VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D894/2008

CATCHWORDS

Domestic Building List; *House Contracts Guarantee Act* 1987 Part 6; Claim by applicant as authority administering HIH indemnity scheme against builder for rectification of defective building works; *House Contracts Guarantee Act* 1987 Section 44; Whether applicant entitled to direct respondent to rectify defective building work where State as indemnifying party has accepted claims from building owners for allegedly defective building work.

APPLICANT	The Victorian Managed Insurance Authority
RESPONDENT	Dura (Australia) Constructions Pty Ltd (ACN 004 284 191)
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	5 October and 21 December 2010
DATE OF ORDER	31 January 2011
CITATION	The Victorian Managed Insurance Authority v Dura (Australia) Constructions Pty Ltd (ACN 004 284 191) (Domestic Building) [2011] VCAT 113

ORDER

1 Questions answered in accordance with attached reasons.

2 **Adjourned to directions hearing before Deputy President Macnamara, 9.30 am, 16 February 2011.**

3 Costs reserved.

M.F. Macanamara
Deputy President

APPEARANCES:

For Applicant	Mr Murdoch QC and Mr Scott Stuckey of Counsel
For Respondent	Mr G. John Digby QC and Mr R. Andrew of Counsel

REASONS

BACKGROUND

1 The collapse of the HIH group of companies in 2001 was perhaps the largest corporate debacle in Australian history. The liabilities of the insolvent company have run into the billions. A Royal Commission was appointed to investigate the circumstances that led to the collapse. Special legislation and funding arrangements were established both at the State and Federal level to mitigate the loss inflicted on innocent policy holders. Unsurprisingly the collapse as corporate collapses customarily do, raised a number of major and difficult legal questions.

2 This proceeding raises a difficult issue of fact and law with respect to legislation enacted by the Victorian Parliament to provide cover in the home owners' warranty market for those whose policies were issued by members of the HIH group. In 1999 the HIH group had acquired a number of insurers in the FAI group. FAI had been a dominant player in the home owners warranty market in Victoria.

3 The present proceeding amongst other issues throws up the question as to the precise nature of the cover provided by FAI.

4 Where a legal or medical practitioner purchases indemnity coverage the insurer will be at risk and liable to pay if a claim to which its policy responds is made for the practitioner's negligence. If the insurer makes a payout the practitioner does not expect to be required to make good or indemnify the insurer, rather the practitioner has purchased cover with the payment of a premium precisely to protect himself or herself against the consequences of such claims

5 In Victoria since home owners warranty coverage was first introduced in the 1970s by amendments to the *Local Government Act* 1958 as it then was, those involved in the construction of new homes have been required to provide coverage of one type or another to meet claims for defective or incomplete work by home builders. The policy underlying the various schemes which have been in force over the years seems to be predominately directed to insuring that home owners have a solvent entity against which they can bring their claims. For instance under the original form of coverage provided for under the *House Contracts Guarantee Act* 1987 the instrument which the home builder was required to procure was by Section 7 characterised as a guarantee. It was customary for the body issuing such guarantees to do so against an obligation on the part of the builder to provide an indemnity against successful claims. The builder could also be required by order of the guarantor to rectify defective work or complete incomplete work.

6 Under the *House Contracts Guarantee Act* 1987 there was but a single *'approved guarantor'* meaning Housing Guarantee Fund Limited. Section 5 of the Act prohibited builders engaging in domestic building work unless a guarantee as provided for in the Act and given by the approved guarantor was in force. According to Section 7(1) as originally enacted, such guarantee was to be:

> A guarantee to the building owner and the owner's successors in title of the performance of the builder's obligations under the domestic building work contract.

7 Section 16 of the Act provided inter alia a right of appeal to the approved guarantor's appeals committee for a builder who was dissatisfied with a decision by the approved guarantor not to reject a claim made *'for loss or damage on account of a defect alleged to be caused by bad workmanship on the part of that builder'*. Whilst these matters were dealt with by the rules of Housing Guarantee Corporation Limited, the approved guarantor, rather than the Act itself, the statutory guarantee resembled an ordinary contractual guarantee in that the builder being the person having the principal obligation to see to the workmanship of the relevant house was liable to indemnify the approved guarantor for any outlays which it was required to make. I considered the nature and effect of these guarantees in *Re Housing Industry Association Limited and Housing Guarantee Fund Appeals Committee Re Delahunty* (1994) 8 VAR 74. Section 16 also provided for review applications with respect to appeals committee determinations to be made to the State's Administrative Appeals Tribunal (*Delahunty's* case was such a review application).

8 Under this scheme the primary liability for bad workmanship lay and remained with the builder. The builder was not protected against the consequences of its own poor workmanship in the way that a professional taking out indemnity insurance is.

9 In 1995 Parliament revisited the arrangements relative to domestic building contracts. First, it abolished the guarantee procedures under the *House Contracts Guarantee Act* 1987. Secondly, it vested the review jurisdiction as to such matters in the Domestic Building Tribunal under the *Domestic Building Contracts and Tribunal Act* 1995. In 1998 the Domestic Building Tribunal was abolished with its jurisdiction transferred to this Tribunal. Finally, the guarantee system under the 1987 Act was replaced by forms of insurance issued in accordance with Ministerial orders under the *Building Act* 1993.

10 The responsible minister issued a ministerial order in the *Victorian Government Gazette* S115 1 October 1996 under the authority of the *Building Act* 1993 with effect from 1 November 1996 requiring builders carrying out domestic building work to take out the cover referred to in the Ministerial order. The insured for the purposes of this cover was defined to mean the builder. Clause 4.2 required the builder to maintain insurance:

> For the period expiring not earlier in the day six years and six months from the completion date of the last major domestic building contract entered into by the builder or earlier termination of that contract.

11 Clause 2.2 of the order stated inter alia:

> The builder shall procure a policy in favour of the builder indemnifying the insured [that is the builder] against claims made by a building owner during the period of insurance for any losses or damage which result from [various matters including breaches of warranties implied by Section 8 of the *Domestic Building Contracts and Tribunal Act*].

12 The insurance was also to cover the risk of non-completion due to death, incapacity, disappearance or insolvency of the builder.

13 This ministerial order was itself revoked by further order with effect from 1 December 1998 published in *Victorian Government Gazette* S122, 30 October 1998. This ministerial order called for insurance which had as the insured the building owner or the owner's successor in title or in the case of a subdivision with a body corporate, the body corporate within the meaning of the *Subdivision Act* 1998. The definition of insured excluded from cover the builder, an owner builder or a building owner which was a related body corporate to the builder within the meaning of the Corporations Law or where the builder and the building owner had a common director or common shareholder.

14 By virtue of Clauses 4.5 and 4.6 of the 1998 ministerial order, builders who had been required to hold cover under the previous and now revoked ministerial order were required to maintain *'run off cover'* for the whole of the period referred to in the 1996 order.

15 Dura (Australia) Constructions Pty Ltd is a builder of domestic buildings. Between 1998 and 2000 it constructed an apartment complex at 346-350 Toorak Road, South Yarra. The building permit for Stage 1 of the apartment complex showed the owner as Cromwell Developments Pty Ltd. The permit issued by building surveyor Jeff Uren of Jeff Uren Pty Ltd related to basement car park and residential apartments – Stage 1: bulk excavation, basement retention and retaining system. It showed a cost of building work of $7.2M *'total project costs'*.

16 In the late 1990s the FAI Insurance Group assumed the leading role in the issue of builders' warranty insurance in the Victorian market. In 1999 another Australian insurer, HIH took over the FAI group of companies.

17 On 15 March 2001 the HIH group including FAI General Insurance Limited, the company which had been a leader in home owners' warranty insurance in Victoria was placed into provisional liquidation. Final liquidation began on 27 August 2001. These events led to a crisis in the insurance industry in Australia, in particular in the indemnity insurance industry. Various Government schemes were established to mitigate the effects of the HIH liquidation. In Victoria the *House Contracts Guarantee*

Act 1987 was amended by the addition of a Part 6 to provide a Government indemnity. The indemnity extended to policies which were underwritten by HIH Casualty and General Insurance Limited or FAI General Insurance Company Limited including insurance required by the ministerial orders. Section 37 of the Act as amended provided '*the State must indemnify any person who is entitled to an indemnity under an HIH policy to the extent of the indemnity under that policy*'. Housing Guarantee Fund Limited which had been slated for liquidation following closure of the scheme under the 1987 Acts being superseded by the new arrangement was made responsible for the administration of the indemnity scheme inter alia (Section 39). By the *House Contracts Guarantee (Amendment) Act* 2005 (No. 52 of that year) the indemnity scheme under Part 6 of the 1987 Act was modified such that Victorian Managed Insurance Authority (VMIA) established under the *Victorian Managed Insurance Authority Act* 1996 was substituted as the entity administering the indemnity scheme.

18 Section 40(1) of the 1987 Act now provides as follows:

> (1) A person who has incurred a loss which is covered by an indemnity under section 37 may make a claim against the Domestic Building (HIH) Indemnity Fund in respect of that loss.

19 The entitlement relied on by VMIA in this proceeding to ground its claim is to be found in Section 44 of the 1987 Act which provides inter alia:

> (1) Subject to subsection (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.
>
> …
>
> (3) VMIA may only give a direction under subsection (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 subsection (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.

APPLICANT'S CLAIM

20 In its points of claim dated 24 November 2008 the applicant, VMIA alleged that in May 1998 the respondent, Dura (Australia) Constructions Pty Ltd entered into a contract for the construction of a multi-unit development at 346-350 Toorak Road for Cromwell Developments Pty Ltd. VMIA further alleged that on 17 May 1999 FAI General Insurance Company Limited entered into a contract of insurance whereby it agreed to indemnify *'certain building owners for any loss or damage from risks set out in Clause 5 of the Ministerial Order S115 made 30 October 1998'*. VMIA alleged that to the extent that FAI was liable for defective building work under the policy with respect to the site, FAI was:

> Subrogated to any right of the insured against [Dura] upon FAI accepting liability for a claim or any part thereof made by the insured under the policy.

21 According to VMIA the FAI policy was an HIH policy within the meaning of Section 35 of the 1987 Act and hence subject to the State indemnity provided for in Part 6 of that Act. VMIA alleged that by the operation of Section 44 of the 1987 Act it was empowered to give Dura reasonable directions in respect of rectification of defective building work in the South Yarra development or payment by Dura 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'*. According to VMIA, Dura breached the warranties of fitness and workmanship imported by Section 8 of the *Domestic Building Contracts Act* 1995 in its construction of the complex for Cromwell leading to claims being made under Part 6 of the 1987 Act which claims were accepted by VMIA on 9 October 2006. VMIA directed Dura *'to rectify the defects … as it was entitled to do by virtue of Section 44 of the House Contracts Guarantee Act 1987'* which Dura refused to do. VMIA sought a declaration that Dura was party to and bound by the terms of the contract of insurance which was alleged to have been written by FAI that the building work carried out in the South Yarra development for Cromwell contained defects which were part of the risk insured under the insurance policy. VMIA sought an order that Dura be required to pay the cost of rectifying the defect.

PRELIMINARY QUESTIONS

22 Deputy President Aird ordered on 25 May 2010 that three questions be determined at a preliminary hearing. The questions being:

> (1) On or about 17 May 1999 (or some other date, and what date) did FAI General Insurance Company Ltd ("FAI") either by itself or with a panel, underwrite and enter into a contract of insurance with the Respondent whereby FAI agreed to indemnify certain building owners for any loss or damage resulting from risks set out in clause 5 of the Ministerial Order S122 made 30 October 1998 pursuant to s135 of the *Building Act* 1993 ("the Contract of

Insurance"), as alleged by the Applicant in paragraph 6 of its Points of Claim?

(2) If yes to (1), insofar as the Contract of Insurance was in writing was it contained in the Certificate for Registration of Builder dated 17 May 1999 and in the Builders Annual Blanket Extra Policy Terms dated 29 December 1998 ("the Builders Annual Blanket Extra Policy"), being the documents referred to in the particulars subjoined to paragraph 6 of the Applicant's Points of Claim and/or in the Schedule being exhibit 'AG6' to the affidavit of Ms Gawthorn deposed 9 February 2010?

(3) If yes, did the Builders Annual Blanket Extra Policy contain a term that on its proper construction empowered the Applicant to give the directions to the Respondent on 9 and 19 October 2006, as alleged in paragraph 16 of the Applicant's Points of Claim?

23 The preliminary hearing came on for hearing before me on 5 October 2010 but the matter was adjourned part heard to enable further questions to be raised based on Sections 13, 14 and 37 of the *Insurance Contracts Act* 1984 of the Commonwealth of Australia. Those additional questions were as follows:

If yes to (3), then:

(i) Would it be a breach of Section 13 of the *Insurance Contracts Act* 1984 for FAI to rely on such a term if the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?;

(ii) Would FAI be precluded from reliance on any such term by reason of Section 14 of the *Insurance Contracts Act* 1984 with the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?;

(iii) Would FAI be precluded from relying on such term by reason of Section 37 of the *Insurance Contracts Act* 1984 with the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?

SOME KEY PROVISIONS

24 I set out certain provisions from the printed policy terms which according to VMIA form part of the *'second policy'*. The following provisions numbered *'A'* to *'C'* are to be found in the terms document under the heading *'Section 3 – The Builder'*. The provisions are as follows:

A. The Insurer is subrogated to any right of the insured against the Builder and/or any other person contracted by the Builder or otherwise engaged to perform the building work under the Major Domestic Building Contract upon the Insurer accepting liability for a claim or any part thereof made by the Insured under this policy regardless of:

(1) when the Insurer makes a payment in relation to such claim; and

(2) whether the Insured will be fully indemnified for all loss and damage suffered by the Insured in relation to the claim.

B. In respect of each claim referred to in Clause A of this Section, subject to:

(1) the Builder paying the Insurer within 30 days of demand by the Insurer the lesser of:

(i) the Reimbursement Amount; and

(ii) the sum for which the Insurer accepts liability in relation to the Insured's claim and all costs and expenses incurred by the Insurer in relation to such claim; and

(2) the terms, conditions, limitations and exclusions in this policy applicable to the Builder including the Builder's compliance with them (which so far as the nature of them respectively permit are conditions precedent to the Builder's right under this Clause B);

the Insurer will not enforce its right of subrogation to recover from the Builder any sum for which the Insurer accepts liability, or any costs and expenses incurred by the Insurer, in relation to such claim.

C. In respect of each claim referred to in Clause A of this Section, subject to the terms, conditions, limitations and exclusions in this policy applicable to the Builder including the Builder's compliance with them (which so far as the nature of them respectively permit are conditions precedent to the right of the Builder under this Clause C):

(1) if the Builder with the Insurer's prior written approval rectifies all or any defects that are the subject of the claim at an agreed cost ("Agreed Cost") and:

(i) the total cost of all rectification for which the Insurer accepts liability is less than the Reimbursement Amount and the Builder bears that total cost; or

(ii) the total cost of all rectification for which the Insurer accepts liability is greater than the Reimbursement Amount and the Builder bears the cost up to the Reimbursement Amount;

the Insurer will not enforce its right of subrogation to recover from the Builder any sum for which the Insurer accepts liability, or any costs and expenses incurred by the Insurer, in relation to such claim; and

(2) where the Agreed Cost in relation to Clause C(1)(ii) exceeds the Reimbursement Amount the Insurer will pay to the Builder the amount of that excess;

PROVIDED THAT:

(3) the Insurer will not be liable to the Builder under this Clause C for the cost of the Builder completing its obligations (including compliance with warranties implied by Section 8 of the DBC Act) under the Major Domestic Building Contract including without limiting the foregoing the cost of rectifying any defect that the Builder must rectify under a defects liability or maintenance period provision or other like provision of such contract; and

(4) these provisions are subject to the Insured's right to refuse access to the Builder as referred to in Clause 2(e) of Claims Procedures.

25 Amongst the special condition subjoined to Section 3 the following appears:

(2) In respect of any claim, the Builder must:

(a) provide the Insurer or any person nominated by the Insurer with reasonable access to the relevant building site for the purpose of inspection and/or rectification or completion of domestic building works;

(b) not undertake or cause to be undertaken any rectification works without the Insurer's prior written approval;

(c) promptly comply with the Insurer's reasonable directions in relation to the completion or rectification of any work under the Major Domestic Building Contract; and

(d) take all reasonable precautions to avoid or minimise additional loss or damage.

APPLICANT'S CONTENTIONS AS TO THE QUESTIONS

26 Mr Murdoch QC and Mr Stuckey of Counsel who appeared on behalf of VMIA referred to VMIA's powers under Section 44 of the *House Contracts Guarantee Act* 1987. They said:

> The factual question here is whether or not any relevant HIH policy would have permitted HIH to give directions to the applicant in relation to the rectification of defective works [scil at the Cromwell development in South Yarra].

27 They noted the definition of *'HIH'* in the 1987 Act Section 35 as extending to FAI General Insurance Company Limited.

28 They said the evidence disclosed a residential builder's warranty insurance policy issued on 17 April 1997 by FAI general Insurance Company Limited for the period 31 May 1997 to 30 June 1998. They described this as *'the first policy'* noting that it was issued in accordance with the requirement

both to insurance under the *Building Act* 1993 and in accordance with Ministerial Order S112 published 1 October 1996. This refers to the first of the ministerial orders as to domestic building insurance described above. This policy was evidenced they said by a Certificate of Currency issued by FAI and dated 17 April 1997. This certificate of Currency was Exhibit AG2 to an affidavit sworn by Ms Allison Jane Gawthorn, a claims supervisor employed by VMIA. They noted that the period of insurance was expressed to be from:

> 4 pm 31 May 1997 until 4 pm 30 June 1998 or until 30 days after the anniversary date of the builder's registration by the Building Practitioners Board.

29 This policy they said was *'consistent with the terms of the builder's annual blanket policy published in October 1996'*. They noted that Clause A of that document granted indemnity to a builder such as Dura:

> Against any claim first made against the insurer by a building owner during the period of insurance in respect of all losses and damage arising which results directly from any prescribed cause and in respect of which a claim was made against the insurer during the period of insurance

pursuant to an FAI policy entitled 'Home Warranty Scheme Builder's Annual Blanket Policy' published in October 1996. A proforma of this document was exhibited to a supplementary affidavit of Ms Gawthorn sworn 15 February 2010.

30 Mr Murdoch and Mr Stuckey described this policy as a *'claims made policy'* for claims made in the period 31 May 1997 to 30 June 1998. They conceded that since the building contract for the Toorak Road development was entered into only on 22 May 1998 no claim was or could have been made against Dura in relation to that development during the currency of this policy. They conceded therefore that that policy did not respond to the claims in this proceeding. They continued:

> But its existence is important to the operation of cover under the second policy.

31 They said there was a second policy of insurance evidenced by a schedule certificate of currency dated 17 May 1999 which they said evidenced a policy underwritten by a panel of companies led by FAI General Insurance Company Limited insuring the building owner. The terms of this second policy, they said, were to be found in the document being Exhibit AG5 to Ms Gawthorn's first affidavit. AG6 is an insurance policy schedule providing cover to Dura for the period 31 May 1999 to 31 May 2000 at 4 pm. The insured was, they said, defined as the building owner. They noted that despite the building owner not being a party the building owner was the *'insured'*. The *'retroactive date'* was shown as 31 May 1997. They said that Section 1 of the policy Clause A granted a limited indemnity to the insured for loss and damage happening during the period:

(a) commencing on the date of the relevant major domestic building contract was entered into (or the date of issue of the building permit for the work whichever is earlier; and

(b) ending six years and six months from the completion date of the domestic building work or termination of the contract whichever is the earlier.

32 They referred to the definition in the policy terms of '*major domestic building contract*' as meaning:

> A domestic building contract entered into by the builder with the building owner in the policy period for the carrying out of major domestic building work.

33 This meant, they said, that the policy applied only to major domestic building contracts which were entered during the policy period. They noted however an extended indemnity in Section 2 in relation to major domestic building work entered into with the builder between 31 May 1997 and the commencement date of the policy 31 May 1999. They referred to Clause A in Section 2 but noted an exclusion in liability for domestic building works insured under another policy of insurance issued in compliance with a ministerial order at the date the builder first became aware or might reasonably be expected to have become aware of some fact or circumstance giving rise to the claim. They referred to Clause D of Section 2 stating that the retroactive date should be the date specified in the schedule, in this case they said 31 May 1997 or in the case of a corporate builder the day the builder first purchased a policy as a pre-requisite to being a registered building practitioner, whichever is the later. They contended therefore the retroactive date was 31 May 1997. Accordingly, they submitted, the second policy would indemnify building owners:

> In respect of work done under contracts entered into buy Dura between 31 May 1997 and 31 May 1999 unless the builder had first become aware of a claim whilst another policy of insurance was in force.

34 They noted there was no suggestion that in this case Dura had notice of any potential claim relating to the claims in this proceeding before 17 May 1999.

35 Next they observed that the terms of the second policy were in accordance with the Ministerial Order S122 which took effect according to its terms from 1 December 1998. They continued:

> The builder did not need to comply with the second ministerial order until the policy was cancelled or expired: Clause 3.1. It further provided that any policy issued under S115 which had not been cancelled or expired by 1 December 1999 was deemed to expire on that date: Clause 3.2.

36 They noted that Clause 4.5 of S122 obliged a builder who was required to take out insurance under S115 to *'maintain that insurance for the remainder of the period required by S115 as though it had not been revoked'*.

37 They said Clauses 4.8 and 4.9 of S122 entitled a builder to meet this runoff requirement either by continuing to hold insurance complying with S115 or by maintaining insurance for that runoff period complying with S122 but for the same period of time as required by S115. They submitted that the second policy was taken out to comply with Clause 4.9 of Ministerial Order S122.

38 They submitted it was clear from the terms of the second policy insofar as at its opening it expressed the policy to*:*

> Be in consideration of … the builders applying to the insurer for insurance cover in the name of the relevant building owner and also the payment by the builder of the premium that the builder was to be regarded as whilst not the insured a party to the policy.

39 They noted for instance that the special conditions to Section 3 of the policy Clause (2) began:

> In respect of any claim, the builder must:
>
> (c) promptly comply with the insurer's reasonable directions in relation to completion or rectification of any work under the major domestic building contract; and
>
> (d) take all reasonable precautions to avoid or minimise additional loss or damage.

40 They also noted that Clause A of Section 3 headed *'the builder'* began by stating *'the insured was subrogated to any right of the insured against the builder …'*. The contentions of Messrs Murdoch and Stuckey then deal with an argument foreshadowed by Dura's counsel based upon what was said to be a different memorandum of insurance issued by insurance brokers Lowndes Lambert which was exhibited to the affidavit of Mr Noble (Mr Noble is Dura's solicitor). In their closing submissions Mr Digby QC and Mr Andrew on behalf of Dura stated that they did not rely upon any affidavit evidence though a number of affidavits including the affidavit of Mr Noble just referred to had been filed on behalf of Dura. The fact that ultimately all of these affidavits was disclaimed and that they were according to Mr Digby QC to be treated as not having been read, emerged only gradually in the course of closing submissions on the final day of the hearing. Mr Murdoch likened the process to Haydn's Farewell Symphony. Nevertheless, the submissions on behalf of Dura do appear to place reliance on the memorandum of insurance. Mr Murdoch and Mr Stuckey said that the premise that the memorandum evidenced an obligation owed by FAI to Dura was based on the view that the broker, Lowndes Lambert was acting as agent for FAI. They submitted there was no factual material to support that. They referred to a number of authorities, statutory and other to the

effect that an insurance broker is agent for the insured and not the insurer. They referred to the evidence of Mr Stinton as to his experience working for Lowndes Lambert as consistent with this.

41 Mr Murdoch and Mr Stuckey submitted I should find that Dura received the policy wording, the policy schedule *'together with the Certificate of Registration'*. They relied upon the evidence of Mr Stinton. Mr Stinton said that he worked for insurance brokers Lowndes Lambert (the broker through which the second policy was written) on two occasions for a total period of eight years in the period between 1987 and 1989 and 1991 to 1996. He said at Lowndes Lambert he had a:

> Client base of approximately 50 builders in relation to whom I essentially fulfilled a role of an account manager. They were ongoing clients for whom I would provide advice and place insurance in accordance with their instruction.

42 He denied that Lowndes Lambert was in his experience agent of the insurer. He said that in 1996 he left Lowndes Lambert and worked for FAI Corporate and Professional Insurance dealing with warranty insurance. He said when FAI was taken over by HIH in 1999 he managed the combined builder's warranty portfolio for both insurers but left HIH early in 2000 because it appeared to him *'there was real doubt about the ability of HIH to trade successfully'* that is, he doubted HIH's solvency. He said that in early 2000 he left and established DEXTA which *'was a specialist underwriting agency'*.

43 Mr Stinton said that he was '*intimately involved in the preparation of a policy wording which was introduced by FAI in December 1998*', that is the policy wording found in Exhibit AG5 to Ms Gawthorn's affidavit. He said that Section 1 of that policy gave the homeowner the insurance cover required by the 1998 Ministerial Order S122. His experience was he said:

> When a policy of domestic building warranty insurance was written by the underwriting department at FAI, FAI would post out to the broker concerning the policy document with the schedule of insurance relating to it, together with a certificate of a builder with the Building Control Commission, and an 'important notice to builders''.

44 These documents he said were sent out in a package together. FAI did not know whether in fact such documents were passed on to the builders.

45 Messrs Murdoch and Stuckey said:

> It is clear that the certificate for registration of a builder reached Dura because Mr Khor [the principal of Dura] succeeded in renewing his registration.

46 In the absence of contrary evidence they submitted I should infer that the policy document and the schedule were received at the same time as the certificate. They submitted on Mr Stinton's evidence I should conclude that FAI forwarded the policy terms and schedule to Lowndes Lambert who were acting as agent for Dura. They submitted that the second policy *'on*

its face' insured the home owner and not the builder. Again they submitted that *'on its face' 'the policy of insurance provides that if the builder did not comply with directions given by the insurer under the policy it cannot avail itself of a reduction in liability'*. They submitted that Special Condition 2 under the second policy:

> Plainly conferred on the insurer the right to give reasonable directions to Dura in relation to the completion or rectification of any works under the building contract. As such, the substance of that right is exercisable by VMIA under Section 44 of the *House Contracts Guarantee Act*.

47 As to the additional question based on the provisions of the *Insurance Contracts Act* 1984 Mr Murdoch and Mr Stuckey said that Section 13 of that Act which provided that a contract of insurance was one of the utmost good faith and that the parties were required to act towards each other with the utmost good faith did:

> Not seek to dictate the provisions that may be included in a contract of insurance … rather, it [sought] to govern the manner in which the parties must relate to each other under that contract of insurance.

48 They said that Section 37 of the *House Contracts Guarantee Act* did not create an insurance policy rather it created *'a statutory right of indemnity'*. Accordingly, the *Insurance Contract Act* did not have any direct application to this right of indemnity.

49 Mr Murdoch and Mr Stuckey said that as to Section 44(3) of the *House Contracts Guarantee Act* it focussed attention on whether a direction to repair could be given *'under the relevant HIH policy'*. Accordingly it was the terms of the policies which were in question not any issue of good faith.

50 They said the State's right of indemnity should be given a wide operation:

> The State has committed public moneys to fund an indemnity against the consequences of breaches of contractual warranties by builders, where a relevant policy of insurance existed. A clear intention is manifested that the public should be entitled to recover such monies from the delinquent builder.

51 They said that if the contract of insurance was intended to confer on the insurer a right to give directions to the builder to rectify defective work it could not be a breach of any obligation of good faith for an insurer to exercise that right for the purpose for which it was intended. The duty of utmost good faith, they said, required a party to act honestly in making disclosure or decisions. They referred to *AMP Financial Planning Pty Ltd v CGU Insurance Limited* (2005) 146 FCR 447, 475. This analysis by the Full Federal Court, they said, was approved by Gleeson CJ and Crennan J in *CGU Insurance Limited v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1, [15]. They said the other judges in the majority namely Callinan and Heydon JJ *'drew an analogy between the duty of utmost good faith and the equitable principles of "clean hands" '*. They submitted that these

Justices held at [257] *'that conduct that did not amount to impropriety might still fall short of the duty of utmost good faith'*. They submitted in the circumstances that what VMIA sought to do displayed no want of fair dealing or commercial decency on the part of FAI. The *House Contracts Guarantee Act* allowed only reasonable directions to be given to the builder hence issues of propriety and decency were intrinsically provided for in that statute.

52 As to Section 14 of the *Insurance Contracts Act* they said that this provision created an obligation on parties to a contracted insurance to act with the utmost good faith breach of which would sound in damages. Sub-section (3) provided that in deciding whether reliance by an insurer on a provision in a contract of insurance amounted to a failure to act with the utmost good faith regard should be had to:

> Any notification of the provision which was given to the insured whether a notification of a kind mentioned in Section 37 or otherwise.

53 Section 37, they said, precluded reliance by an insurer on a provision *'of a kind that is not usually included in contracts of insurance that provide similar insurance cover'* unless the insured was clearly informed in writing of the effect of the provision prior to the making of the contract. Mr Murdoch and Mr Stuckey conceded that by virtue of Sections 10(1) and 10(2) of the *Insurance Contracts Act* that Act applied to contracts which should ordinarily be regarded as contracts of insurance *'even though they also contain some terms which are not by way of insurance'*. They noted however that here the contract was between FAI and Dura but *'the person who is to receive the benefit of the indemnity is not a party to the contract'*, that person being the building owner or the building owner's successor. They said that in the present instance Dura was not the *'insured'* under the policy. They said the *Insurance Contracts Act* was an interference with parties rights to contract feely and therefore should be given effect only *'insofar as it can be clearly shown to have been intended by the legislature to interfere with a particular common law doctrine or right'*. They referred to *Federal Commissioner of Taxation v Citibank Limited* (1989) 85 ALR 588, 614-5. Accordingly they said Section 37 should be construed as operating only with respect to provisions acting against the interests of an insured *'as there is no reason to imagine the legislature intended to require notice* [to be] *given to insurers of terms that were of no interest to them'*. Since Dura was not the insured under the policy the provision had no operation in relation to terms binding between Dura and FAI but not the insured. They said in any event there was no evidence that these provisions were not usually included in contracts of insurance providing similar cover:

> Indeed, such evidence as there is suggest that such terms were in fact the norm. The factual pre-condition to the operation of this section is therefore not satisfied.

54 They said provision of the policy document to the builder's agent viz. its broker constituted sufficient notice for the purposes of Section 37 therefore they said the provisions of the *Insurance Contracts Act* were no bar to the success of VMIA's application.

SUBMISSIONS ON BEHALF OF RESPONDENT

55 Mr Digby QC and Mr Andrew of Counsel on behalf of Dura submitted that VMIA had failed to establish as a matter of evidence that the policy wording which it relied on was ever agreed to by Dura or that Dura had ever agreed that it could be directed to rectify defects. They submitted that the policy which Dura purchased showed Dura as the insured. They referred to a renewal certificate dated 17 May 1999 issued by FAI General Insurance Company Limited as leader of a panel of insurers. It showed the insured as Dura and covered the period 31 May 1999 to 31 May 2000. It showed the type of insurance as *'BAD – Commercial Builder's Structural Defects Policy'*. The renewal certificate concluded stating:

> For more details of this insurance, refer to the policy wording in Certificate of Currency.

56 The Certificate of Currency headed *'Builder's Indemnity Co-insurance Scheme'* and headed *'Builder's Structural Defect Insurance'* again showed the insured as Dura. The summary of cover was as follows:

> Legal liability for claims first made against the insured during the Period of Insurance and reported to the Insurers during that period for acts, errors or omissions of the Insured as a Builder and resulting in a Structural Defect not discovered or known by the insured before the issue of the occupancy permit in respect of the building work or certificate of final completion or practical completion, whichever is applicable.

57 The limit of the indemnity was shown as $10M, the policy number quoted was 1804115770, the retroactive date was shown as *'the date when insured was first registered as a building practitioner as required by the Building Act 1993'* and automatic extensions apart from the *Trade Practices Act* and the *Fair Trading Act* and *'one automatic reinstatement'* referred to *'runoff cover as required by the ministerial order'*. There was a further renewal certificate for policy number 1804116760 showing Dura as the insured with the same time period, namely 31 May 1999 to 31 May 2000. This renewal certificate covered *'BWB – Domestic Buildings Annual Blanket Warranty'* the policy number was 1804116760. Again, the certificate stated *'for more details of this insurance, refer to the policy wording and certificate of currency'*. This document referred to the following indemnities:

> Indemnifies the Building Owner for any losses or damage which result from this set out in Clause 5 of the Ministerial Order in respect of a major domestic building contract as defined in the *Domestic Building Contracts Act* 1995.

> Maximum six and a half years from completion of work (or seven years from the date of the building contract) as required by Clause 5.4 of the ministerial order.

58 It also provided *'run off'* cover in accordance with Clause 4.9 of the ministerial order in respect of domestic building work as required by Clause 4.5 and 4.6 of the ministerial order subject to the retroactive dates stated below. The retroactive date stated *'cover does not apply before 31 May 1997'*. The limited indemnity was $100,000 in the aggregate for all claims per home plus reasonable legal expenses of the building owner. The builder's owner excess was *'as per ministerial order'*.

59 They said:

> The policy wording relied on by VMIA … expressly excludes the builder (Dura) – see definition on page 8. Accordingly, the terms of that policy wording cannot be applied against Dura.

60 VMIA, they said, had adduced no evidence that it gave notice to Dura of Special Condition 2(c). They submitted in light of Section 37 of the *Insurance Contracts Act* VMIA could not rely on that provision. Given that the policy whatever its effect was written by FAI and not VMIA I take this submission to mean that VMIA adduced no evidence that FAI gave notification of the special condition. Since by virtue of the 1987 Act VMIA's rights, whatever they were, were derivative from FAI's VMIA was disabled from relying on the provision.

61 They said reliance on Special Condition 2(c) would be unconscionable. They noted the evidence of Mr Stinton, a witness for VMIA that the policy in question *'was marketed as providing extra cover for builders'*. They submitted in any event that properly construed, the policy relied on by VMIA did not contain any provision whereby FAI could have directed Dura to rectify defects. They said Clause 2(c) relied upon by VMIA ought not be construed in isolation. They referred to Clause 3C(3) of the relevant policy terms which excluded any liability on the part of FAI for the cost of rectifying any defect *'that the builder must rectify under a defects liability or maintenance period provision or like provision of such contract'*. Clause 3C, they said, provided that the insurer would not enforce its right of subrogation at all if the builder with the insurer's prior written approval elected to rectify any defect at an agreed cost. That clause did not apply in the present circumstances because Dura had not elected to rectify it. In any event VMIA had not agreed to pay the costs of rectification and there was no agreed cost. They submitted that the proper construction of Special Condition 2(c) was that it only applied in a case where under Clause 3C the builder was completing its obligations under the Domestic Building Contract and the insurer was therefore not liable to the builder under Clause 3C for the costs of the completion. They said:

> In such a case, the builder is not "covered" – and therefore in those circumstances it is not inconsistent for the insurer to give the builder

> reasonable direction "in relation to completion or rectification of any work under the major domestic building contract".

62 They said that VMIA's construction of Special Condition 2(c) is inconsistent with the provisions of Section 3 which provided for the builder to rectify at an agreed cost and for the insurer to pay the builder the costs of rectifying defects in excess of the reimbursement amount. They continued:

> That Special Condition 2(c) permits the insurer to direct a builder to rectify defects, in the manner contended by VMIA in this proceeding, makes the provisions of Clause 3C meaningless, accordingly, the proper construction is one which gives effect to the provisions of Clause 3(c) as well as the special condition.

63 In any event they said the provision should be construed *contra proferentem* (FAI being the *'proferens'*).

64 They said that Mr Stinton, VMIA's own witness had admitted under cross-examination that there had been an underwriting mistake and Dura not the owners was the relevant insured.

65 Mr Digby and Mr Andrew noted that VMIA had called two witnesses only, Ms Gawthorn who had never worked for FAI or HIH and so had no direct personal knowledge of the matters in dispute and Mr Stinton who swore two affidavits. They noted that objections had been upheld to large portions of Mr Stinton's affidavit.

66 They said that Mr Stinton's evidence was unreliable because whilst in his affidavit he swore that he left FAI/HIH in early 2000, under cross-examination he agreed that it was in February or March 1999 that he left those companies because he took office as a director of a competitor company DEXTA in May 1999 which he agreed was a month or two after leaving FAI.

67 They also noted that Mr Stinton had sworn that whilst at FAI he had *'set the strategy'* with regard to the management of claims arising out of the collapse of home builder Avonwood Homes Pty Ltd. Again, in cross-examination he had to concede that whatever dealings he had in managing the fallout from the collapse of Avonwood Homes must have been done at DEXTA because Avonwood Homes did not collapse until 9 May 2001. They said Mr Stinton's evidence that he left HIH because of concerns as to its solvency was not credible. They said:

> In early 1999, HIH had just purchased FAI and was one of the biggest insurers in the country – it is absurd to suggest that he [Mr Stinton] had real doubts about its ability to trade.

68 They noted that HIH survived for a further two years.

69 Further, they said that Mr Stinton in cross-examination conceded a series of matters which were supportive of the view that Dura and not the relevant building owners were the insured parties. As a result they said, since the policy in question was one to indemnify Dura rather than the building

owner, VMIA's claim must fail and the key questions must be answered against it. The policy wording relied on by VMIA could not be applicable because it stipulated that the building owner and not the builder was the insured. They continued:

> Therefore, when the Lowndes Lambert memorandum of insurance referred to the policy wording, this was a reference to policy wording applicable to the old policy number 1804116760 which was being renewed.

70 Mr Digby and Mr Andrew placed extensive reliance on a decision of Judge Bowman in *Moutidis v Housing Guarantee Fund Limited* [2003] VCAT 1347. They referred to paragraph [30] to [38] of His Honour's reasons for determination in which His Honour relied on a number of authorities including *MacGillivray and Parkington on Insurance Law* [220] and [237] and the judgment of Hedigan J in *Shepherd v National Mutual Life Association of Australasia Limited and Bob Broadley and Associates Pty Ltd* (1995) 8 ANZ Insurance Cases 61-233. The effect of the various authorities and Judge Bowman's determination was that an insurer is disentitled from relying upon terms in its detailed policy conditions which are inconsistent with the initial proposal on acceptance of the relevant insurance cover. His Honour found that reliance could not be placed upon the omission of an express limitation of liability which had been agreed upon by the parties from the detailed policy terms.

71 As to the construction of commercial documents, Mr Digby and Mr Andrew relied upon *Robertson and Thomson v French* (1803) 4 East 130 (102 ER 779 per Lord Ellenbrough); *Australian Paper Manufacturer's Limited v American International Underwriters (Australia) Pty Ltd* [1994] 1 VR 685, 690 per Fullagar, Smith and JD Phillips JJ; *AWB (International) Ltd v Tradesmen International (Pvt) Limited* [2006] VSCA 210 at [16]; *Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd* (2004) 219 CLR 65 at [17]; *Secured Income Real Estate (Australia) Limited v St Martin Investments Pty Ltd* (1979) 144 CLR 596, 606. They submitted that those authorities supported the construction advocated by their client.

72 They submitted that the *'FAI Builder's Annual Blanket Extra Policy'* had more than one purpose or object. One of the objects was to protect building owners. They continued:

> It is now beyond argument that the FAI Builder's Annual Blanket Extra Policy also provided protection to the builder.

73 They referred to the Certificate of Registration prepared by FAI stating that Dura was the insured, similarly the Lowndes Lambert Memorandum of Insurance. They noted the word *'extra'* in the title of the policy. They noted that there were limits on the insurer's rights of subrogation against the builder Clause 3B. They reiterated their reference to Clause 3C. These clauses were they said according to Mr Stinton's second affidavit, a *'point of marketing distinction'*. They said there were two additional fundamental

restrictions on any builder liability to FAI under the policy. First they said FAI's rights of subrogation were limited by an agreed amount described as the *'reimbursement amount'* which was referred to as *'capped subrogation'* and secondly:

> FAI chose not to include a term whereby it could direct the builder to rectify defects. Instead, the policy expressly provided that the builder could elect to rectify defects, with the prior written approval of FAI, and subject to the owner's right of refusal, for an agreed amount, and the builder would be paid by FAI the agreed amount less the reimbursement amount. [This appears to be a further reference to Clause 3C.]

74 They said that according to Mr Stinton's affidavit builders who purchased such a policy paid a higher premium for the benefit of the cover. This was a marketing tool according to Mr Stinton they said.

75 They said that Section 3 of the policy provided extra cover for the builder. Clause 3A provided they said that the insurer *'is subrogated to any right of the Insured (ie the building owner) against the builder'*. However they noted Clause 3B provided that the insurer would not enforce its rights of subrogation to recover from the builder any sum for which the insurer accepts liability subject to the builder paying the insurer within 30 days of demand the lesser of the reimbursement amount $10,000 or the sum for which the insurer accepts liability, This limitation they said had been overlooked by VMIA.

76 They said Clause 3C provides that the insurer will not enforce its rights of subrogation at all if the builder with the insured's prior written approval elects to rectify all or any of the defects at an agreed cost. They said that in such a case if the agreed cost exceeded the reimbursement amount of $10,000 then the insurer would pay the excess to the builder. They referred to Clause 3C(2). They referred again to the proviso to Clause 3C and sub-clause (3) which is referred to above. They said Clause 3C was a clause that works for the benefit of the builder and this was:

> Consistent with Dura being the insured as stated on the 1997 certificate, the 1999 certificate for registration and the Lowndes Lambert Memorandum and Schedule.

77 As to Sections 13, 14 and 37 of the *Insurance Contracts Act* 1984 Special Condition 2C:

> Would be an unusual term and should have been properly notified to Dura. So even if a copy of the policy had been mailed to Dura this is not enough. Proper notice would require that Dura be put on notice that it could be called upon to rectify a claim at its expense, notwithstanding the provision for capped subrogation and the $10,000 reimbursement amount.

78 It would be unconscionable and in breach of the duty of utmost good faith they said to construe Special Condition 2(c) in the manner contended for by VMIA. At the conclusion of the hearing on 21 December 2010.

VMIA'S SUBMISSION IN REPLY

79 Counsel for VMIA were granted leave by 4 pm, 23 December to put in written submissions in reply to Dura's closing submissions. These written submissions at some length were received at the Tribunal by fax at 3.59 pm on 23 December.

80 They said that VMIA relied upon the following:

(a) a policy schedule dated 17 May 1999 nominating the building owner as the insured and Dura as the builder for a policy period of 31 May 1999 to 31 May 2000 with a retroactive date applicable to Section 2 of 31 May 1997; exhibit AG6;

(b) a certificate for registration of builder expressed to record insurance in compliance with the Ministerial Orders dated 29 October 1998 and 9 November 1998 under Section 135 of the *Building Act* for domestic builders, describing the "insured builder" as Dura (Australia) Constructions Pty ltd and by way of summary stating that it indemnifies the building owner from any loss or damage which results from the risks set out in clause 5 of the Ministerial Order: exhibit AG3;

(c) the policy terms which are identified by Trevor Stinton as the policy wording introduced by FAI in December 1998 after the Ministerial Order changed to S122 (affidavit of 23 June 2010 paragraph 16): exhibit AG5;

(d) certificate of currency forming part of Exhibit 2 which is a document forwarded by Lowndes Lambert to Shane Cody of Dura referring to a certificate of currency for renewal for the "domestic builders annual blanket warranty" which is in the same form as AG3 and summarises the cover as "indemnifies the Building Owner for any loss or damage which results from risks set out in clause 5 of the Ministerial Order …";

(e) an extract from the building works contract entered into by Dura on 22 May 1998 in relation to the project the subject of the claims which identifies Dura's current insurance as policy 1804116760 issued by FAI, which insurance the builder was obliged to effect before carrying out any domestic building works by operation of Section 135 of the *Building Act*: exhibit AG9.

81 They said that these documents were consistent with Dura's having obtained cover for the relevant building owners in accordance with Ministerial Order S122 issued under Section 135 of the *Building Act*. They said the contention that Dura was the '*insured*' under the subsisting policy should be rejected. They said Dura provided no evidence that it ever sought that insurance from FAI or that it ever directed its broker Lowndes Lambert

to obtain such. There was no evidence of any proposal executed by Dura to obtain that insurance nor was there evidence of Dura having received documents which caused it to believe that FAI had agreed to insure it on those terms. They said:

> No submission has been made that such a contract would have complied with the requirements of Ministerial Order S122 of the *Building Act.*

82 They noted that Dura had ultimately put in no evidence at all, in particular it had failed to call evidence from any of its officers or employees or its broker, Lowndes Lambert. They said there was no evidence adduced by Dura to make good the contention that Lowndes Lambert was acting as agent of FAI.

83 They noted that according to Mr Stinton, during his time with FAI, Lowndes Lambert did not act as an agent for FAI and had no authority from FAI to do so. They referred to paragraph 8 stating that Mr Stinton's evidence on this point was not challenged. They noted that Dura adduced no evidence alleging non-receipt by Lowndes Lambert of the package of documents which according to Mr Stinton it was standard practice for FAI to send to its customer's broker. They said that the general course of a business or office, public or private, could be relied upon as evidence that a particular course of action was followed. They referred to *Elliott v R* (2007) 239 ALR 651 [28]; *Trade Practices Commission v TNT Management Pty Ltd* (1984) 56 ALR 647, 703. They said such evidence was admissible even if it could not be said that the course of practice was invariable. They referred to *Olga Investments Pty Ltd v Citipower Limited* [1998] 3 VR 485. They said the inference that the package was sent to Lowndes Lambert could be drawn despite the fact that Mr Stinton ceased to work at FAI/HIH in February or March of 1999; the inference could be drawn based on a presumption of continuity. They referred to *Pepper v Tuohy* (1926) 48 ALT 53; [1926] ALR 300. They said there was only a few months gap between Mr Stinton's departure and the relevant events and therefore no reason to suppose that the standard practice changed in that period. They said I could draw that inference with the greater confidence in the knowledge that Mr Ray Martin was available as a witness for Dura and he remained an employee of FAI/HIH after Mr Stinton departed. No such evidence was given. They referred to *Jones v Dunkel* (1959) 101 CLR 298.

84 Again they said Mr Stinton's evidence was that during his time at Lowndes Lambert up to 1996:

> Had carried on business purely as a broker acting as agent for insureds and that during his time at FAI it conferred no authority on Lowndes Lambert to act as its agent.

85 They noted that evidence was not challenged. Accordingly they said the only evidence as to Lowndes Lambert's authority was consistent with the normal position recognised in law for an insurance broker *'namely that it acts as agent for the prospective insured and not for the insurer'*.

86 They said that the criticisms by Dura's counsel of the evidence of Mr Stinton was unjustified. An imprecise recollection of the year in which an event occurred after an interval of more than a decade they said was *'entirely understandable'*. They submitted there was no reason to disbelieve Mr Stinton's evidence as to the view that he had of HIH's future solvency when he left its employ.

87 They noted there was no evidence to contradict the inference that the policy document was not received by Dura at the time the insurance was arranged.

88 They said that the passages referred to from Judge Bowman's decision in *Moutidis'* case and the authorities which His Honour relied upon were beside the point in the present case. One of them *Collett v Morrison* (1851) 9 Hare 162 was:

> Simply an example of rectification, where it can be demonstrated that there is an agreement anterior to the executed document which that document has failed properly to give effect to.

89 They said however that in the absence of any evidence of a preliminary contract or anterior agreement *'the contract of insurance will inevitability be upon the insurer's terms and conditions for that type of policy'*. In contrast to the situation in *Moutidis'* case here there was no evidence about promise and representations made to Dura.

90 They noted that the policy wording relied on by VMIA was introduced by FAI in December 1998 in response to Ministerial Order S122. This was to enable builders to comply with the ministerial order. The effect of Section 135 of the *Building Act* 1993 was that it was an offence to carry out major domestic building contract work unless the builder held the necessary cover (Section 136(2)). A further offence was created by Section 137 where a builder held itself out as covered by relevant insurance when it was not. Section 137A expressly authorised the Minister to issue orders under Section 135 requiring insurance in relation to breaches of the warranties implied under the *Domestic Building Contracts Act*.

91 They noted that Mr Stinton in re-examination said that the only types of builder's warranty insurance offered by FAI between December 1998 and his departure from FAI were *'the Builder's Master Warranty Policy and a job specific policy'*. Accordingly they said the principal of Dura was obliged by the ministerial order in Section 135 of the *Building Act* to effect insurance insuring owners against any breach of warranty by Dura. This was the type of policy which FAI offered and after December 1998 FAI did not offer the type of insurance that was required by the former ministerial order therefore as at the relevant date they said Dura and its principal were obliged to obtain insurance in the form stipulated by Ministerial Order S122

and that ministerial order treats the building owner as the insured and not the builder. Dura therefore accepted the form of insurance relied on by VMIA. Anything in the relevant certificates which was inconsistent with that structure had to be read they said subject to the notation on the certificates *'for more detail of this insurance refer to the policy wording in certificate of currency'*.

92 They said it was an over simplification of the relevant policy to suggest it also provided protection to the builder. They said Section 3 *'relates not to the provision of indemnity but rather to relations between the insurer and the builder'*. The starting point of the section, they said, was the contractual provision in Clause A subrogating the insurer to any rights which the insured might have against the builder *'upon the insurer accepting liability for a claim only part thereof'*. They said the starting point of the section therefore was to provide FAI with all the rights of the owner against Dura upon FAI accepting liability for a claim. Next they said Clause B provides that if Dura has complied with all of its obligations under the policy:

> Then it is entitled by making payment to FAI within 30 days of demand of the lesser of the reimbursement amount or the amount which FAI has accepted liability for, to preclude FAI from enforcing its right of subrogation to recover from Dura the amounts for which it has accepted liability.

93 Clause C, they said, permits the builder and the insurer to agree to the cost of any rectification work and to pay the builder the cost of such works insofar as it exceeds the reimbursement amount. There is no right on the part of the builder to be paid for simply completing its obligations under the major domestic building contract. They said that the benefit of these limitations accrued only if the builder had complied with all of its obligations under the contract. Those obligations included Special Condition 2:

> If Dura complied with that obligation then it would be in a position to seek agreement as to the cost of the rectification works under Section 3(c) providing that it had complied with all other obligations.

94 Here, however Dura has at all times refused to carry out rectification work. Mr Murdoch and Mr Stuckey stressed the breadth of the obligation under Special Condition 2(c) extending as it did *'in respect of any claim'*. They continued:

> Dura's self-defeating decision to not comply with such directions does not in or of itself provide any reason to read down the plain wording of the section.

95 They said paragraph 33 of Mr Stinton's affidavit of 23 June 2010 *'confirms that this was the way in which the policy was to be applied by FAI'*. They submitted that this construction was a natural and ordinary meaning of the words and there was no justification for going outside the four corners of the document. In fact no extrinsic evidence had been adduced by the

respondent Dura. As to alleged breaches of the duty of utmost good faith, they said there was no evidence of representation or promotions made to Dura. They said:

> There was no evidence that builders paid a higher premium for this insurance or that FAI chose not to include a term whereby it could direct the builder to rectify defects.

96 There is no breach of the duty of utmost good faith here:

> In the absence of any allegations that representations were made to Dura as to the nature or effect of the policy, or that Dura relied upon any representation or even misunderstood the nature and effect of the policy.

97 As to Section 14(3) and 37 of the *Insurance Contracts Act* these could apply only in favour of someone who was the insured, in this case the building owner not Dura.

98 They said that any obligation as to the giving of notice would in any event be excluded by Section 71(1) of the *Insurance Contracts Act*.

99 In any event they said there was no evidence that the Special Condition 2(c) was an unusual term.

100 They said that a person dealing with a agent, in this case FAI dealing with Lowndes Lambert as agent for Dura was:

> Entitled to assume that every agent has advised his principal, or will advise him, of all material facts which come to the knowledge of the agent in the course of an employment.

101 They referred to *Blackburn, Lowe and Co v Haslam* (1888) 21 QBD 144. They said one means of giving notice to an insured was by providing the insured with a document containing the provisions or the relevant provision. They said this was done in Dura's case. Given that the building owner and the building owner's successors were within the definition of the insured, it would be impossible for an insurer to comply with Section 37 as contended by Dura by giving notice of the relevant clauses to each person falling within the definition of *'the insured'*.

CONCLUSIONS

Which Policy?

102 VMIA's contention as recorded above is that Dura purchased cover for the relevant period in accordance with the terms of what is described as *'the second policy'*. Mr Digby and Mr Andrew on behalf of Dura contended that the policy was on different terms and evidenced inter alia by a Memorandum of Insurance issued to Dura by brokers Lowndes Lambert and referring to policy *'1804116760'*. The period of cover is shown as being from 30 June 1999 to 30 June 2000. This memorandum dated 20 June 1999 shows the insured as Dura. It includes a page which appears to be part of a standard printed form by Lowndes Lambert as to various

insurance issues such as duties of disclosure, subrogation and so forth. Under the heading Special Notices the following appears:

> This memorandum of insurance (and any attachments) is only prepared as a summary of your insurance policy. It is not a complete description of all your policy terms, conditions and exclusions.
>
> In case of a claim under any policy, or questions with regard thereto, the provisions of the policy will prevail.

103 The third page is headed Schedule of Cover Building practitioners – *Building Act* 1993. There is a limit of liability of liability of $100,000 plus reasonable legal expenses of the home owner with an excess of $10,000 on any one claim. Under the heading *'Cover'* the following appears:

> Claims made, noting this cover meets all the statutory requirements of the *Domestic Building Contracts and Tribunal Act* 1995 and ministerial order thereto.

104 Mr Digby and Mr Andrew contend that insofar as this memorandum makes reference to the terms of the policy with those terms prevailing over the summary and the memorandum, the reference is not to the so called second policy relied on by VMIA but rather to what VMIA describes as the first policy, a policy which had Dura as the insured and did not include any obligation on Dura's part to carry out rectification at the request or direction of the insurer. They observe that the policy number quoted in the memorandum is the number ascribed to the so called first policy as evidenced by the certificate of currency dated 17 April 1997 which was exhibit AG2 to Ms Gawthorn's affidavit.

105 I reject this view of things. First, by virtue of Ministerial Order S122 in Section 135 and the following sections of the *Building Act* 1993 it was mandatory for Dura to hold insurance in the form of S122. If Dura's contentions on this point are correct it was operating illegally with inappropriate insurance cover. It seems unlikely that Dura would have done such a thing or that Lowndes Lambert and FAI would have facilitated it. Secondly, there is the question as to the role of Lowndes Lambert. As indicated above, VMIA's entitlements against Dura under Part 6 of the *House Contracts Guarantee Act* are purely derivative of FAI's rights against Dura. It is only if Lowndes Lambert was FAI's agent at the time of issuing the memorandum that it would have power to bind FAI to a particular legal position as to FAI's rights against Dura and as to what policy terms applied. In *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Limited* (1986) 160 CLR 226. The High Court of Australia considered a claim by an insurer against the insured for premiums which had been paid by the insured to its broker but not passed on to the insurer. Had the broker been the agent of the insurer with authority to receive the premium, the payment to the broker would have constituted a payment to the insurer and the insurer's claim for

payment now would necessarily have failed. The Court Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ said:

> … under the general principles of the law of agency, a broker is the agent of the insured not the insurer: [authorities omitted] there will be rare circumstances in which a broker may also be an agent of the insurer, but the Courts will not readily infer such a relationship because a broker so placed faces a clear conflict of interest between his duty to the insured on the one hand and to the insurer on the other. (1986) 160 CLR 226, 234

106 This is also recognised by the definition of *'insurance broker'* in the Commonwealth *Insurance (Agents and Brokers) Act* 1984 which defines that term as meaning:

> A person who carries on the business of arranging contracts of insurance, whether in Australia or elsewhere, as agent for intending insureds.

107 As the Justices in the *Norwich Winterthur* case acknowledged in particular cases it may be proven that a broker is the agent of the insurer for particular purposes such as the receipt of premiums. An example of such a finding is the decision of the Full Court of the Supreme Court of Victoria in *Norwich Fire Insurance Society Limited v Brennans (Horsham) Pty Ltd* [1981] VR 981. As previously noted there was no evidence adduced on this point by Dura. Mr Stinton, VMIA's witness, was extensively cross-examined. He had been an employee of Lowndes Lambert albeit at an earlier point than is material in this proceeding, nevertheless there was nothing in any answer that he gave in cross-examination which support any finding that in issuing the memorandum of insurance, Lowndes Lambert was agent for FAI.

108 The evidence of VMIA's witness Mr Stinton who it will be recalled had worked at Lowndes Lambert albeit not at the material time and also at FAI dealing with domestic building warranty insurance was that Lowndes Lambert acted as brokers for insured and not as agent for FAI. In those circumstances I reject the contention that Dura was operating under cover of some renewed incarnation of what has been described as the first policy.

109 Can it be said however that whatever cover Dura had at the material time is to be regarded as existing in accordance with the terms of the *'second policy'*? In *Moutidis v Housing Guarantee Fund Limited* [2003] VCAT 1347, a case relied on by Dura, Judge Bowman as Vice-President of the Tribunal referred to and adopted a passage from *MacGillivray and Parkington on Insurance Law* (though His Honour did not indicate which edition) which had previously been adopted and approved by Hedigan J in the Supreme Court in *Shepherd v National Mutual Life Association of Australasia Limited and Bob Broadly and Associates Pty Ltd* (1985) 8 ANZ Insurance Cases ¶ 61 – 233, 75,615. The passage is to the following effect:

> It will readily be assumed that, when an applicant seeks insurance cover from particular insurers, he impliedly offers to take an insurance

> on the insurers' usual, or standard, terms of cover, just as the insurers' interim cover note will be issued impliedly subject to the usual conditions contained in their policies. When, therefore, the insurers come to issue their policy, their only obligation is to issue it with the terms and conditions usually attached to their policies, in so far as these are not inconsistent with the express term of the parties' preliminary contract.

110 The situation therefore is that the terms of the second policy relied on by VMIA are *prima facie* applicable.

111 Mr Digby and Mr Andrew however submitted that there was no evidence that the policy terms were ever *'issued'* to Dura. Therefore a Special Condition 2(c) could not be relied upon by VMIA. Mr Murdoch and Mr Stuckey however relied on the evidence of Mr Stinton. Mr Stinton said that he was in charge of domestic building warranty insurance at the time that the relevant terms were adopted. As to the matter of issuing policies, Mr Stinton said:

> When a policy of domestic building warranty insurance was written by the underwriting department of FAI, FAI would post out to the broker concerned the policy document with the schedule of insurance relating to it, together with a certificate for registration of a builder with the Building Control Commission, and an 'important notice to builders'. These documents went out in a package together, and this was our standard practice. I am unable to say what would typically be done with them on receipt by the insurance broker.

112 It will be recalled that in cross-examination by reference to the dates of various events including his accepting office as a director of DEXTA Corporation, Mr Stinton had to concede that he was probably not *'in charge'* of domestic building warranty insurance at FAI at the relevant time when the second policy was allegedly written. Nevertheless, in my view it is reasonable to infer that the same practice to which he deposed as being followed during his time at FAI was likely persisting at the material times. This is an example of the presumption of continuance which the law generally makes. Speaking of this legal presumption, the learned editors of *Cross On Evidence Australian Edition* [1125] (Service 128) state:

> Evidence of this sort is given so frequently that it is sometimes said that continuance in general, and the continuance of life in particular, is the subject of a rebutable presumption of law; but the question is simply one of relevance depending on common human experience, and it would be best to avoid the use of the word 'presumption' altogether in this context or if that term must be applied, it should be qualified by the use of some such expression as a 'presumption of fact' or a 'provisional presumption'.

113 Common human experience would suggest that if FAI had a practice of sending insurance policies to the brokers of the insureds who had arranged the insurance in year one there is no reason in the absence of some indication to the contrary that this practice would not have persisted in

following years. Mr Murdoch and Mr Stuckey relied on a decision of the Full Court of the Supreme Court in *Pepper v Tuohy* [1926] ALR 300. The question before the Court there was as to the authority which an agent had to sell land. It was accepted that the agent initially possessed authority to sell in accordance with the plaintiff's claim. There was a dispute however as to whether or not that authority had by the material time been withdrawn and substituted with a more limited authority which would have necessitated the rejection of the plaintiff's claim. The Trial Judge being unable to make a finding as to whether the initial authority had been withdrawn or not dismissed the plaintiff's claim. On appeal the Full Court entered judgment for the plaintiff on the basis that the presumption of the continuance of the initial authority had not been rebutted on the evidence in light of the Judge's finding.

114 The evidence of FAI's practice with regard to the issue of policies given by Mr Stinton coupled with the presumption of continuance might be thought to be relatively feeble evidence, and so it is. In the present case however it stands entirely uncontradicted. No evidence has been adduced from any officer of Dura or anyone from Lowndes Lambert who for the reasons given above should be regarded as agent of Dura and therefore within its camp denying receipt of the policy. Since Lowndes Lambert was Dura's agent to arrange the insurance, receipt of the policy terms by Lowndes Lambert was effectively receipt by Dura. Since no-one from Dura or Lowndes Lambert gave evidence denying receipt of the policy document I can, based on the principle of *Jones v Dunkel* (1959) 101 CLR 298, infer that the evidence of such persons would not have been of assistance to Dura. Accordingly I can with greater confidence accept Mr Stinton's evidence.

115 Subject to certain issues under the *Insurance Contracts Act* 1984 to which I will turn presently, I find that as between itself and FAI, Dura was bound by the terms of what has been described as the second policy, that is, the document being Exhibit AG5 to the affidavit of Ms Gawthorn sworn 9 February 2010.

116 Should the terms in the policy be modified in any way in light of the principles enunciated by Judge Bowman in *Moutidis'* case? In that case and in the authorities upon which he relied, His Honour found that there had been clear representation to the insured as to the terms of the policy of insurance by persons acting for the insurer which were not reflected in the written policy ultimately issued. Here there is no evidence of any such representation at all. As previously noted there was no evidence from Dura on any subject.

117 I am conscious that the finding that I have made is in the face of the description in a number of places including certificates of currency, the Lowndes Lambert memorandum of insurance and so on of Dura as *'the insured'* a matter as Mr Digby and Mr Andrew have observed that is quite inconsistent with the terms of the second policy as evidenced in the relevant

document. In my view this is a reflection of the regrettably *'slap dash'* approach which appears to be taken in the insurance industry to the documentation of very important relationships. Where these various documents referred to Dura as being *'the insured'* they mean no more in my view than that it is Dura which has purchased the cover and paid the premium albeit for the benefit of the various building owners and their successors in title. No doubt in retrospect some more appropriate description of Dura in this role could have been used in the various documents, one which was not at odds with the policy terms themselves, for instance *'builder arranging cover'*. One may infer that in the insurance industry generally it is customary to refer to the person paying the premium as the insured as in most cases he, she or it is. It would be practically difficult for any of these certificates to have described [accurately] who the insured was. The policy in question was a master policy, that is, it did not relate to any particular project but rather to the projects which Dura undertook in a particular timeframe. Even if it were a project specific in the case of a unit development such as the Cromwell building in Toorak Road it would probably have been impossible to give an exhaustive list of the names of unitholders as at the time of issue of the relevant certificate.

Can VMIA Rely on Special Condition 2(c)in Light of the Provisions of the *Insurance Contracts Act?*

118 For convenience I set out in full below the provisions of the *Insurance Contracts Act* 1984 which Dura says disentitle VMIA from directing it to carry out rectification work:

> **13** A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
>
> **14** (1) If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.
>
> (2) Subsection (1) does not limit the operation of section 13.
>
> (3) In deciding whether reliance by an insurer on a provision of the contract of insurance would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the insured, whether a notification of a kind mentioned in section 37 or otherwise.
>
> …
>
> **37** An insurer may not rely on a provision included in a contract of insurance (not being a prescribed contract) of a kind that is not usually included in contracts of insurance that provide similar

> insurance cover unless, before the contract was entered into the insurer clearly informed the insured in writing of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise).

119 Consideration of these items of Commonwealth legislation does not entail the Tribunal impermissibly exercising judicial power under Chapter III of the *Commonwealth Constitution*, something which in accordance with established principle can be done only by a State Court or a Federal Court. VMIA's claim here is under a State statute, namely the *House Contracts Guarantee Act* 1987 Part 6. The operation of the Commonwealth legislation as between Dura and FAI is if you will, incorporated by reference as a piece of State law because VMIA's ability to require Dura to rectify defects in the Cromwell development in Toorak Road is by virtue of Section 44 of the 1987 Act no greater than was FAI's.

120 Even if this were not so before cross-vesting arrangements in favour of State Supreme Courts and with respect to the *Trade Practices Act* 1974 in particular it was held that a State Court having purely State jurisdiction had authority to entertain a simple defence based on Commonwealth law. *Carlton and United Breweries Limited v Tooth and Co Limited* (1986) 5 NSWLR 1.

121 Mr Digby and Mr Andrew submit that if it is otherwise possible for VMIA to rely upon Special Condition 2(c) it would be contrary to the duty of utmost good faith for it do so in the present circumstances.

122 As Mr Murdoch and Mr Stuckey have pointed out VMIA and Dura are not in the relationship of insurer and insured. Their relations are governed by the *House Contracts Guarantee Act* 1987 Part 6 and not by the *Insurance Contracts Act*. However insofar as VMIA's rights whatever they may be are derivative from FAI's and by express provision of Section 44(3) of the 1987 Act no more extensive than FAI's rights were, the *Insurance Contracts Act* question is incorporated by reference into the relationship between VMIA and Dura. It follows that whether a breach of the duty of utmost good faith as provided for in the Commonwealth Act is established must be judged as between Dura and FAI. To put it another way the proper question is would it be a breach of FAI's duty of the utmost good faith to rely on Special Condition 2(c) in these circumstances?

123 The primary submission by Mr Murdoch and Mr Stuckey on this matter was that the duty of utmost good faith was a duty of disclosure and so a decision to rely on a provision in a contract of insurance by definition could not be a breach of such a duty, yet Section 14 of the Commonwealth Act assumes that reliance on a term of a policy could be a breach of the duty of utmost good faith. The heading to the section *'Parties not to rely on provisions except in the utmost good faith'* accurately summarises the effect of the section. Section 12 of the Act may also be relevant on this point, it provides:

> (12) The effect of this Part is not limited or restricted in any way by any other law, including the subsequent provisions of this Act, but this Part does not have the effect of imposing on an insured, in relation to the disclosure of a matter to the insurer, a duty other than the duty of disclosure.

though the precise effect of this section is not the subject of any submission before me and I confess its purpose and effect is not self evident to me.

124 At the level of generality however I accept the further submissions put by Messrs Murdoch and Stuckey that whatever the duty of utmost good faith means in the post contractual and performance phase of an insurance relationship it cannot be apt to preclude reliance on a provision in a contract of insurance for what will appear to be its evident purpose as distinct from some by purpose or improper purpose. The purpose of a provision such as Special Condition 2(c) would appear to be to place the insurer in the same position as House Contracts Guarantee Limited was placed as approved guarantor under the *House Contracts Guarantee Act* 1987 as originally enacted, that is, having an obligation to meet claims for defective building work but having an entitlement effectively to indemnify itself against that cost by requiring the builder to make rectification.

125 Section 14(3) proceeds on the footing that reliance on a provision of a contract of insurance would breach the obligation to act with utmost good faith based upon a failure by an insurer to provide notification of an unusual term in accordance with Section 37. In my view Sections 14(3) and 37 of the Commonwealth Act do not avail Dura either, first, as Mr Murdoch and Mr Stuckey correctly observe there is no evidence which establishes that Special Condition 2(c) is *'of a kind that is not usually included in contracts of insurance that provide similar insurance cover'*. Indeed the fact that Parliament saw fit to include Section 44 in its amendments to the *House Contracts Guarantee Act* 1987 when the State stepped into the breach upon the collapse of the HIH group would suggest that such provisions are usual. Certainly in light of the previous regime operating under the original version of the *House Contracts Guarantee Act* an obligation on the part of the builder to rectify was an essential part of the scheme not something which was unusual though it must be conceded that the regime was one of guarantee rather than insurance. In any event I accept the submission on behalf of VMIA that insofar as Section 37 precludes an insurer from relying on a provision in a contract of insurance, that reliance must be made as against the insured. For reasons previously given the insured in this case is the building owner not Dura. In Section 37 Parliament has simply not directed its attention to the unusual situation existing here where the party purchasing the cover was neither the insured nor someone acting as agent for the insured but rather the builder. The evident policy of Section 37 is that if the insured's rights are to be infringed upon or if its liabilities are to be increased beyond in the form of policy customarily given there should be some notification of it before the contract is entered into. Here Dura is not

the insured and Section 37 if it operated would obliged warning to be given to the insured. In the case of a master policy such as the one we are dealing with here this would simply be impracticable because the identities of those persons who will fall within the definition of the insured could not exhaustively be determined before the contract was entered into. In my view Section 37 has no application here.

126 For these reasons in my view there is nothing in the *Insurance Contracts Act* 1984 which either by its own force or indirectly by incorporation by reference into State law defeats VMIA's claim in this proceeding.

True Construction of Policy

127 The most difficult question for determination is the true construction of the policy which I have found to exist.

128 If Special Condition 2(c) is read alone and in isolation it places FAI and under Part 6 of the 1987 Act, VMIA, in the same situation as the approved guarantor under the original version of the *House Contracts Guarantee Act* 1987, that is, able to avoid outlays or indemnify itself by requiring refunds or rectification work from the builder; but the section does not stand alone rather it stands in the context of the entire policy. It is part of Section 3 of the policy headed *'The builder'*. Paragraph A of Section 3 provides that FAI is *'subrogated to any right of the insured against the builder'*. Paragraph C qualified the right of subrogation subject to all exclusions in the policy and subject to:

> The builder's compliance with [the terms, conditions, limitations and exclusions in this policy applicable to the builder] if the builder rectifies the defects with the insurer's "prior written approval" then no subrogation would be pressed against the builder if the total agreed cost for the rectification work is less than the reimbursement amount.

129 The schedule sets the reimbursement amount at $10,000. Paragraph C continues that where the agreed cost exceeds the reimbursement amount the insurer will pay the builder to the amount of the excess except where the rectification work needs to be done under a defects liability and maintenance period provision. This provision has been said to embody a regime of *'capped subrogation'* whereby the builder's liability to rectify is limited to the reimbursement amount viz. $10,000 for each property. This regime, say Messrs Digby and Andrew, is inconsistent with a blanket entitlement on the part of FAI and by extension VMIA to require the builder to carry out rectification work. Their submission is that the two provisions are to be read together by treating Special Condition 2(c) as applying only where under Paragraph C of Section 3 the builder is completing its obligations under the major building contract, therefore under paragraph C the insurer is not liable to reimburse the builder for this rectification work.

130 They said that this construction was consistent with the view that Section 3 of the policy was intended to provide special extra benefits to the builder in accordance with the title of the policy *'Builder's Annual Blanket Extra'* policy.

131 I agree with the submissions of Messrs Murdoch and Stuckey that Section 3 of the policy is not devoted solely or even primarily to providing extra benefits to the builder rather it is in part governing the relationship of FAI with the builder. The very first part of Section 3, Paragraph A, creates a general right of subrogation in favour of FAI and against the builder. This is scarcely an extra benefit. The learned author of Lewison, *The Interpretation of Contracts* (3rd Edition 2004) states at Clause 9.08:

> If a clause in a contract was followed by a later clause which destroyed the effect of the first clause, the later clause is to be rejected as repugnant and the earlier clause prevails. If, however, the later clause can be read as qualifying rather than destroying the effect of the earlier clause, then the two are to be read together, and effect given to both.

132 This principle is well established and is based on the speech of Lord Wrenbury in the House of Lords in *Forbes v Git* [1922] 1 AC 256. Whilst Messrs Digby and Andrews did not directly invoke this principle this is clearly what underlay their submission. I agree that in the circumstances it is necessary to read the two clauses, namely Paragraph C of Section 3 and Special Condition 2(c) of Section 3 together.

133 In their submissions in reply Messrs Murdoch and Stuckey submitted as recorded above that the proper way to read the two clauses together was that the builder was entitled to *'capped subrogation'* in accordance with paragraph C but only if the builder otherwise performed all of its obligations under the contract, one of those other obligations being the one imposed by Special Condition 2(c). This interpretation of the policy has the advantage that it enables a literal interpretation to be applied. Again Dura has not performed all its obligations because it is clear it has refused to carry out any rectification work. The interpretation urged by Dura requires one to imply a limitation on the apparent breadth of Special condition 2(c) which does not appear in the text. The interpretation urged on behalf of VMIA gives literal effect to the words without the implication of other words or any implied restriction on the literal operation of the words. Given that the policy is a printed standard form and that both of the potentially inconsistent provisions are part of that printed form and therefore part of what one supposes was intended to be a harmonious whole, a provision which allows the two provisions to be read together literally would seem the more likely one. The sort of error or oversight which can easily occur when specially negotiated provisions are grafted on to a standard form potentially requiring even vigorous surgery in the course of interpretation would not seem to arise here.

Answers to Questions

(1) On or about 17 May 1999 (or some other date, and what date) did FAI General Insurance Company Ltd ("FAI") either by itself or with a panel, underwrite and enter into a contract of insurance with the Respondent whereby FAI agreed to indemnify certain building owners for any loss or damage resulting from risks set out in clause 5 of the Ministerial Order S122 made 30 October 1998 pursuant to s135 of the *Building Act* 1993 ("the Contract of Insurance"), as alleged by the Applicant in paragraph 6 of its Points of Claim?'

134 Answer: *'Yes'*.

(2) If yes to (1), insofar as the Contract of Insurance was in writing was it contained in the Certificate for Registration of Builder dated 17 May 1999 and in the Builders Annual Blanket Extra Policy Terms dated 29 December 1998 ("the Builders Annual Blanket Extra Policy"), being the documents referred to in the particulars subjoined to paragraph 6 of the Applicant's Points of Claim and/or in the Schedule being exhibit 'AG6' to the affidavit of Ms Gawthorn deposed 9 February 2010?

135 Answer: *'Yes'*.

(3) If yes, did the Builders Annual Blanket Extra Policy contain a term that on its proper construction empowered the Applicant to give the directions to the Respondent on 9 and 19 October 2006, as alleged in paragraph 16 of the Applicant's Points of Claim?

136 Answer: *'Yes'*.

137 If yes to (3), then:

(i) Would it be a breach of Section 13 of the *Insurance Contracts Act* 1984 for FAI to rely on such term with the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?

Answer: *'No'*.

(ii) Would FAI be precluded from reliance on any such term by reason of Section 14 of the *Insurance Contracts Act* 1984 with the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?

Answer: *'No'*.

(iii) Would FAI be precluded from relying on any such term by reason of Section 37 of the *Insurance Contracts Act* 1984 with the result that VMIA may not now rely on such term (having regard to Section 44(3) of the *House Contracts Guarantee Act* 1987)?

Answer: *'No'*.

MFM:RB