VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP301/2017

CATCHWORDS

Building and Property List – Warranty Insurance – Interpretation of Warranty Insurance – When did loss, damage or expense occur in relation to a defect – Whether the loss, damage or expense occurred within the period of the Insurance Policy – Ministerial Order No. S98 23 May 2003.

APPLICANTS	P & J Simone Holdings Pty Ltd (ACN 613 363 910), L Seth, SS & CK Kee & Leow, RJ & KA Birch, A G Gutwirth, Mr R M Noonan, MV Kubes, KL Alexander, Vinrom Pty Ltd, Susan Lau Pty Ltd, MJ Cox, KM & PH Chan & Quek, Universal Licensing Co. Pty Ltd, PD Sullivan, S & R Levon & Puccio, Brisam Holdings Pty Ltd, GL Hunter, RDC and EA Galbraith, Owners Corporation PS543998L
RESPONDENT	QBE Insurance (Australia) Limited (ACN 003 191 035)
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Direction Hearing
DATE OF HEARING	6 October 2017
DATE OF ORDER	6 October 2017
DATE OF WRITTEN REASONS	18 October 2017
CITATION	P & J Simone Holdings Pty Ltd v QBE Insurance (Australia) Limited (Building and Property) [2017] VCAT 1683

ORDERS

1 (a) The loss or damage in connection with the fire safety defects did not "occur" when the works were completed and the property was handed over by the Builder in October 2007;

(b) The owners’ loss or damage in connection with the fire safety defects did not “occur” within any of the periods of insurance under the Policies.

2 The proceeding is listed for a Directions Hearing at 11.30 am on 30 November 2017 at 55 King Street, Melbourne.

3 Reserve costs.

Robert Davis
Senior Member

APPEARANCES:

For P & J Simone Holdings Pty Ltd & Others	Ms S. Kirton of Counsel
For QBE Insurance (Australia) Limited	Mr P.G. Cawthorn QC

APPLICATION AND ISSUES

1 The applicants seek to claim pursuant to Builders' Warranty Insurance in relation to Fire Prevention defects in the block of Units including the common property situated at and known as 765 Malvern Road Toorak Victoria (the **property**).

2 The issue before me was a preliminary issue which has been defined in two questions which I am required to answer which are as follows:

> **(a) "Did the Owners' loss or damage in connection with the Alleged Defects 'occur' when the works were completed and the property was handed over by the Builder in October 2007?"**
>
> **(b) "If the answer to question 1 is 'no', did the Owners' loss or damage in connection with the Alleged Defects 'occur' within any of the periods of insurance under the policies?"**

Agreed Statement of Facts

3 A Statement of Agreed Facts has been filed by the parties. That Statement of Agreed Facts reads as follows:

> 1. The Applicants are the owners of the residential apartments and common property situated at and known as 765 Malvern Road, Toorak, Victoria ("the Property").
> 2. The Respondent was a provider of domestic building insurance within the meaning of section 137AA of the Building Act 1993 ("the Building Act") and the Domestic Building Insurance Ministerial Order made 23 May 2003 ("the MO").
> 3. Between or about July 2006 to October 2007, Pritchard Pty Ltd ("the Builder") constructed the residential apartments at the Property ("the Works").
> 4. An occupancy permit was issued dated 26 October 2017.
> 5. In accordance with section 135 of the Act, on or about 12 July 2006 the Respondent issued 18 certificates of home warranty insurance, one in respect of each of the residential apartments to be constructed by the Builder.
> 6. The terms of the insurance are contained in the certificates, the MO, and the document headed "Domestic Construction Insurance Policy – Residential Builders Victoria (the "Policy") (**Annexure A**).
> 7. On or about November 2007, administrators were appointed to the Builder and the Builder was subsequently deregistered.
> 8. Following completion of the works, certain claims in respect of waterproofing defects were made on the Respondent for indemnity under the insurance.

9. On or around 31 March 2015, whilst investigating the likely rectification work needed for those waterproofing defects, at least some of the Applicants formed the view that there might be fire safety defects in the Works carried out by the Builder.

10. An audit report dated 16 March 2016 was obtained by the applicants from David Swinson of Fire Safety Consulting, which identified numerous alleged defects and breaches of the applicable codes and regulations (“the Alleged Defects”) in the Works (“Swinson Report”).

11. None of the Applicants were aware of the Alleged Defects by or before 26 October 2013.

12. On or about 9 January 2017, the then owners of the residential apartments and the Owners Corporation each lodged a claim with the Respondent seeking indemnity under the Policy for the matters subject of the Swinson Report (“the Claim”).

13. The Sixth Applicant purchased Unit 6 at the Property from the previous owners R J & p v Crawley by contract of sale dated 16 March 2017.

14. The Eighteenth Applicant purchased Unit 7 at the Property from the previous owners T R & L Burstin by contract f sale dated 4 March 2017.

15. By letter dated 2 February 2017, the Respondent rejected the Claim.

16. By letter dated 8 May 2017, the Respondent issued a revised decision rejecting the Claim.

17. For the purposes only of the preliminary questions the Respondent assumes that the Alleged Defects are defects within the meaning of the policy.

18. For the purposes of the preliminary questions it is agreed that the Alleged Defects were in existence at the completion of the building work.

Background

4 The applicants claim is for loss and damage arising as a result of the following:

(a) Defective Work – both non-structural and structural;

(b) Incomplete Works; and

(c) Breaches of Statutory Warranties implied into the Building Contract that the Builder would carry out the work:

(i) In accordance with the plans and specifications set out in the contract; and

(ii) In accordance with all laws;

Which are collectively referred to as Alleged Defects in the Statement of Agreed Facts.

The Policy

5 The relevant provisions of the Policy issued by the respondent are as follows:

> **Clause 1 Domestic builders warranty insurance**
>
> The policy covers loss and damage resulting from the non-completion of work or breach of statutory warranty because of:
>
> - Death; or
> - Disappearance; or
> - Insolvency
>
> of the builder…
>
> **Clause 5 What is covered by this policy?**
>
> **Primary cover**
>
> 5.1 We will pay for the following sustained by you:
>
> 5.1.1. loss or damage resulting from non-completion of the work because of the insolvency, death or disappearance of the builder or speculative builder; or
>
> 5.1.2. the following loss or damage but only if you cannot recover compensation from the builder or speculative builder, or have the builder or speculative builder rectify the loss or damage, because of the insolvency, death or disappearance of the builder or speculative builder:
>
> (a) loss or damage from work that is defective;…
>
> **Clause 8 How long are you covered for?**
>
> **Non-structural defects**
>
> 8.1 This policy covers loss or damage arising from a non-structural defect occurring during the period commencing on the commencement date and ending 2 years after the completion of the work or date of termination of the building contract, whichever is the earlier.
>
> **Other causes**
>
> 8.2 This policy covers loss, damage or expense, from a cause other than a non-structural defect, occurring during the period commencing on the commencement date and ending 6 years after the completion of the work or the date of termination of the building contract, whichever is the earlier.
>
> **Clause 13 Conflict with the Order**
>
> 13.1 This policy is intended to comply with the requirements set out under the Order. However, if this policy conflicts with, or is inconsistent with the Order, the policy must be read and enforceable as if it complies with the Order.
>
> **Clause 16 Words with special meanings**

16.1 …Defective

Includes, in respect of any work:

- in breach of a statutory warranty; or
- where there has been a failure to maintain any standard or quality of work specified in the building contract.

Ministerial Orders

6 The policy was made pursuant to the Ministerial Order No. S98 23 May 2003 pursuant to the *Building Act 1993*.

7 The relevant parts of the Ministerial Orders read as follows:

7 Required Insurance

(1) Before entering into an insurable domestic building contract, a builder must ensure that—

(a) a policy is issued that complies with this Order (except Part 3); and

(b) the policy covers the building work to be carried out under the contract.

8 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**;

12 Period of insurance

(1) The policy must provide the indemnities referred to in clauses 8 and 9 in relation to non-structural defects in respect of loss or damage occurring during the period commencing on the commencement day and ending not earlier than 2 years after the earlier of—

(a) the completion date of the domestic building work; and

(b) the date of termination of the relevant domestic building contract.

(2) The policy must provide the indemnities referred to in clauses 8 and 9 in respect of all other loss and damage occurring during the period commencing on the

> commencement day and ending not earlier than 6 years after the earlier of—
>
> (a) the completion date of the domestic building work; and
>
> (b) the date of termination of the relevant domestic building contract.

8 It will be noted, that Clause 12 of the Ministerial Orders reflects Clause 8 of the Policy.

Decision of Respondent

9 By a revised decision made 8 May 2017, the respondent's lawyers, on behalf of the respondent, decided that the applicants' loss did not occur at the time the works were or should have been carried out – instead the works occurred in the policy being in the time Alleged Defects became known or manifest, and this was after the insurance period.

10 The applicants challenge the decision and seek review thereof on the basis that their loss and damage occurred at the time the works were or should have been carried out and that this was during the period of insurance, and the policy should not be interpreted as requiring their loss be known or manifest at that time.

Interpretation of Clause 8 of the Policy

11 Ms Kirton, Counsel for the applicants, conceded during the hearing that the word "occurring" in both Clause 8.1 and 8.2 of the Policy, refer to the words "loss" or "damage" in Clause 8.1 and "loss", "damage" or "expense" in Clause 8.2. It was not confined to the word "defect" used in both those clauses.

12 Ms Kirton, while conceding that the word "occurring" used in both sub-clauses of Clause 8 of the Policy is ambiguous, that the date that the applicants' loss or damage arising from the builder's breach of the performance of the defective work or the date on which the work was handed over or finally completed – October 2007, accordingly, she submitted the Respondent's rejection of the claim – was incorrect.

13 There were a number of cases referred to me during argument, which Ms Kirton said went both ways. Both Ms Kirton and Mr Cawthorn QC, Counsel for the respondent, stated that there was no direct authority on the points of issue before me.

14 Ms Kirton referred me to *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* (2014) 1QldR 476, [2014] QCA 233 which was a decision by the Court of Appeal at 499 [37] ff, Margaret McMurdo P, discussed a number of the relevant cases. She there stated:

> The principles discussed in *Hayman, Hawkins v Clayton and Pullen* which I have set out have been followed in a number of cases: see for

example *Di Sante v Camando Nominees Pty Ltd* [2000] VSC 211 [28] – [30] and *Council of the Shire of Noosa v Farr* [2000] QSC 60.

In the latter case, upon which the appellant placed some emphasis, the Council plaintiff sued consulting engineers for damages alleged to arise from negligent design of waterworks infrastructure. The Council argued it did not suffer loss until it fully appreciated the water intake design by one defendant was completely faulty. His Honour rejected the arguments, noting:

> 'They are based upon a misunderstanding of what the Full Supreme Court of Victoria held in *Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27. In that case Pullen suffered economic loss when the consulting engineer he retained to design a public swimming pool on a site known to offer poor foundational material did not provide adequate support for the structure. When filled with water the pool settled differentially and cracked. The problem manifested itself over several years without the cause becoming apparent until an independent engineer investigated and discovered the design error. The court held (p 67) that in cases of pure economic loss due to a latent defect in design time begins to run when the latent defect first becomes known or was discoverable by reasonable diligence, applying the judgment of Deane J in *Hawkins v Clayton* (1987-1988) 164 CLR 549 at [588] and his Honour's judgment in *Sutherland Shire Council v Heyman* (1984-1985) 157 CLR 424 at [503] – [505]. The latent defect was the inadequacy of the footings and what to be known or reasonably discoverable was that inadequacy. On the facts of that case, the defective design was known or was reasonably discoverable only upon receipt of the second engineer's report. Likewise, in this case, it is said that the [Council] did not know and could not reasonably have discovered the inadequacy of the design until [it] saw the *Burdekin* intake operating. The argument overlooks the point made in *Pullen* (at 67) that:
>
> > "The position is different in cases where all or some of the damage be it in the form of physical injury to person or property or present economic loss, is directly sustained in the sense that it does not merely reflect diminution in value or other consequential damage which occurs or is sustained only when a latent defect which has existed … becomes manifest. In those cases, damage is sustained when it is inflicted or first suffered then the cause of action accrues at that time"'.

15 It is noted, that Ms Kirton at [40] of her submissions, attempts to amplify what is said in the above cases which have been discussed by McMurdo P by reference to the author Sydney Jacobs in ***Damages in a Commercial Context*** who says the following about Deane J's decision in *Hawkins v Clayton* at [14.30]:

> It would appear as though what His Honour had in mind in the latter category was something like a building which was something like a building which was manifestly defective from the date of practical completion. Such an example might be where, upon practical, completion, there were substantial cracks apparent and readily visible in so many places as to clearly put the owner or occupier on notice that there was something seriously wrong from the beginning.

16 The difficulty with Jacobs' interpretation of Deane J's decision, is that the same has been now commented on in the *Melisavon* case by McMurdo P at [45]. At that paragraph, Her Honour stated:

> The principles to be applied are those stated by Deane J in Hawkins v Clayton, with which Mason CJ and Wilson J agreed: damage by way of pure economic loss is suffered when the latent "defect was actually discovered or became manifest, in the sense of being discoverable by reasonable diligence."

17 It thus follows, that as the defect in the property was not discovered until 2015 which was outside the 6-year period of Clause 8.2 of the Policy, that the defect did not become manifest or discoverable until that time. Therefore, the defect in this particular instance was outside the time covered by the Policy. Ms Kirton submitted, that insofar as the Owners Corporation was concerned, the value of what they received had a diminution at the time that the property was handed over from the builder. In my view, that does not take the matter any further, because defects were not discovered and did not become manifest until 2015.

18 In *Cyril Smith & Associates Pty Ltd v Owners Strata Plan No 64970* [2011] NSWCA 181 a residential apartment building was completed in 2001. It had defects with windows that manifest themselves in water penetrating in several units and the rusting of the steel structure supporting the roof. An issue on Appeal was whether the 6-year limitation period had expired before the proceeding was commenced against the appellant. Basten JA at [22] referred to *Owners of Strata Plan 50946 v Multiplex Constructions (NSW) Pty Ltd* [2006] NSWSC 377 at [20] where White J expressed the following view:

> In my view, there is no additional requirement that in order for a defect to be latent it must not be visible, or must be concealed or hidden, although, of course, a defect which is visible and not hidden may be manifest in the sense of being discoverable with reasonable diligence. Moreover, a defect may be, and often will be, different from the physical thing which may be observed. For example, there may be a latent defect in the design of a building where a temporary external wall is too thin to carry a load, even though the thickness of the wall and the size of the roof it carries is plainly visible.

19 Basten JA made the following observations as to the water penetration [26]:

> The relevant defect in the building was not the design, installation or inspection of the windows but the windows themselves. Once it was

> appreciated that the windows themselves were defective (in that they were not adequately watertight) the defect was known. They physical consequences of the defect, namely the ingress of water, was not itself the defect, although it might well have been sufficient to lead a reasonable person to make enquiry and thus discover the defect. In this respect, there is an important distinction between a case of water penetration in a room, where the point of egress can be readily investigated, and the adequacy of footings of foundations to a building, which can often only be inspected with difficulty.

20 It is apparent from what Basten JA said above, that he found that the windows themselves were defective and the time ran when that became known by the ingress of water. Therefore, it follows that a latent building defect time is treated as running, and damage as having occurred, from when the defect becomes known or manifest. In this particular instance, the defect in the property's fire protection arrangements, did not become known until 2015 which was outside the time of the Policy.

21 Ms Kirton suggested, that I should be very careful in applying the principles in a number of decisions that were cited to me by Mr Cawthorn, as those principles involved matters of negligence and negligence only becomes actionable where there is damage. Ms Kirton distinguished the present situation which she said was a breach of warranty which was similar to contract which could be actionable prior to damage. The difficulty with the submission of Ms Kirton is that there is a presumption in statutory interpretation that where a statue uses a word or phrase with an established legal meaning, that is the meaning the word or phrase will bear unless the context suggests otherwise. See *AG (NSW) v Brewery Employees Union* (1908) 6 CLR 469, 431; *Lo v Russell* [2016] VSCA 323 at [46].

22 The same approach is taken to contracts where the draft person is presumed to have drafted the contract addressing the legal situation by giving the relevant word or phrase its established meaning: see *Gutheil v Ballarat Trustees* (1922) 30 CLR 293 at [303]. In *McCann v Switzerland Insurance Australia* (2000) 203 CLR 579 at [589] after observing that, as a commercial contract, a policy of insurance should be given a businesslike interpretation, Gleason CJ added:

> Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.

23 To this can be added: the purpose of the transaction and the context in which the parties were operating: *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [117].

24 The draftsperson of the Ministerial Order and the Policy have drafted the phrase "loss and damage occurring" as an established meaning in mind, namely, that in the context of latent defects, loss or damage occurs in a temporal sense when it becomes known or manifest. In this particular instance, it was 2015.

25 The case of *AXA Global Risks (UK Ltd) v Haskins Contractors Pty Ltd* (2004) 13 ANZ Insurance Cases 61-611. The New South Wales Court of Appeal made it clear, that loss was consequent upon damage. At [52]: the Court observed:

> The insurer did not suggest that the Policy would not have responded merely because the original work and materials were defective. But it submitted that the judge's findings went further, in establishing that the eastern wall was doomed from its inception. So much may be conceded, but there remains a critical distinction between property that is liable to become damaged and property that is damaged. The Policy did not respond until physical damage actually occurred. The Insuring Clause extended to physical loss or damage "*arising from any cause whatsoever*". It cannot be rewritten merely because of the absence of an exclusion clause broad enough to cover the sub-contractor's bad work and inadequate materials.

26 Mr Cawthorn submitted:

> Indemnity sought to be recovered in this case is the cost of rectifying the alleged defects. These are alleged to be in the form of physical defects and the costs of their rectification (loss) are consequent upon their existence: *Bryan v Maloney* (1994 - 1995) 182 CLR 609 at [643].

27 Ms Kirton went to some length to distinguish the *AXA* case. Without referring to all the distinctions that Ms Kirton made, she made it clear that the Policy in the AXA case referred to physical loss or damage to the property incurred during the period of insurance. In this particular instance, there was no reference to the word "physical" therefore she stated, that it would include economic loss which at least the Owners Corporation would have suffered at the time of the handover from the builder.

28 Ms Kirton in order to support her submission, referred to [51] of the *AXA* case where the Court noted that there was a submission made by Counsel in relation to an analogy whereby, "the analogy of a fire policy covering a property in a remote location. If property is destroyed by a fire unbeknown to the owner who discovers the loss much later, the relevant occurrence still happened at the time of the fire, not its discovery." The Court found that the analogy was inapt in the *AXA* case and did not lead to an inference that the 2000 cracking or splitting occurred in the preceding year. Ms Kirton stated that because of the distinction between the present situation and the *AXA* case the analogy of the fire situation applied in this particular instance.

29 I reject the submission of Ms Kirton in relation to this matter, because in this particular instance I do not think the analogy of a fire situation is appropriate. For the reasons I have already stated, I have come to the conclusion that in this particular case loss is consequent upon the damage. The damage did not occur at the time of the builder handing over the property, the damage occurred when it was discovered. This is the established meaning of "damage". Even though, there have been numerous distinctions made in these type of cases by Ms Kirton, there is an accepted

principle, that loss is consequent upon damage. In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, McHugh J stated at [107]:

> Many defects will not manifest themselves for many years after the erection of the building. Given the now accepted doctrine that damage does not occur until the defect manifests itself, those involved in the construction of the building may be required to defend themselves many years after the event. Claims that might have been defended if brought within the normal periods imposed by the statute of limitations may become indefensible in practice. (*emphasis supplied*).

30 A close examination of Clause 8, leads to the conclusion that loss is from or after the works were completed. The Ministerial Order and the Policy contemplate the responding to defects manifesting themselves after the building works were completed. Thus the loss and damage or expression damage is to be from a defect (Clause 8) and must occur in the period. The cover under the Ministerial Order (and the Policy) is for loss or damage resulting from domestic building work that is “defective” within the meaning of Clause 8. The Policy refers to cover for loss and damage arising from work that is defective (Clause 5.1.2). The defect must cause loss or damage. The defect is the cause and the loss and damage is the effect. The temporal limitation on cover for structural defects (causes) (Clause 8) is the earlier of (2 years for non-structural defect) and (6 years for a cause other than non-structural defect). But the loss, damage or expense from the cause must occur during the period. The limitation is on loss, damage or expense “occurring” during the period. If the loss, damage or expense from a defect occurs after the period it is not compensable.

Conclusion

31 Thus I conclude in this particular situation, the Policy and the Ministerial Order do not allow for compensation for defects that were discovered after the period of insurance which in this case is 2 years for non-structural work and 6 years for work for causes other than non-structural.

32 The conclusion that I have referred to above, as a matter of practicality, is easily tested. If one does not give a temporal meaning to the words as used in the Policy, it would be open in a situation like this for property owners to make claims many decades into the future. That would not only lead to an absurd situation, but would make such claims almost impossible to defend. It is clear to me, that the drafters of the Ministerial Order and the Policy, could not have intended such a meaning. Further, I note, that the Shorter Oxford Dictionary, defines the word “occur” to mean:

> To present itself; to be met with or found, to ‘turn up’, or appear (*in* some place, class of things, course of action, etc.).

33 This makes it clear to me that the loss, damage and expense, must arise within the time of the Policy. That is, in this case, before 2013. It is not appropriate, to make such a claim in 2015.

34 I will answer the questions asked as follows:

(a) The loss or damage in connection with the fire safety defects did not "occur" when the works were completed and the property was handed over by the Builder in October 2007;

(b) The owners' loss or damage in connection with the fire safety defects did not "occur" within any of the periods of insurance under the Policy.

Robert Davis
Senior Member