VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D16/2006

DOMESTIC BUILDING LIST

CATCHWORDS

House Contracts Guarantee Act 1987 – HIH indemnity scheme – s.44(1)&(2) – right to give a direction to builder to reimburse fund for amounts paid out on claim – s.44(3) – right limited to right of HIH under policy to claim reimbursement – demand given – evidence of – no right under policy for HIH to claim reimbursement – no right to give direction

FIRST APPLICANT	State of Victoria by its agent Housing Guarantee Fund Ltd (ACN 006 258 233)
SECOND APPLICANT	CGU Insurance Ltd (ACN 004 478 371) Professional Risks Division by its agent Housing Guarantee Fund Ltd
RESPONDENT	Choong Je Ahn
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	9 August 2006
DATE OF ORDER	1 September 2006
CITATION	State of Victoria v Choong Je Ahn (Domestic Building) [2006] VCAT 1816

ORDER

1. The application is dismissed.

2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr D. McDonald of Counsel
For the Respondent	Mr D. Noble, Solicitor

REASONS

The claim

1. This is a claim by insurance underwriters ("the Applicants") to recover from the Respondent ("the Builder") an amount they have paid to a developer, 45th Vilmar Pty Ltd ("the Owner") in settlement of a claim under a policy of domestic building insurance ("the Policy"). They also seek to recover costs they have incurred in relation to the Owner's claim.

2. Ultimately, the claim is brought under Clause 7.1 of the Policy but for the following reasons I find that they are not entitled to demand reimbursement under that clause and so the Application fails.

Background

3. In about April 1999 the Builder entered into a contract to construct 3 units for the Owner in Seaford.

4. Pursuant to a proposal of insurance submitted by the Builder to HIH Insurance Group Limited ("HIH") and CGU Insurance Limited, those two companies issued the Policy granting certain contractual indemnities to the Builder and the Owner.

The Scheme

5. HIH has been wound up and under a statutory scheme ("the Scheme") implemented by the *House Contracts Guarantee Act* 1987 (as amended) the State of Victoria is required to indemnify any person who is entitled to an indemnity under an HIH policy to the extent of the indemnity under that policy (s37(1)). Under the terms of the Policy HIH was the underwriter as to 90% of the risk and CGU was underwriter as to 10% of the risk. At all material times the Scheme was administered by the Housing Guarantee Fund but is now managed by its statutory successor, the Victorian Managed Insurance Authority ("the Fund").

6. A dispute arose between the Builder and the Owner as to payments made under the building contract and allegedly defective and incomplete work. Proceedings were issued in this Tribunal and the matter came before me for hearing. In a written decision made on 9 August 2006 I dismissed the Builder's claim and ordered him to pay to the Owner the sum of $29,972.80. This sum was arrived at after offsetting various amounts the Owner owed the Builder.

7. Before that proceeding was decided, in separate proceedings against the Fund and CGU, the Owner sought indemnity under the Policy with respect to defective work. It is common ground that, since the Owner was a developer, the policy only provided indemnity with respect to defects in the building work. After a number of interlocutory steps this proceeding was settled in accordance with terms of settlement executed on behalf of the Fund and CGU of the one part and the Owner of the other part. Pursuant to

those terms it was agreed that if the Owner should obtain a judgment or order in its favour for damages for defective work against the Builder, the Fund and CGU would indemnify the Owner to the extent the Builder failed to comply with any such order, up to the maximum of $100,000.00, which was the limit of the indemnity under the Policy.

8. The builder failed to comply with the Tribunal's order in favour of the Owner and the whole of the sum of $29,972.80 was paid to the Owner by the Applicants. They now seek to recover this sum from the Respondent Builder, together with the further sum of $30,732.83, representing the costs incurred by the Fund and CGU in regard to the separate proceeding brought against them by the Owner.

The hearing

9. The matter came before me for hearing on 9 August 2006. Mr D McDonald of Counsel appeared on behalf of the Applicants and Mr D Noble, Solicitor, appeared on behalf of the Respondent. Evidence in support of the claim was provided by an affidavit sworn by the Fund's Recoveries Controller, Mr Mackwell who was cross examined.

Evidence

10. It became apparent during cross examination that most of the facts to which Mr Mackwell deposed were not within his direct knowledge but based on information contained in his file. As such, the evidence was hearsay but the source of the information namely, the file, was revealed. This Tribunal can receive hearsay evidence but it should be treated cautiously.

11. One matter deposed to was the sending of a letter of demand to the Respondent by the Fund dated 9 May 2005. Mr Mackwell acknowledged that the letter was sent not by him but by his colleague, Miss Hunter who was the only other person working in the recoveries office at the time. He said that he could not swear that the letter had been signed or sent but he could say that the copy was on the file and the practice of the office was that mail was collected and posted each day. Although less than ideal, I think that the presence of the copy letter on the file and the practice adopted in the office of the Fund in regard to correspondence is sufficient to provide some evidence that the letter was sent which I think is sufficient in the absence of any evidence that it was not received.

12. The letter refers to the amount paid to the Owner and states that payment of that sum is required within 10 days. No mention in the letter is made of the further claim for costs that is brought in this proceeding. It is common ground that no payment has been made to the Applicants by the Builder.

Grounds of claim

13. The present claim is brought pursuant to s44 of the *House Contracts Guarantee Act* 1987. That section provides as follows:

(1) Subject to sub-section (3), if a claim is made under section 40 for loss arising from incomplete or defective building work, VMIA may give reasonable directions to the builder concerned in respect of—

(a) the completion of the building work or the rectification of the defective building work; or

(b) the payment by the builder to the Domestic Building (HIH) Indemnity Fund of any amount in respect of the completion of the building work or the rectification of the defective building work.

(2) Subject to sub-section (3), if a claim is made under section 40, VMIA may direct the builder concerned to pay to the Domestic Building (HIH) Indemnity Fund any amount paid out of the Fund on that claim.

(3) VMIA may only give a direction under sub-section (1) or (2) to the extent that HIH would be able to require that work or require a payment to HIH by the builder under the relevant HIH policy.

(4) A builder must comply with a direction under sub-section (1) or (2).

(5) VMIA may recover an amount to be paid by a builder under this section in any court of competent jurisdiction as a debt due to the State.

Is VCAT a "court of competent jurisdiction"?

14. For the purpose of this proceeding it is not necessary for me to determine whether or not this Tribunal is a court of competent jurisdiction within the meaning of s44(5).

Proof of the Policy

15. The real point in issue was the application of s44(3) and the meaning of the Policy itself. As to the latter, Mr Noble submitted that the evidence as to the contents of the Policy were insufficient because the form of policy produced refers to a written proposal to the insurers by the builder "containing particulars and statements as incorporated in this policy…". Mr Noble said that since the proposal was not before me I could not make any finding as to what the terms of the Policy are. I reject that submission. I think the failure to produce the proposal does no more than indicate that there may be further provisions in the proposal that might have been incorporated but that no one has chosen to prove them.

16. Further, the Policy is admitted. In his Points of Defence the Builder admits that he purchased domestic builder's warranty insurance and says in the particulars to that admission:

> "The required insurance as evidenced by Certificate of Insurance No 991030/1 and the terms are as set out in the document entitled RCI Builders' Insurance ("the policy") as exhibited to Mr Mackwell's affidavit as "AM2" as governed by the relevant Ministerial order".

17. It is not suggested that the proposal, which is incorporated into the policy by reference, contains any provision which might negate or vary any of the

other provisions contained in the documents referred to in the Points of Defence.

Was a direction given?

18. Mr Noble submitted that the Fund had not made a direction to the Builder pursuant to s44(2) that he pay to the Fund the amount paid out on that claim. As stated above, I accept that the letter of 9 May 2005 was sent and I think the wording of that is sufficient to constitute a demand.

Was the direction valid?

19. By s44(3), a direction to pay money pursuant to s44(2) may only be given by the Fund to the extent that HIH would have been able to require a payment to it under the relevant policy. The provision in the Policy relied upon is Clause 7.1 which is in the following terms:

> "The builder, if requested by the insurers, shall be required to attend the building site for the purpose of rectification, completion or inspection of the works and when instructed by the insurers rectify any defective work or complete any non-complete work at the builder's own expense or pay promptly (or within the terms of any proposed settlement) any amount for which the builder is liable to pay to the insurer. Should the builder fail to comply with the direction of the insurers, or fail to comply with a policy provision or policy clause then the insurer shall be entitled to recover from the builder an amount equal to the amount the insurers are required to spend in settlement of any claim hereunder, plus the insurer's reasonable legal expenses and other costs associated with the investigation, substantiation or settlement of any claim. This policy condition shall not limit any other right of action the insurers may have".

20. It was not suggested that the Fund requested the Builder to attend the building site for the purpose of rectification, completion or inspection of the works nor is it suggested that the Fund instructed him to rectify any defective work or complete any incomplete work. The case hinges on the meaning of the words *"…. or pay promptly (or within the terms of any proposed settlement) any amount for which the builder is liable to pay to the insurer"*. (sic). It seems to me that a direction to make such a payment can only be made with respect to an amount for which the Builder is liable to pay to the insurers, not any amount at all that the insurers care to demand. This part of the clause seems to do no more than say that, if the builder is liable to pay money to the insurers, it must do so promptly.

21. The only liability to pay money created by the clause seems to be in the next succeeding sentence which provides that the insurers shall be entitled to recover from the builder an amount equal to the amount they are required to spend in settlement of any claim plus their reasonable legal expenses and other costs associated with the investigation substantiation or settlement of the claim. However that sentence starts with the words: "Should the builder fail to comply with the direction of the insurers or fail to comply with a

policy condition or policy clause …". There is no evidence that the builder has failed to comply with a policy condition or policy clause. What he has failed to do is meet a judgement the Owner has obtained against him and failed to pay amounts demanded by the Applicants.

22. Mr McDonald referred to the following note which appears upon the policy schedule/certificate of insurance which forms part of the policy:

> "Important note, this policy operates on a recovery basis that all residential building work claimed costs are recoverable from the builder as per clause 7.1"

23. I do not think that this note takes the matter any further. The recovery referred to is, as it states, by means of clause 7.1. The note does not purport to expand the meaning of that clause.

Conclusion

24. Since clause 7.1 of the Policy does not permit the insurers to require a payment to it by a builder unless the builder has failed to comply with the direction of the insurers or failed to comply with a policy condition or policy clause, and since no such failure on the part of the Builder has been proven or for that matter, appears to have occurred, I think s44(3) of the Act prevents the making of a demand pursuant to s44(2). That being so, recovery under the section is not permitted.

25. I asked Mr Noble what benefit the successful outcome of this proceeding would be to the Builder, since it appears that the Applicants would have a right to recover by means of subrogation or as assignees of the judgement debt from the Owner. The question was asked rhetorically, but the difference may be that more than half the amount sought to be recovered in this proceeding is the costs the Applicants incurred in their proceeding against the Owner which may not be recoverable under a right of subrogation or as assignee of the judgement debt. It is unnecessary for me to express a concluded view about that.

26. Costs will be reserved.

SENIOR MEMBER R. WALKER