

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D45/2008 AND D46/2008

CATCHWORDS

Domestic builders warranty insurance – extent of indemnity -

D45/2008

APPLICANTS

Angelo Moretti, Nancy Moretti

D46/2008

APPLICANTS

Tony Cataldi, Franca Cataldi

RESPONDENT

CGU Insurance Ltd (ACN: 004 478 371)

WHERE HELD

Melbourne

BEFORE

Deputy President C. Aird

HEARING TYPE

Hearing

DATE OF HEARING

28 May 2008

DATE OF ORDER

19 June 2008

CITATION

Moretti v CGU Insurance Ltd; Cataldi v CGU Insurance Ltd (Domestic Building) [2008] VCAT 1177

ORDER

1. The applications are dismissed
2. Costs reserved with liberty to apply

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants

Mr A. Moretti

For the Respondent

Mr M. Brassell, National Claims and Technical
Manager

REASONS

- 1 These two proceedings are concerned with the same question of interpretation of the extent of the indemnity under the relevant policies of warranty insurance. One of the applicant owners, Mr Moretti appeared on behalf of the applicants in both proceedings. Mrs Morretti and Mrs Cataldi are cousins. Mr and Mrs Cataldi attended in person and confirmed that he had their authority to speak on their behalf and at the conclusion of the hearing confirmed they did not wish to add anything further. Mr Brassell, National Claims and Technical Manager appeared on behalf of the respondent.
- 2 In May 2006, each couple entered into a contract with Urban Design Homes (Urban Design Group Australia Pty Ltd) for the construction of a unit each in Apollo Bay. It was a term of each contract that the owners would supply, and the builder would install, certain items. Progress under the two contracts was slow and the due date for completion: 6 December 2006, was not achieved. In early January 2007 the builder requested that the door hardware be supplied and delivered to site, and in late January 2007 he rendered the progress claim for the fixing stage. At that time fixing stage had not been reached and a complaint was made by the owners to the Building Advice and Conciliation Victoria ('BACV').
- 3 Following an inspection and mediation, the owners and the builder agreed to continue with the project upon certain 'guarantees' being given by the builder. In mid April 2007 the builder advised the owners that the project was nearing completion, and requested that the cooktop, oven, dishwasher, airconditioner and ironing maid for each unit be supplied, as these were required for completion. Mr Moretti said he was told by the builder that if the items were not delivered he would call a halt to the progress of the works. Mr Moretti said that because of the distance to Apollo Bay, and given the agreements reached at the BACV mediation, he did not check the progress, and the owners supplied the items as requested. They have not been installed and cannot be located. I understand that enquiries of the liquidator for the builder reveals he has been unable to locate them either.
- 4 In July 2007, after learning the builder was in financial difficulties, a claim was made on the respondent insurer. The insurer accepted the claim for both units in respect of incomplete and defective works. It obtained quotations for the completion works required for each unit and in each instance they exceeded the 20% cap under the policy. Both owners have been paid the 20% cap for the completion works. The insurer has continued to process and approve claims for rectification works.
- 5 However, the insurer rejected the claim for reimbursement of the items supplied but not installed which have subsequently gone missing ('the supplied items'). There is no dispute about the cost of the items: \$7,720.00 for each unit (receipts have been provided to the insurer). The insurer

rejected the claim on the grounds that the non-installation of the supplied items were completion works for which the owners had already been compensated to the full extent possible under the Act. The insurer asserts that it is required to indemnify the owners for completion works and/or the cost of rectification works, and that where there is contravention of a trade practices provision, it is only obliged to indemnify where there is defective building work arising from the breach. It asserts it cannot be required to indemnify where there are no defective works to be rectified.

- 6 The owners rely on various provisions of the relevant Ministerial Order (s98 of 2003), and in particular clause 8(d). Clause 8 provides:

Indemnity for loss

- (1) The policy must indemnify the building owner in respect of loss or damage resulting from non-completion of the domestic building work.
- (2) The policy must also indemnify the building owner in respect of loss or damage resulting from all or any of the following events
 - (a) domestic building work that is defective;
 - (b) a breach of any warranty implied into the domestic building contract by section 8 of the Domestic Building Contracts Act 1995;
 - (c) a failure to maintain a standard or quality of building work specified in the domestic building contract;
 - (d) conduct by the builder in connection with the domestic building contract that contravenes a trade practices provision.
- (3) The policy may provide that the indemnity referred to in sub-clause (1) or (2) only applies if the builder dies, becomes insolvent or disappears.

A 'trade practices provision' as set out in clause 8(d) is defined in Schedule 1 to the Ministerial order as meaning, insofar as it concerns the *Fair Trading Act 1999*, section 9, 11 or 12.

- 7 The owners assert that the conduct of the builder in requiring the items to be supplied and delivered to site because they were required for completion at a time when the works were not at this stage, was misleading and deceptive conduct as set out in s9 of the *Fair Trading Act 1999*. In other words, they contend that the loss of the supplied items should be covered by the policy because they would not have gone missing but for the builder's misleading and deceptive conduct in requiring them to supply the items at a time when they were not required, and could not be installed. They also rely on clause 38 of the Ministerial Order which provides:

Limitation relating to contravention of trade practices provision

The policy may limit the indemnity provided by the insurer for loss or damage arising from conduct of a builder that contravenes a trade

practices provision to the cost of rectifying the relevant domestic building work.

This limitation is included in s3.1(e) of the relevant policy:

3.1 We will indemnify you for the following loss or damages in respect of Domestic Building Work only if the Builder dies, becomes Insolvent or disappears:

...

(e) loss or damage resulting from conduct by the Builder in connection with the Domestic Building Contract that contravenes a Trade Practices Provision but only for the cost of rectifying the Domestic Building Work (emphasis added)

8 The owners argue that the limitation means that the cost of rectifying the domestic building work includes the cost of replacing the supplied items – replacement of these items being a way of achieving rectification. Further, that the definition in clause 38 is broader than a simple obligation to rectify.

9 In this regard they rely on the definition of ‘defective’ work in the Ministerial Order:

‘defective’, in relation to domestic building work, includes

- (a) a breach of any warranty listed in section 8 of the **Domestic Building Contracts Act 1995**;
- (b) a failure to maintain a standard or quality of building work specified in the relevant domestic building contract;

and, insofar as it relates to the s8 warranties, the owners assert that neither s8(a) or (d) relate specifically to defective works. Section 8 (a) and (d) provides:

8. Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract-

(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

...

(d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

I cannot agree with the owners’ interpretation. Where the works have not been carried out in accordance with the s8 warranties they will be defective (s8(a)) and/or incomplete (s8(a) and (d)). There is no other possible interpretation.

- 10 At the hearing, Mr Brassell said that since making the decision that the non-installation of these items were completion works, he had been advised by the policy underwriters that where the items had gone missing this was not the appropriate description and that in such circumstances they would not be covered by the policy even as completion works. I accept that the replacement of the items are not properly described as completion works.
- 11 Whilst I have some sympathy for the owners' position this application must be considered within the scheme of warranty insurance. However, the question is whether the owners' loss and damage i.e. the loss of the supplied items arose as a result of '*conduct by the builder in connection with the domestic building contract that contravenes a trade practices provision*'. It seems to me that the loss the owners have suffered did not arise from the alleged misleading and deceptive conduct by the builder in requiring them to supply the items when the houses were not nearing completion. Rather those losses arise through the failure of the builder to secure the items on site. I am unable to say how they 'disappeared'. The only evidence I have before me is that they have not been installed, they are not on site and, to date, they have not been located. This would seem to me to be a matter which should be reported to the police. The owners might well have a claim under the builder's contract works insurance or some other policy of insurance, details of which they may be able to obtain from the liquidator.
- 12 If I am wrong, and the owners' loss does arise from the alleged misleading and deceptive conduct of the builder, I am satisfied that the limitation set out in s3.1(e) of the Policy contemplates that there will be defective work capable of rectification. I am not satisfied that replacement of the items constitutes rectification within the meaning of the limitation.
- 13 The owners' applications will be dismissed. I will reserve the question of costs with liberty to apply, but refer the parties to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C. AIRD