

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D411/2006

CATCHWORDS

Builders' Warranty Insurance – certificate of warranty insurance issued in name of registered builder – domestic building contract with unregistered builder – certificate of warranty insurance altered identifying builder as the contracting unregistered builder – does warranty insurance respond?

APPLICANTS	Saheser Tabakglou, Suleyman Tabakglou
RESPONDENT	CGU Insurance Ltd (ACN 004 478 371)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	13 March 2007
DATE OF ORDER	5 April 2007
CITATION	Tabakglou v CGU Insurance (Domestic Building) [2007] VCAT 530

ORDER

1. The application is dismissed.
2. Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs before Deputy President Aird.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr M. Clarke of Counsel
For Respondent	Mr S. Stuckey of Counsel

REASONS

- 1 This is an unfortunate case where the Applicant owners find themselves the victims of a fraud. The owners entered into a building contract with Downunder Resources Pty Ltd ('Downunder') and were provided with copies of Certificates of Warranty Insurance identifying Downunder as the builder. It subsequently became apparent that the Certificates issued by the Respondent ('the insurer') had identified Gerard Helliard Pty Ltd ('GHP') as the builder, as had the building permits. The owners seek a review of the decision of the insurer to deny their claim for indemnity under the policies of warranty insurance.

Background

- 2 In 2001 the owners purchased an old house with the intention of demolishing it and building two units (they own 98 shares between them and their son and daughter have one share each) – one for them to live in and the other for their son and daughter. Mrs Tabakoglu did most of the organising for the building of the units. She said someone in the planning department at the Kingston City Council referred her to Dale Swenson of AA Design and Planning Pty Ltd who prepared the plans for the town planning permit. What she described as 'the structural plans' were prepared by David Calleja. After telling Mr Swenson they had obtained a quotation for more than \$600,000.00, which was more than they could afford, he gave Mrs Tabakoglu the names and telephone numbers of three builders including Chuminda Narayan ('Chum') who gave them an oral quotation of \$500,000.00.
- 3 An MBAV New Homes Contract was prepared with Downunder as builder for the construction of two units. The space for the provision of the 'Registered Building Practitioner No' has been left blank, although MBAV Membership No 2714 has been completed. The page titled 'Instrument of Agreement' was signed by Mr Tabakoglu on 20 July 2004. Mrs Tabakoglu went to Turkey on 24 July 2004. Whilst she was away her husband liaised with Chum. The pages of the contract were initialled by him on 4 October 2004 and he gave evidence that it was his understanding that the contract would not become binding until that date. The contract was signed and initialled by Chum, on behalf of Downunder, who provided Mr Tabakoglu with two certificates of warranty insurance (one for each of the units) which identified Downunder as the builder.
- 4 Work commenced, and payments totalling \$310,000.00 were made to Downunder in accordance with the terms and conditions of the building contract. Downunder ran into financial difficulties and sought to terminate the contract on 29 April 2005. Downunder presented the owners with a 'Letter of Termination' signed on behalf of Downunder by Chum and George Romanos (co-directors). The owners declined to sign it as they

were not prepared to give Downunder an indemnity in the terms contemplated. Downunder was subsequently placed into liquidation.

- 5 After engaging a building consultant, Kevin McDonald, to provide a report, the owners obtained a copy of the building permit from the Kingston City Council. On receipt of the report on or about 28 June 2005 they learned that the building permits identified the builder as GHP as did the copies of the Certificates of Warranty Insurance held by the Kingston City Council.
- 6 Mr and Mrs Tabakoglu both gave evidence that it was always their understanding that Chum was the builder and he was their primary contact. They said that Mr Helliar was on site from the commencement of the works, and assisted with the concrete slab works. Mr Tabakoglu said that Chum had introduced Mr Helliar as his partner on the day the slab was poured, and that he discussed the works with Mr Helliar a couple of times, otherwise all his discussions were with Chum. On the day the slab was poured he was also introduced to Chris who, he said, Chum told him was the site supervisor.
- 7 At some time, towards the end of Downunder's involvement in the project, the owners arranged to meet Mr Helliar on site as Chum was overseas. There was apparently a disagreement between Mr Helliar and Chris and police were in attendance. Mr Helliar telephoned Chum and Mrs Tabakoglu spoke to him. She says that Chum assured her that everything would be fine, that they should not believe anything Chris said and that they should ask him to leave, which they did.
- 8 Mrs Tabakoglu said that when Chum returned from overseas, she again went to the site and had a discussion with Mr Helliar who told her that he had been in and out of hospital, that he was the licensed builder and that Chum and George (Romanos) were not paying him. At that time there was a builder's sign on the fence in the name of GHP. She also says that she had some further discussions with Chum who assured her that they (he, Mr Romanos and Mr Helliar) were all partners, that he dealt with the customers but Mr Helliar was the licensed builder.
- 9 Following Downunder indicating it would be unable to complete the project, the owners say they were contacted by Mr Helliar with a promise that he would complete the works. They say works continued intermittently until early June 2005 when they ceased. There is no evidence of any payments having been made to Mr Helliar by the owners.
- 10 When she contacted the Respondent ('the insurer') Mrs Tabakoglu was advised that they did not hold a policy in the name of Downunder. The owners nevertheless lodged a claim which was rejected.
- 11 The owners have sought a review of the insurer's decision and allege, first that there is a contract of insurance between the insurer and Downunder under which the insurer is liable to indemnify them for any breaches of its obligations under the building contract, or, alternatively, that the owners

entered into a domestic building contract with GHP which, they contend, undertook works at the subject property, that these works are covered under the relevant policies of warranty insurance as evidenced by the Certificates issued by the insurer on 29 September 2004 (which identify GHP as the builder) and that they are entitled to claim under the relevant policies of warranty insurance.

The warranty insurance scheme

12 The requirements relating to domestic building warranty insurance are set out in Section 135 of the *Building Act 1993* which provides:

- (1) The Minister may, by order published in the Government Gazette—
 - (a) require building practitioners in specified categories or classes of building practitioners or any part of a class or category of building practitioners to be covered by insurance; and
 - (b) require specified classes of persons to whom section 137B or 137D applies to be covered by insurance for the purposes of that section; and
 - (c) specify the kinds and amount of insurance by which building practitioners and persons in each specified category or class or part of a category or class are required to be covered.
- ...
- (6) For the purposes of this Act, a person is covered by the required insurance if—
 - (a) the person holds the required insurance; or
 - (b) the building work carried out by or on behalf of the person is covered by the required insurance; or
 - (c) in the case of a person who manages or arranges the carrying out of domestic building work, the work carried out by the person and the building work which the person manages or arranges is covered by the required insurance; or
 - (d) the person is not a party to the required insurance but is specified or referred to in the insurance, whether by name or otherwise, as a person to whom the insurance cover extends.

13 The relevant sections of the applicable Ministerial Order (S98 of 2003) provide:

6. *To which contracts does this Part apply?*

This Part applies to a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$12,000 (an ‘insurable domestic building contract’).

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.
- (2) A builder may enter into an insurable domestic building contract without complying with subclause (1) if the contract contains a written condition that:
 - (a) requires a policy that complies with this Order (except Part 3) and covers the building work carried out under the contract to be issued before the builder may enforce any provision of the contract; and
 - (b) requires the policy to be issued before any domestic building work is carried out under the contract; and
 - (c) states that no money (including deposit money) is payable under the contract before that policy is issued; and
 - (d) requires the builder to ensure that a copy of the policy is provided to the building owner within 7 days after it is issued.

...

- 14 The obligation to take out the insurance rests with the builder who enters into the contract with the owners. In this case, a Certificate of Warranty Insurance identifying GHP as the builder was issued, but the domestic building contract was entered into by Downunder, and the copy of the Certificate of Warranty Insurance provided to the owners was altered so that it identified the builder as Downunder not GHP.
- 15 Clause 8 of the Ministerial Order makes it clear that the purpose of the insurance is to indemnify the owners in respect of any loss or damage they may suffer as a result of a breach by the builder of its obligations under the building contract or of the statutory warranties set out in s8 of the *Domestic Building Contracts Act 1995*. An insurer may also include a provision that the indemnity will only apply if ‘*the builder dies, becomes insolvent or disappears*’. In the present situation, Downunder and GHP have both been placed into liquidation.

Is there a contract of insurance between Downunder and the insurer?

- 16 There is simply no evidence to support the owners' contention that there is a contract of insurance between Downunder and the insurer.

Who is the builder?

- 17 The owners allege, in the alternative, that they entered into a domestic building contract with GHP and the policies of insurance issued to GHP therefore apply. The owners seeks to support these allegations by what, at best, can be described as circumstantial evidence. It is helpful to set out paragraph 12 of their Points of Claim:

Further or alternatively the Applicants entered into a domestic building contract with Gerard Hellier Pty Ltd (sic) who undertook work on the said property.

PARTICULARS

- (a) Commenced work on the said property;
- (b) Obtained the Certificates of Insurances numbers...in its own name;
- (c) Obtained Planning permits for the work in its own name;
- (d) Obtained the Building Survey in its own name for the works;
- (e) Obtained Building permits, soil and road tests and other surveys in its own name;
- (f) Entered into agreement with subcontractors to carry out the work and the tests;
- (g) Used and operated its business at the offices of the secondnamed Respondent;
- (h) Uses the same telephone number as the secondnamed Respondent.

PARTICULARS

The building contract arises by operation of Section 3 of the Domestic Building Contracts Act 1995.

- 18 In response to the insurers request for particulars, the owners filed Further and Better Particulars dated 22 November 2006 in which they maintain:
- (a) the building work was carried out by or behalf of Downunder, and as such is covered by the relevant insurance.
 - (b) Gerard Helliar Pty Ltd managed, arranged and carried out the work and arranged the required insurance;
 - (c) the contract of insurance which they allege exists between Downunder and the insurer, is not in writing but is implied '*from the conduct between Gerard Helliar Pty Ltd and Down Under Resources Management*' (paragraph 1(c)).

- 19 Mr Helliar suffers from a serious mental illness. Mr Swenson (who provided the owners with Chum's contact details) gave evidence that he has known Mr Helliar for a number of years (since 1996 or 1997), and that he met Chum through Mr Helliar. Mr Swenson was appointed as Mr Helliar's administrator under the *Guardianship and Administration Act* 1986 in 2000 until 2006 when the order was reviewed, and Mr Helliar's sister appointed as his administrator. He said that he was introduced to Chum by Mr Helliar sometime in 2004 when Mr Helliar told him that he was working with Chum and George (Romanos). Mr Swenson said that he had done some drawings for Chum and George under the name of Prestige Housing. Although he said he knew that Mr Romanos did not work on the tools, he said he did not know whether Chum was a 'qualified builder'.
- 20 There can be no doubt that GHP applied for and obtained approval for warranty insurance eligibility. The application is purportedly signed by Mr Helliar as director of GHP. I am not in a position to make any findings as to whether or not it is his signature. Financial Statements prepared and certified by GHP's accountants were lodged with the insurer in support of the application for warranty insurance eligibility, and I have before me copies of correspondence passing between the accountants and the insurer in relation to a further injection of capital into GHP to satisfy the insurer's requirements. Mr Helliar's registration as a building practitioner (DBU 2487) was approved by the Building Commission after the insurer confirmed GHP's eligibility for warranty insurance. The applications for job specific insurance are also purportedly signed by Mr Helliar, in his capacity as director of GHP. One might well question how all this occurred in circumstances where Mr Helliar had been under administration for some years, and was the sole director of GHP.
- 21 Mr Helliar's relationship and/or that of GHP with Downunder is unclear. Although not drawn to my attention by either party, I note that Mr Helliar's DBU appears on Prestige Housing Constructions' letterhead. Mr Helliar was not called to give evidence, because, as I understand it, he is not well enough. Mr Nankervis, who conducted interviews with various persons in relation to a Building Commission investigation, said he had some concerns about Mr Helliar's mental health when he interviewed him. It is apparent from those records of interview, which have been tendered in evidence, that Chum was aware of the serious nature of Mr Helliar's mental illness and that he required people to look after him. Various other references to his illness and behaviour are made throughout the record of interview.
- 22 In relation to each of the owners' allegations I make the following comments and observations:
- GHP commenced work on site
- 23 The owners allege that as Mr Helliar was on site from the commencement of the works this confirms that he was the responsible builder. However, it is not unusual for there to be a number of people working on a building site

in differing capacities including as employees, contractors, sub-contractors – it does not mean they are the builder. I am unable to determine the capacity in which Mr Helliard/GHP was on site, and am not persuaded that this supports the owners' contention that GHP was the builder.

GHP obtained the Certificates of Insurance in its own name:

- 24 There is no dispute that the Certificates of Insurance issued by the insurer identify GHP as the builder. It may well be that they were obtained by GHP. In all probability, if those certificates had been provided to the owners, unaltered, and if the domestic building contract had been entered into by GHP, there would be no dispute about whether the insurance policies respond. However, the Certificates of Insurance were altered and Downunder, the party which entered into the domestic building contract with the owners, was substituted for GHP as the builder.

GHP obtained planning permits for the work in its own name:

- 25 I do not have the planning permits before me. However, I note that the owners and Mr Swenson have given sworn evidence that A&A Design and Planning Pty Ltd, of which Mr Swenson is the sole director, was engaged by the owners to obtain the planning permit. As I understand Mr Swenson's evidence, the planning permit was issued on or about 5 November 2003. Mrs Tabakoglu's evidence as set out in her Witness Statement (para 21) is that she first contacted Chum *'in or about May or June 2004'*, some six months after the planning permit was obtained. There is no evidence that Mr Helliard or GHP had any involvement with the project in 2003 or the obtaining of the planning permits.

GHP obtained the Building Survey in its own name for the works:

- 26 I do not have a copy of the building survey before me and am unable to verify in whose name it was obtained, or by whom.

GHP obtained building permits, soil and road tests and other surveys in its own name:

- 27 I have been provided with a copy of the Applications for Building Permit and the Building Permits. They identify the Agent of the Owner – the applicant for the permit - as Prestige Housing Constructions and GHP as the builder. The signature of the person signing the applications is indecipherable and has not been identified. Mr Lee Chu, of MCI Building Surveyors, who gave evidence on behalf of the owners confirmed that Chum was their primary contact in relation to applications lodged by Prestige Housing Constructions. Neither he nor Mr Albert Mitchell, the registered building surveyor engaged by MCI Building Surveyors to 'sign off' on building permits, were able to identify the signature of the person who signed the applications. Mr Chu confirmed his only contact was with Chum. Mr Mitchell confirmed that he understood that Mr Helliard was the 'builder for Prestige' from discussions he had with Mr Chu, but that he had

never met Mr Helliard nor spoken to him on the telephone. Although he was able to recall two other applications for building permits made by Prestige Housing Constructions which identified GHP as the builder, this does not assist.

GHP entered into agreements with subcontractors to carry out the work and the tests

- 28 There is no evidence before me to support this allegation. I do not have copies of any sub-contract agreements or any other documents or correspondence supporting this allegation. Rather, at paragraph 35 of his Witness Statement Mr Tabakoglu states:

Unfortunately, after Down Under Resource Management stopped work on the site, we received numerous calls from trades people informing us that they had not been paid for materials. I informed them that we had paid the builder up to lock up stage.

- 29 Rather than evidencing that the sub-contractors were engaged by GHP this suggests they were engaged by Downunder and that it was responsible for payment of materials on site, as one would expect of 'the builder'.

GHP used and operated its business at the offices of the secondnamed Respondent and uses the same telephone number as the secondnamed Respondent

- 30 Although it is suggested that GHP and Downunder shared the same address, telephone number and contact details, I have not been provided with a Company Search for GHP showing its principal place of business at the time. Rather, the owners rely on the contact details set out on the 'Home Warranty Insurance – Eligibility Application' and the 'Home Warranty Insurance Job Specific Policy Application'. Whilst these suggest that GHP and Downunder shared the same address and contact details it does no more than reveal a possible connection between them. It is not sufficient, on balance, to persuade me that GHP was the builder. I cannot even be certain on the evidence before me that these applications were completed by Mr Helliard on behalf of GHP.

The building work was carried out by or on behalf of Downunder, and as such is covered by the relevant insurance.

- 31 I accept that the work was carried out by Downunder – but Downunder is not the builder whose work the insurer agreed to indemnify. Contrary to what appears to be the owners' understanding of the policies of warranty insurance, the insurer does not insure the works *per se*. Rather, the insurer indemnifies the owners for any breach by the builder, as named in the policy of warranty insurance, of its obligations under the contract or the warranties set out in s8 of the *Domestic Building Contracts Act 1995*. In this case, the insurer agreed to indemnify the owners for the performance by GHP of those obligations. GHP did not enter into a contract with the

owners. The insurer did not agree to indemnify the owners for Downunder's performance of those obligations.

GHP managed, arranged and carried out the work and arranged the required insurance. The building contract arises by operation of Section 3 of the Domestic Building Contracts Act 1995

- 32 There is simply no evidence that GHP managed, arranged and carried out the work. It seems to me that the owners have misunderstood Section 3 of the *DBC Act* which defines 'builder' as:

...a person who, or a partnership which-

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work.

and 'domestic building contract' as

...a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor.

and 'domestic building work' as

...any work referred to in section 5 that is not excluded from the operation of this Act by section 6.

- 33 There is no evidence to support the allegation that GHP managed and/or arranged the carrying out of the building work or that it intended to do so, or to carry out the building work. It may well be that Mr Helliard carried out some work on site, but this does not mean that he, or GHP was the builder for the purposes of the insurance policies. I am not able to determine, on the evidence before me, whether Mr Helliard was on site in his personal capacity, or as a director of GHP, or even, perhaps, as an employee of, or contractor to, Downunder. Even if I were satisfied that GHP fell within the definition of 'builder' in s3 (and I am not) this does not deem into existence a contract between it and the owners. It simply means that the obligations imposed on a builder under the Act extend to those who fall within the definition of 'builder'. There is no evidence of a 'domestic building contract' which is defined as:

...a contract to carry out, or to arrange or manage the carrying out of domestic building work, other than a contract between a builder and a sub-contractor.

having been entered into between the owners and GHP.

- 34 Further, whilst insurance may have been obtained by GHP – it was not obtained in the name of the entity which entered into the major domestic building contract as the 'builder' ('Downunder'). Even if I accept (and for

the reasons set out above I cannot be certain they were) that the Applications for Job Specific Warranty Insurance were completed and signed by Mr Helliar on behalf of GHP, they refer to domestic building contracts signed on 27 September 2004. This is inconsistent with the dates set out in the contract. As noted above, the Instrument of Agreement page was signed on 20 July 2004 and the pages initialled on 4 October 2004, the date on which Mr Tabakoglu believed the contract became binding.

The contract of insurance which the owners allege exists between Downunder and the insurer, is not in writing but is implied from the conduct between Gerard Helliar Pty Ltd and Down Under Resources Management

- 35 Unfortunately, no particulars in relation to what constitutes the ‘alleged conduct’ have been provided. As noted above, I am unable to determine the capacity in which Mr Helliar and/or GHP was involved in this project. I did not find Mr Tabakoglu’s evidence that he had been told by Chum, when he was first introduced to Mr Helliar that they were partners, persuasive, particularly when considered in the context of the evidence by both him and his wife that they always believed Chum was the builder. In the record of interview conducted by Mr Nankervis in respect of the Building Commission investigation, Mr Tabakoglu stated:

...I do not believe that Gerard Helliar’s name was on anything that I signed including the Application for the Building Permit. I would not have signed anything with Gerard HELLIERRS name on it because Down Under Resource were the people engaged to do the building (sic) (lines 75-79)

I had seen Gerard HELLIER working on the building site but I had not discussed any business with him. I was under the impression that HELLIER was actually working for Down Under Resource management (sic) (lines 103-105)

- 36 The owners also contend that the insurer was aware of the close relationship between Downunder and Mr Helliar and that Downunder were utilising GHP’s domestic building registration and warranty insurance. They rely on a letter from Prestige Housing Constructions dated 20 April 2004 which is in the nature of a reference for GHP’s application for warranty insurance, wherein they state that:

...Gerard Helliar has been working for our group of companies for more than 6 years. He has worked as our registered builder and site manager during this period...

- 37 In response to an enquiry from me as to whether there was any connection between Prestige Housing Constructions and Downunder a copy of a business name search was forwarded to the Tribunal the following day by the owners’ solicitors. It is suggested in the accompanying letter that the Business Name Extract confirms ‘*Prestige Housing Constructions is controlled by Down Under Resource Management Pty Ltd*’. The extract, which was apparently obtained on 13 October 2005, reveals that

Downunder was carrying on business under that name during the period 16 July 2004 to 18 August 2004, and again commencing on 23 February 2005. Downunder was not carrying on business as Prestige Housing Constructions on 20 April 2004 – the date of the reference written in support of GHP’s application for warranty insurance. Similarly it was not carrying on business under that name on 23 October 2004, the date stamped on the Application for Building Permit lodged with MC Building Consultants or the date on which the Building Permit was issued – 8 November 2004.

- 38 In any event one could not reasonably expect the insurer to check and confirm the identity (or their relationship to the applicant for insurance) of every person who provides a reference to an applicant for warranty insurance eligibility. However, it would not be an unreasonable expectation that insurers would require a builder applying for insurance for a particular project to provide it with a copy of the relevant building contract. Unfortunately, its failure to do so, in this instance, does not enable me to find that there is an insurance policy which responds to the owners’ claim.
- 39 The owners also seek to rely on a photocopy of a business card obtained by and tendered through Brian Nankervis who conducted an interview with Mr Helliar in connection with enquiries being conducted by the Building Commission. I understand that I am being asked to regard this ‘business card’ as evidence of Mr Helliar’s direct involvement with Prestige Housing Constructions. However, I note it is in the name of *G.K.G. Prestige Constructions* – this appears to be an entirely different entity. I also note, in the context of the allegation that GHP and Downunder share the same contact details, that the mobile phone number is not the same as that used by Downunder. In any event, even if the business card had been in the name of Prestige Housing Constructions, it would not have been determinative of the nature of the relationship between it and Mr Helliar.
- 40 The owners contend that GHP’s role as builder is evidenced by Mr Helliar having Chris (the supervisor) removed from the site. However, this is not consistent with the owners’ evidence that they arrived on site to find the police in attendance seemingly as a result of a disagreement between him and Mr Helliar, who telephoned Chum whilst they were there. Mrs Tabakoglu spoke to Chum who, she says, told her that she and her husband should not believe everything that Chris said and that they should tell him to leave. This does no more than reinforce my view that Chum was ‘in charge’, not Mr Helliar.
- 41 The owners also allege that GHP’s role as builder is confirmed by the erection of a builder’s sign on the fence in the name of GHP. However, once again I do not consider this to be determinative particularly as, on the evidence before me, this sign was apparently erected shortly prior to the end of Downunder’s involvement on site and after Mr Helliar had been hospitalised as a result of his mental illness.

- 42 The owners also seek to rely on correspondence from the Secretary for the Body Corporate of an adjoining property to the building surveyor, which although referring to Mr Helliar ‘*issuing delivery instructions*’ and otherwise refers to ‘*the builder*’ does not assist in identifying the builder. I note that the author of this correspondence was not called to give evidence.
- 43 I am also asked to find that as the insurer has not refunded the insurance premiums to the owners or to GHP that it is deemed to have accepted that the works are insured. In my view it was entirely appropriate for the insurer to retain the premiums pending determination of this application.
- 44 The owners also allege that the building contract has been transferred to GHP. However, I accept the submission on behalf of the insurer that for there to be a transfer the contract would either have had to be by way of novation, or assignment under s134 of the *Property Law Act* 1958. For there to be a novation of the contract, the consent of all parties would have been required (*The Aktion* [1987] 1 Lloyd's Rep. 283 at 310) – this clearly did not occur here. Any assignment under s134 of the *Property Law Act* would need to have been in writing.

Conclusion

- 45 As I observed at the beginning of these reasons, this is an unfortunate case where the owners have been the victims of a fraud. I am not quite sure how it is put by the owners that there is no evidence of any fraud – the Certificates of Warranty Insurance have clearly been altered and provided to the owners ‘as evidence’ of warranty insurance having been obtained by Downunder. Whether Mr Helliar was complicit in the fraud I am unable to say. He suffers from a serious mental illness which was clearly known to Chum and to Mr Swenson.
- 46 It is also clear that the owners have been let down by a system of checks and balances which has failed to protect them on this occasion. Although I make no findings as to their individual culpability I note that Mr Swenson referred them to Prestige Housing Constructions as a builder known to him; Mr Albert Mitchell, the registered building surveyor, appears to have carried out few or no checks before issuing the building permit, effectively ‘rubber stamping’ the paperwork prepared by Mr Chu or his employees who are not registered building surveyors, and the insurer through its broker – MBA Insurance Services issued the Certificates of Warranty Insurance without requiring a copy of the relevant contract.
- 47 On their own evidence it was always the owners’ intention to enter into a contract with Downunder. Until they obtained the report from their building consultant they always believed that Downunder was the builder. Chum, a director of Downunder, was their primary contact, and it is apparent on the evidence before me that he acted as the person responsible for the works.

- 48 The owners do not appear to understand the meaning and extent of the policies of warranty insurance. Under these policies the insurer agrees to indemnify the owners where the builder named in the policy breaches the warranties set out in the building contract and/or s8 of the *Domestic Building Contracts Act 1995*. It does not insure the works. There is no evidence that these works were carried out by GHP, the registered builder. The contract was entered into by Downunder, the Certificates of Warranty Insurance issued in the name of GHP were altered so that Downunder was named as the builder – I am satisfied this alteration was made by someone other than the owners or the insurer. Whilst the nature and extent of any relationship there may have been between Downunder and Mr Helliar and/or Chum is unclear, it is clear that Mr Helliar suffers from a serious mental illness and whether he was actively involved in this subterfuge, or was simply another victim is open to speculation which is not the role of the Tribunal.
- 49 I have no alternative other than to dismiss this application. I will reserve the question of costs with liberty to apply being mindful always of the provisions of s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C AIRD