VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D270/2005

CATCHWORDS

Powers of VMIA under s44 of the *House Contracts Guarantee Act* 1987 – Ministerial Order s122 of 1998

APPLICANT	Construction Engineering (Aust) Pty Ltd (ACN 005 490 773)
RESPONDENT	Victorian Managed Insurance Authority
JOINED PARTIES	David Mitchell, Wendy Cole, Matthew McNeill, Elliott Friedman, Joshua Friedman, Peter Papadopoulos, Rachel Bloom, Geoffrey Moar, Lesley Moar, George Mariotto, June Burchell, Mr. Fung, Mrs. Fung, Tom Tangas, Helen Davidson, David Graham, David Spedding, Mary Harper, Michael Heath, Marie Malcolmson, Rita Hollins
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	10 November 2006
DATE OF ORDER	23 January 2007
CITATION	Construction Engineering (Aust) Pty Ltd v Victorian Managed Insurance Authority (Domestic Building) [2007] VCAT 69

ORDER

1. The Tribunal being satisfied the Respondent had power to give the directions the subject of this proceeding, the preliminary applications by the Applicant are dismissed.

2. **This proceeding, together with proceedings D429/2005, D891/2005 and D384/2006, is referred to a directions hearing before Deputy President Aird on 13 February 2007 at 2.15 p.m. at 55 King Street Melbourne, with an estimated hearing time of half a day.**

3. I direct the Principal Registrar to place a copy of the Reasons on D429/2005, D891/2005 and D384/2006 to which they also apply.

3. Costs reserved – liberty to apply. Any application for costs shall be heard at the directions hearing on 13 February 2007

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr N. Frenkel of Counsel
For the Respondent	Mr P. Murdoch QC with Mr S. Stuckey of Counsel
For the Joined Parties	No appearance

REASONS

1 During 2005 the Respondent directed the Applicant to carry out certain rectification works to a number of apartments in an apartment building in Church Street Richmond. The Applicant seeks a review of the decisions of the VMIA relating to each of the claims in proceedings numbered D270/2005, D429/2005, D891/2005 and D384/2006 to which these Reasons relate. Although Senior Member Walker had made orders in anticipation of the appointment of an expert under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 on 6 April 2006, by application dated 4 August 2006 the Applicant Builder sought the following orders or declarations to be determined before the appointment of the expert.

- A declaration that the Respondent had no power to give the directions the subject of the proceeding.
- Alternatively to paragraph 1 above, an order that the Respondent's directions the subject of the proceeding be struck out.
- An order that the Respondent pay the Applicant's costs of the proceeding.

2 The claims arise under policies of warranty insurance issued by FAI, and the directions given by VMIA under s44 of the *House Contracts Guarantee Act* 1987 as part of the HIH Indemnity Scheme following the liquidation of HIH and its associated companies, including FAI.

3 Section 44 of the *House Contracts Guarantee Act* 1987 provides:

> (1) Subject to sub-section (3), if a claim is made under section 40 for loss arising from incomplete or defective building work, VMIA may give reasonable directions to the builder concerned in respect of—
>
> (a) the completion of the building work or the rectification of the defective building work; or
>
> (b) the payment by the builder to the Domestic Building (HIH) Indemnity Fund of any amount in respect of the completion of the building work or the rectification of the defective building work.
>
> (2) Subject to sub-section (3), if a claim is made under section 40, VMIA may direct the builder concerned to pay to the Domestic Building (HIH) Indemnity Fund any amount paid out of the Fund on that claim.
>
> (3) VMIA may only give a direction under sub-section (1) or (2) to the extent that HIH would be able to require that work or require a payment to HIH by the builder under the relevant HIH policy.
>
> (4) A builder must comply with a direction under sub-section (1) or (2).

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

4 Up until the filing of its Further Statement of Legal Contentions on the day before the first return date for the hearing of this application, there was a dispute between the parties as to the applicable policy of warranty insurance. At the commencement of the hearing, the Applicant confirmed this issue had been resolved by the parties, but noted that it nevertheless contends that the relevant Policy is inconsistent with the Ministerial Order and further that it is vague for uncertainty. The hearing was adjourned by consent until 10 November 2006.

5 Mr Frenkel of Counsel appeared on behalf of the Applicant. Mr Murdoch, QC with Mr Stuckey of Counsel appeared on behalf of the Respondent. Although I was referred to a number of authorities I have only referred to those which I consider to be relevant and of assistance.

6 Mr Frenkel said that the Applicant makes its application on the following bases:

- the policy is void for uncertainty and it is therefore not applicable to this proceeding; and
- the policy is unenforceable because Special Condition 2(c) of Section 3 is inconsistent with the Ministerial Order.

Is the policy void for uncertainty?

7 The Applicant's primary position is that the relevant policy is void for uncertainty or simply does not apply to these proceedings. Section 1 of the relevant policy relates to what is described as *'the 'Building Owner' Insurance'*, Section 2 to *'Transitory 'Run-off' Indemnity'* and Section 3 is simply headed *'the Builder'*. The parties agree that Section 1 does not apply. The Applicant contends that Section 2 is void for uncertainty because, unlike Section 1, it does not specify a period of insurance. Further, as there is no definition of "The Insured' in the Schedule relative to Section 3, Section 3 cannot apply for the benefit of the homeowner, and the circumstances in which it would apply are unclear from its wording primarily because there is no introductory paragraph setting out the circumstances in which it will apply.

8 In the Schedule 'the Insured' is identified in Section 1 as:

> The Building Owner (and other persons included in the definition of insured)

and in Section 2 as:

> The building owner under a Major Domestic Building Contract specified in Clause A of Section 2 (and other persons included in the definition of insured for the purposes of that contract).

the Policy Period is:

'from 27 June 1999 to 27 June 2000 at 4.00pm'

and the Retroactive Date applicable to Section 2 is:

27 May 1996

9 Mr Murdoch submitted that there is no inconsistency. The policy must be read as a whole, not as a series of unrelated sections. It is entirely appropriate that there is a definition of insured in the Schedule as it relates to Sections 1 and 2 – there is no need to refer to section 3 in the Schedule. There can be no uncertainty as to the period of insurance – this is clearly referable to the retroactive date set out in the schedule by reference to the transitionary provisions as they are set out in the Ministerial Order and in the Policy.

Discussion

10 In my view, it cannot be said that the meaning or intent of this policy is unclear. It must be read as a whole in the context of a system of warranty insurance intended to provide protection to homeowners when completion and/or rectification works are required. Section 3 applies where a claim has been made under the policy. It seeks to impose certain obligations on a builder once that claim has been made. It should not be read independently of the other provisions of the policy. There can be no doubt as to the period of insurance. The policy period is clearly referable to the retroactive date as submitted on behalf of the Respondent. Even had I been satisfied that there was any uncertainty, contractual terms should only be set aside where it is impossible to determine or identify the contractual intention of the parties. (*Upper County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429. This is not the case here. The parties – the builder and the insurer - clearly intended to enter into a policy of warranty insurance as required by the *Building Act* 1993 and the Ministerial Order.

Is Special Condition 2(c) inconsistent with the Ministerial Order?

11 The Respondent relies on Special Condition (2) of Section 2 of the relevant policy, and in particular Special Condition 2(c) which provides:

> 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.

12 The Applicant contends that Special Condition 2(c) is unenforceable by virtue of the provisions of clauses 8.1 and 9 of Ministerial Order S122 dated 30 October 1998, and that insofar as a policy contains terms that are not expressly contemplated by the Ministerial Order, the policy is inconsistent with the Order, and the 'offending provisions' are unenforceable.

13 Clause 8.1 of the Ministerial Order provides that any term of a policy which conflicts with or is inconsistent with the Order will be unenforceable.

14 Clause 9.1 provides:

> A policy must not contain any provision, which limits, modifies, varies, avoids or excludes any of the requirements for a policy set out in this Order or which, subject to this clause provides for limitations or exclusions to the policy not expressly permitted by this Order.

15 The Applicant contends that insofar as the policy seeks to give the insurer a right to direct the builder to carry out rectification works, it seeks to limit, modify, vary, avoid or exclude the provisions and requirements of the Ministerial Order (in contravention of Clause 9.1 of the Order) and to the extent it does so, it is void and should be struck from the Policy. The Applicant contends that Special Condition 2(c) is inconsistent with Clause 7.6 of the Ministerial Order which requires the insured (the homeowner) to *'comply with the reasonable direction of the insurer in relation to the completion or rectification of the domestic building work'*.

16 The Respondent's position is that the Ministerial Order is essentially concerned with the relationship between the insurer and the insured homeowner, and the indemnity to be provided to the insured homeowner under the policy. It is not concerned with the relationship between the insurer and the builder. It is permissive about matters which may be included to reduce the benefit to a homeowner and mandates provisions which must be included for the benefit of a homeowner. It is silent about the relationship between the insurer and the builder. There are no requirements about provisions which must be or may be included in relation to that relationship.

Discussion

17 I am not persuaded that Clause 7.6 is relevant in determining whether an insurer is empowered to issue directions to a builder to return to site and carry out rectification works. Clause 7 simply enables an insurer to impose obligations on a homeowner to ensure that when the owner becomes aware of what is described as *'an insured event under the policy'* the insurer's interests are protected.

18 The policy is a contract of insurance between the insurer and the builder for the benefit of the insured – the owner (for the time being, and as successor in title). There is no prohibition in the Ministerial Order which prevents an insurer and a builder entering into a contract of insurance which imposes certain obligations on the builder and gives the insurer certain powers in

relation to those obligations providing they do not impact in any way on the extent of the indemnity to be provided to the homeowner.

19 I am not persuaded that Special Condition 2(c) is inconsistent with the Ministerial Order. It matters not, in my view, that the Order is silent as to the obligations which may be imposed on a builder under the policy. I am not persuaded that Special Condition 2(c) offends Clause 9.1 of the Order as it is not contrary to any specific provision in the Order and as such cannot be said to limit, modify, vary, avoid or exclude any of the requirements of the Order. Although I have read with interest the observations of Phillips JA in *Housing Guarantee Fund Ltd v Dore* [2003] VSCA 126 to which I was referred by the Applicant, they do not, in my view, assist the Applicant. At page 262 His Honour said:

> In the end, of course it does not matter; for if there is any departure in the wording of the policy of the requirements of the Ministerial Order, it is the latter which prevails inasmuch as the policy is to "be read and enforceable as if it complies with the Ministerial Order;…"

Had I been satisfied Special Condition 2(c) offends the Ministerial Order these observations would have been most pertinent but that is not my finding. In any event, *HGFL v Dore* related to policy provisions concerning the relationship between the owner and the insurer – not between the builder and the insurer with which these proceedings are concerned.

20 I am not persuaded by the Applicant's submission that Special Condition 2(c) does not apply to the claims the subject of these applications, as when read in conjunction with Special Condition 2(a) and (b) it was obviously intended to apply when the builder was still in possession of the building site and not otherwise. The situations where a builder will still be in possession of a site when a claim is made under a policy of warranty insurance are the exception rather than the rule. The policy clearly contemplates that directions may be made for the builder to return to site to carry out any necessary works. Clause 2 (d) and (e) under the heading 'Claims Procedures' are pertinent and provide:

> Upon becoming aware of some fact or circumstance which may give rise to a claim under this policy, the Insured shall
>
> …
>
> (d) provide the Insurer or any person nominated by the Insurer with reasonable access to the relevant building site for the purposes of inspection and/or rectification or completion of domestic building work;
>
> (e) permit access for the purposes of Clause 2(d) above to a builder nominated or approved by the Insurer, subject to the Insured's right upon reasonable grounds (**which may include loss of confidence in the Builder**) to refuse access to the Builder. (emphasis added)

where ‘Builder’ is defined in the policy as ‘the builder specified in the Schedule’.

21 Further, I accept the Respondent’s submission that it is unthinkable that the legislature would have enacted s44 if its effect and intent were not capable of performance. Section s44 enables the VMIA to ‘give reasonable directions to the builder’ to carry out rectification and completion works, to the extent that HIH was able to give such direction under the terms of a relevant policy. There would have been little point in including in the legislation to give effect to the HIH Recovery Scheme a provision that was not capable of performance

22 This power to direct and all of Section 3 is additional to the provisions set out in Sections 1 and 2 relating to the relationship with the owners. It is clearly stated in the Special Conditions that these provisions are not subject to the Ministerial Order. There is nothing in the Ministerial Order that states that any policy can only include the specified provisions and must not include additional provisions.

CONCLUSION

23 Although I am satisfied the Respondent is empowered under s44 and the relevant policy to direct the builder to carry out rectification works, I make no finding as to whether the direction was reasonable or appropriate in this case. That is a matter to be determined at another time. As I have not heard argument on the question of costs, I will reserve costs with liberty to apply.

24 I will refer the matter to further directions hearing at which time any application for costs will be heard and further directions made for the conduct of the proceeding, which may well include the appointment under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 in accordance with the previous directions.

DEPUTY PRESIDENT C. AIRD