant that no approval had ever been given by Vero.
- 23 Mr Barnett also gave evidence that the issuing of the *RWC* number on the application was of no consequence because *RWC* numbers were automatically generated upon an application being made, irrespective of whether the application was proceeded with. He said that if the application was not proceeded with, it would be automatically deleted by the system after the expiration of 60 days and the *RWC* number would be extinguished from the system.
- 24 Finally, Mr Barnett referred me to the first paragraph of the *Application Summary* which stated:

Your application has been automatically saved. Your Policy Number is RWC77277709. Please keep a copy of this number for your reference. Please review the details of your policy application. If you do not wish to submit your application now, you can retrieve and submit your application at a future date. Please be advised that saved applications will only remain in the system before they are automatically deleted.

If you would like to retain a copy of your application, please print your application below. Please note: Any printed copy of a Policy Application is not to be used as a Certificate of Insurance as required under Building Contracts Legislation. Homeowners are not covered as a result of creating this Policy Application until the Policy Application has been submitted and accepted by Vero Insurance

Limited and a Certificate of Insurance has been issued in respect of each individual dwelling.

- 25 Considering the evidence and submissions, I cannot see how a contract of insurance was ever made or finalised. Whilst, steps were certainly taken by the Builder to procure insurance, those steps were not, for reasons unknown, finalised with the result that the application for insurance was left in limbo. I am reinforced in this view by the fact that there is no evidence of a premium ever having been paid by the Builder and no evidence of a certificate of insurance ever being issued by Vero; all of which confirm that the application for insurance was never accepted or approved by Vero. Moreover, the *Application Summary* itself states that it is not evidence of an insurance contract having been made. The paragraphs cited above are entirely consistent with the evidence of Mr Barnett.
- 26 Regrettably, it would seem that the owners have paid a deposit under the building contract with the Builder in circumstances where they genuinely and honestly believed that a contract of warranty insurance was in place. I find, however, that no such contract of insurance was ever procured, despite the express representation made by the Builder through the words in the building contract. I make this finding having carefully considered the factors that Ms Dean pointed to as giving rise to an inference that a contract of insurance had been created. In my view, the impact of those factors is diminished by the explanations given by Mr Barnett during the course of his evidence.
- 27 I order that the application be dismissed.

SENIOR MEMBER RIEGLER