

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D509/2005

CATCHWORDS

Appeal against decision of insurer – installation of septic tank – unsatisfactory performance of septic tank – installation complied with council requirements at the time – breach of statutory warranties under s8 of the *Domestic Building Contracts Act 1995*

[2005] VCAT 2032

APPLICANT: Nunan Builders Pty Ltd (ACN 075 363 530)

RESPONDENT: Vero

FIRST JOINED PARTY: Mr Phillip Spencer

SECOND JOINED PARTY: Ms Leanne Spencer

WHERE HELD: Melbourne

BEFORE: Deputy President C. Aird

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 23 September 2005

DATE OF ORDER: 26 September 2005

ORDERS

1. The application is dismissed.
2. The Respondent's decision of 20 June and the direction contained in the accompanying Work Schedule dated 28 June 2005 is affirmed.
3. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant: Mr Brian Nunan, Director

For the Respondent: Mr M Farrelly, Solicitor

For the First Joined Party: Mr P Spencer, in person

For the Second Joined Party: Ms L Spencer, in person

REASONS

1. By application filed on 25 July 2005 the Applicant ('the builder') appeals the decision of the Respondent ('the insurer') dated 20 June 2005 although referring to and attaching a Works Schedule dated 28 June 2005, that it '*rectify and make good septic system to ensure the septic system is fit for the purpose for which it is intended*'. The Work Schedule includes the following:

Note:

At the time of inspection it is noted that the septic system adopted is unsatisfactory and is not suitable for the purpose in which it is intended. However, the septic system installed by the builder complied with the council requirements at the time of construction and complies with the design provided by council.

2. The owners of the subject property, Mr and Mrs Spencer, were subsequently joined as Joined Parties under s60 of the *Victorian Civil and Administrative Tribunal Act 1998*, their interests clearly being affected by the appeal. They attended the hearing, as did Mr Nunan, director of the builder, and Mr Farrelly, solicitor on behalf of the insurer. Mr Briggs, the plumber who installed the septic system as a sub-contractor to the builder, attended as a witness for the builder.
3. There is no dispute that the septic system does not operate satisfactorily with significant overflowing resulting in pondage of waste accompanied by extremely unpleasant odours. This is despite apparently careful and limited use of water including the redirection of grey waste from the washing machine to the garden, not using the dishwasher, and although allowing the children to shower, restricting them having a bath to once a week. Mr Nunan suggested that hairdressing carried out by Mrs Spencer at the subject property may be contributing to the problem but in the absence of any supporting expert opinion this is mere speculation which cannot impact on my decision.

4. Mr Spencer gave evidence they had been advised by the local health inspector that this was a health hazard and they should avoid areas of ponding. The builder appeals the decision because he believes that he should not be held liable in circumstances where the system was installed in accordance with the council requirements at the time, with the design having been approved by council. I was provided with a copy of a letter from the Senior Environmental Health Office of the Benalla Rural City Council dated 22 December 2004 to the plumber which, omitting the formal parts, provides:

“I wish to confirm to the best of my knowledge based on the inspections undertaken I believe the septic tank installed at the above property was installed in accordance with the permit issued for the same on the 16th of January 2003.

I have no reason to believe then or now that it did not comply with the requirements of the Septic Tank Code in operation at that time”.

5. Therefore the question to be determined is whether the builder having complied with the council requirements at the time, and the design and installation of the septic system having been approved by the council, is absolved from any liability for the defects. Mr Farrelly said the insurer had issued the Schedule of Works having regard to the provisions of s8 (a), (b) and (c) of the *Domestic Building Contracts Act 1995* which provide:

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;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal

requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act.

...

6. He also referred me to the *Plumbing Regulations* 1998 No 148 made under the *Building Act* 1993 and in particular s31G which provides:

Plumbing works carried out for the installation of, or alterations, additions or repairs to, any part of the sanitary plumbing system or sanitary drainage system of any property must comply with AS 3500.2.1

and then to AS 3500.2.1 – 1996 and in particular to clause 5 which provides:

The objective of this Standard is to:

- (a) Safeguard people from illness due to infection or contamination resulting from personal hygiene activities.
- (b) Safeguard people from the loss of amenities due to the presence of unpleasant odours or the accumulation of offensive matter resulting from sewage water disposal.

and Clause 6:

Sanitary fixtures and sanitary appliances using water-borne waste disposal are to be provided with an adequate disposal system.

7. I accept that the septic system does not comply with this Standard and therefore does not comply with s31G of the *Plumbing Regulations* referred to above. It is apparent that the septic system is inadequate and its performance is unsatisfactory and it is therefore not fit for the purpose for which it is used. Although I understand and appreciate the builder's position, in circumstances where it complied with the relevant council requirements, I am satisfied that the installation of a septic system which, ultimately does not comply with the legislation and is not fit for purpose is a breach of the warranties set out in s8. I therefore have no alternative but to dismiss the builder's application and affirm the decision of the insurer. I repeat my comments in *Webb v Housing Guarantee Fund Ltd* [2004] VCAT 2343 at paragraph 23

Although it is alleged the bathrooms have been built in accordance with the plans this is immaterial – they are clearly not fit for purpose and as such are in breach of the statutory warranties set out in s8 of the *Domestic Building Contracts Act 1995*. Further, I reject the suggestion by Mr Coghlan that as the showers had been passed by the building surveyor there could be no defect.

8. Whether the builder can seek legal redress from another party is a matter about which he may wish to seek advice.
9. I will reserve the question of costs with liberty to apply. However, I draw the parties' attention to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C. AIRD