Supreme Court

New South Wales

Case Name:	AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance
Medium Neutral Citation:	[2017] NSWSC 548
Hearing Date(s):	18, 19, 20, 24 April & 1 May 2017
Decision Date:	5 May 2017
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	See [19] to [21]: plaintiff's claim fails; further submissions invited as stated at [21]
Catchwords:	CONTRACT – indemnity by defendant to plaintiff for loss suffered as a result of claim made by owners corporation under residential building insurance policy – proper construction of indemnity – whether condition precedent to liability established – whether plaintiff issued policy of the kind referred to in indemnity – whether plaintiff was obliged to indemnify owners corporation for loss now claimed against defendant; BUILDING AND CONSTRUCTION – whether defects in residential building were structural defects – whether defects complained of by owners corporation were in a structural element – whether defects were structural defects that were likely to result in physical damage to any part of the building – proper construction of reg 57AC of Home Building Regulation
Legislation Cited:	Australian Securities and Investments Commission Act 2001 (Cth) Building Regulation 2004 (ACT) Evidence Act 1995 (NSW) Home Building Act 1989 (NSW)

	Home Building Regulation 1997 (NSW) Legislation Act 2001 (ACT) Trade Practices Act 1974 (Cth)
Cases Cited:	Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549 Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 Kimberley NZI Finance Ltd v Torero Pty Ltd [1989] ATPR (Digest) 53,193 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357; HCA 31 Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; 110 ALR 608 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 Norcast S.ar.L v Bradken Limited (No 2) [2013] FCA 235 O'Neill v Vero Insurance Ltd [2008] VSC 364 Re Golden Key Ltd [2009] EWCA Civ 636 Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477 Simic v New South Wales Land and Housing Corporation [2016] HCA 47 Stone v Chappel [2016] SASC 32 The Owners – Units Plan 1917 v Koundouris [2016] ACTSC 96 Vero Insurance Ltd v Harden Jones [2009] WADC 70 Wesfarmers General Insurance Limited v Jameson [2016] NSWCATAP 136 Zickar v MGH Plastic Industries Pty Ltd (1996) 187 CLR 310
Texts Cited:	Macquarie Dictionary Australia Online (Macmillan Publishers, 2017) Oxford English Dictionary Online (Oxford University Press, 2017)
Category:	Principal judgment
Parties:	AAI Limited trading as Vero Insurance (Plaintiff/Cross-Defendant) Kalnin Corporation Pty Ltd (First Defendant/Cross-

	Claimant) Laurence Nash Kalnin (Second Defendant/Cross-Claimant)
Representation:	Counsel: D D Feller SC with C Purdy (Plaintiff/Cross-Defendant) M R Elliott (Defendants/Cross-Claimants) Solicitors: Vardanega Roberts (Plaintiff/Cross-Defendant) Rankin Ellison Lawyers (Defendants/Cross-Claimants)
File Number(s):	SC 2014/340831

JUDGMENT

1 In 2001, the second defendant, Mr Laurence Kalnin, owned a property in Redfern which he then used as a storage facility.

2 Mr Kalnin decided to develop the property through the first defendant, Kalnin Corporation Pty Ltd, of which he was a director and shareholder.

3 During 2001, Kalnin Corporation sought development consent for the construction of a multi-unit residential complex on the site. The final form of development consent was given on 20 February 2002.

4 Later in 2002, Kalnin Corporation engaged a builder, Definite Dimensions Pty Ltd, to carry out the development. The principal of the builder was Mr Brian Carpenter.

5 The builder was required by the *Home Building Act 1989* (NSW) ("HB Act") to obtain insurance in relation to the works to be undertaken.

6 The builder applied to the plaintiff, Vero Insurance (then known as Royal & Sun Alliance Limited), to be certified as eligible to obtain statutory home warranty insurance and then to obtain a policy of insurance for the project.

7 In order to write the insurance, Vero required that Mr Kalnin and Kalnin Corporation, as developer, execute an indemnity in its favour.

8 On 14 August 2002, Mr Kalnin executed the indemnity on his own behalf and on behalf of Kalnin Corporation. I will set out the terms of the indemnity below. Vero now seeks to enforce that indemnity.

9 On 16 October 2002, Kalnin Corporation entered a building contract with the builder.

10 Vero completed its assessment of the builder's application for insurance in November 2002 and issued certificates of insurance in the name of the builder and Kalnin Corporation on 12 November 2002.

11 There is controversy as to the wording of the policy the subject of these certificates of insurance. I will return to this below.

12 The project proceeded. The work was completed by the end of 2004 and an occupation certificate was issued on 23 November 2004. The strata plan was registered on 13 January 2005 and the relevant owners corporation created then or shortly thereafter.

13 In November 2008, the owners corporation notified Vero of allegedly defective work and foreshadowed a claim under the policy. By now, the builder had been placed into liquidation.

14 In March 2009, the owners corporation made a claim for indemnity under the policy. It is common ground that whatever policy wording is relevant, by the time the owners corporation made its claim for indemnity, Vero was only liable to indemnify it in respect of "structural defects" as that expression was defined in the HB Act (as the time to claim for non-structural defects – two years – had long passed).

15 Between May 2009 and February 2013 Vero, through various consultants, evaluated and assessed the range of defects alleged by the owners corporation and evaluated tenders from four remedial builders to carry out defect rectification work.

16 Ultimately, Vero paid some $4.232 million in respect of remedial works. It now seeks to recover that sum from Mr Kalnin and Kalnin Corporation.

The issues

17 Five questions arise.

18 They are, whether:

(1) the policy issued by Vero was that called for by the indemnity and thus sufficient to enliven the obligations under the guarantee; the "Policy Point";

(2) Vero complied with its obligation under cl 2 of the indemnity (set out below) to act "reasonably and properly" when making payment to the owners corporation (in circumstances where it is contended Vero gave no consideration as to whether the defects of which the owners corporation complained were structural or not); the "Reasonable Consideration Point";

(3) it has been proven that the payments Vero made to the owners corporation were (as I have found to be required by cl 2 of the indemnity – see [55] below) both a result of an act or omission of the builder, and a structural defect in the building (and, thus, damage to which the policy responded); the "Clause 2 Point";

(4) Vero failed to satisfy the condition precedent in cl 6 (b) of the indemnity (set out below) to notify Mr Kalnin and Kalnin Corporation "promptly of the proposed settlement" of the claim by the owners corporation; the "Condition Precedent Point"; and

(5) Vero engaged in misleading or deceptive conduct for the purposes of s 52 of the *Trade Practices Act 1974* (Cth) ("TPA") and its analogues by failing to inform Mr Kalnin and Kalnin Corporation of misgivings it allegedly had concerning the builder's financial position; the "Misleading or Deceptive Conduct Point".

19 I have concluded that the answer to question (4), the Condition Precedent Point, is "yes" (see [119] to [166] below). That is sufficient to dispose of Vero's claim.

20 I have concluded that the answer to questions (1), (2) and (5) are "yes", "yes" and "no" respectively (see [24] to [49], [50] to [60] and [167] to [192] below, respectively). Each of these answers is in Vero's favour. However, as the answer to question (4) is "yes", this does not avail Vero.

21 As to question (3), because of the state of the evidence adduced on this question by Vero, and my rulings under s 136 of the *Evidence Act 1995* (NSW) in respect of that evidence (see [66] below), I have expressed opinions as to the proper construction of the relevant provision of the indemnity, and of reg 57AC of the Home Building Regulation 1997 (NSW) ("HB Regulation") (set out below). I now invite Vero to identify what evidence it relies on to prove that the payments it made were in respect of structural defects in the building which resulted from an act or omission of the builder.

22 Before turning to these matters, I set out the relevant terms of the indemnity as exposition of the issues directs attention to certain of those terms.

The indemnity

23 Relevantly, the indemnity is in the following terms:

> "FORM 3 – DEVELOPER POLICY INDEMNITY (NEW SOUTH WALES)
>
> **Job Specific Deed of Indemnity**
>
> (To be used in New South Wales for indemnity in respect of a developer policy or policies for a specific site address and issued to a particular developer.)
>
> **Item 1:** The indemnifier: Laurence N Kalnin, Kalnin Corporation P/L
>
> **Item 2:** The proposer: Definite Dimensions Pty Ltd
>
> **Item 3:** The site: 32 Rosehill St Redfern
>
> ***Important***
>
> 1. This deed imposes various obligations on the parties signing it as indemnifier. In particular, the insurers will be entitled to seek compensation from those parties personally for any claim the insurers pay under building indemnity policies issued for the proposer named above in relation to the site named above
>
> 2. The insurers recommend that the indemnifier consult solicitors before signing this deed
>
> 3. This deed is not a policy of insurance, nor does it give the proposer named above any automatic right to the issue of a policy
>
> **BACKGROUND**
>
> **A** *We* [i.e. Mr Kalnin and Kalnin Corporation] have requested that, upon application being made by the *proposer* [i.e. the builder], *you* issue a *policy* for specific building work to be done by the *proposer* at the *site*.
>
> **B** *We* acknowledge that *you* will not consider issuing such a *policy* unless *we* agree to provide this indemnity.
>
> **OPERATIVE**
>
> **1. Meanings**
>
> In this deed, except where the context otherwise requires:
>
> …
>
> *'policy'* means a Developer Residential Construction Warranty policy, administered by Royal & Sun Alliance Australia Ltd to be issued on the application of the *proposer* in relation to specific building work done or to be done by the *proposer* at the *site;*…
>
> **2. Indemnity**
>
> *We* indemnify *you* against all claims, payments, costs, and any other expenses, losses and damages that *you* reasonably and properly sustain or incur that result from:

(a) the *proposer's* acts or omission; and

(b) a claim made by an *insured* under the terms of a *policy*

3. Obligation to pay

We will pay to *you*, within 28 days of receiving a written demand for payment ('the date for payment') any amount for which *we* have indemnified *you* under Clause 2 without set off or counterclaim. The written demand for payment must specify the amount that *you* claim is payable, the *policy* to which it relates and the details as to how those costs, expenses, losses and damages were sustained or incurred

…

6. Dealing with claims

We have no right to direct *you* as to how you deal with any claim made under any *policy*. *You* must:

(a) inform *us* promptly of the details of any claim under any *policy* to which this deed relates;

(b) inform *us* promptly of the proposed settlement of any such claim.

…

EXECUTED as a Deed on the 14th day of August 2002." [Emphasis in original]

The Policy Point

24 The indemnity required Mr Kalnin and Kalnin Corporation to indemnify Vero in respect of loss and damage reasonably and properly sustained by Vero as a result of a claim made by an insured under the terms of a "policy".

25 "Policy" was defined to mean ("except where the context otherwise requires") a "Developer Residential Construction Warranty Policy" issued on the application of the builder.

26 At the time, Vero offered a policy with wording set out in a document called "Developer NSW Residential Construction Warranty Insurance". I will call this the "Developer Policy". It also offered a policy with wording set out in a document called "Residential Construction Warranty Insurance". I will call this the "Residential Policy".

27 While it is clear that Vero issued a policy of some kind, there is no evidence that Vero provided policy wording to the builder or to the owners corporation at the time. Mr Kalnin received no policy wording on the occasion he executed the indemnity.

28 There are some differences between the wording of the Developer Policy and the Residential Policy. But none are material. Each satisfied the requirements of Pt 6 of the HB Act (which does not recognise any distinction between a "residential" or a "developer" policy). Each provided indemnity to the owners corporation (when formed) and to purchasers from the developer of lots or land in the development. Neither provided indemnity to the developer itself.

29 Mr Feller SC, who appeared with Mr Purdy for Vero, submitted that it should be inferred that Vero's underwriters intended that a Developer Policy be issued.

30 But that is not what Vero had asserted prior to the commencement of the hearing before me.

31 At or about the time the strata plan was registered in January 2005, the solicitor acting for Kalnin Corporation on the sale of the lots in the development asked Vero for copies of the policy wording so he could annexe it to the contracts of sale. Vero gave him the Residential Policy wording.

32 When the owners corporation made a claim under the policy in late 2008, Vero gave it the Residential Policy wording.

33 Indeed, until the first day of the hearing before me, Vero admitted that the relevant policy was the Residential Policy.

34 Mr Feller submitted that no weight should be given to these matters as they merely bespoke errors made within Vero by unidentified personnel. This bold submission sought to make a virtue of Vero's allegedly poor record keeping. I do not accept it.

35 It was for Vero to prove what policy was issued. Until the hearing commenced, every utterance made by Vero on the subject was to the effect that the policy it issued was the Residential Policy.

36 Further:

(1) when the builder made an application to Vero for insurance on 11 July 2002 the standard form application (prepared by Vero) stated that:

> "This application form is to help us decide whether or not we will provide you with eligibility for Residential Construction Warranty Insurance";

(2) on 4 November 2002, Vero issued to the builder a "Certificate of Eligibility", which was headed "Residential Construction Warranty";

(3) on 12 November 2002, Vero issued Certificates of Insurance to the builder and to Kalnin Corporation, each of which was headed "Residential Construction Warranty".

37 It is true that each of the Developer Policy and the Residential Policy is a species of "Residential Construction Warranty Insurance". Accordingly, I give less weight to the factors in [36] than to the factors in [31] to [33]. But the fact remains that none of the documents set out at [36] describe the policy as a "Developer" policy.

38 In these circumstances, I am satisfied that the policy that was issued was a Residential Policy.

39 The question then is whether the indemnity should be construed so that Mr Kalnin and Kalnin Corporation are only liable to indemnify Vero in relation to any loss it suffered as a result of issuing a Developer Policy (and not for any loss it suffered by issuing a Residential Policy).

40 The result turns on the proper construction of the indemnity having regard to the familiar principles most recently restated by the High Court in *Simic v New South Wales Housing Corporation* [2016] HCA 47 at [78]:

> The proper construction of [a commercial contract] is to be determined objectively by reference to its text, context and purpose [*Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]–[52]]. As was stated in *Electricity Generation Corporation v Woodside Energy Ltd* [at [35]]:
>
> > [T]he objective approach [is] to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean … [I]t will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd* [[2009] EWCA Civ 636 at [28]], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making

> commercial nonsense or working commercial inconvenience'. (footnotes omitted)".

41 A contract of suretyship, including a contract of indemnity, is to be construed strictly and in favour of the surety. Thus, in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 the High Court said:

> "At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety." [Mason ACJ, Wilson, Brennan and Dawson JJ at 561]

42 However, I do not see the resolution of this issue as involving consideration of an ambiguous provision and construing that provision *contra proferentum*. Rather, what is involved is examination of the words the parties have used, in light of the facts known to each of them.

43 The indemnity recites (under the heading "Important") that Vero will seek indemnity from the indemnifier for any claim Vero pays "under building indemnity policies" issued by it "for" the builder.

44 The indemnity then recites (under the heading "Background") that the indemnifiers have requested Vero, on the builder's application, to issue "a policy for specific building work" to be done by the builder at the Redfern site.

45 The indemnity then defines "policy" to mean a Developer Policy "except where the context otherwise requires".

46 Although Mr Kalnin was not then aware of the provisions of the HB Act, the "surrounding circumstances" known to both Vero and Mr Kalnin were that:

(1) Mr Kalnin proposed to engage the builder to carry out the development on the Redfern site;

(2) the builder was required by law to effect insurance against any building defects in that development;

(3) the builder had approached Vero to issue a policy for that building work; and

(4) as was recited at clause "B" under the heading "Background" of the indemnity, Vero would not consider issuing such a policy unless Mr Kalnin and Kalnin Corporation executed the indemnity.

47 The parties agreed that, "except where the context otherwise requires", the policy the subject of the indemnity was to be a Developer Policy. The parties thus contemplated that the "building indemnity" policy that Vero would issue

might not be a Developer Policy, but that it would nonetheless be the subject of the indemnity.

48 In these circumstances, my opinion is that a reasonable business person in the position of the parties would understand that the "policy" in respect of which the indemnity was to operate was whatever "building indemnity" policy Vero ultimately issued following the builder's request for cover of the "specific building work" the builder was to do at the Redfern site; and that if, as happened, the "building indemnity" policy that Vero issued was a Residential Policy and not a Developer Policy, the context would otherwise require that the indemnity apply to that policy.

49 Accordingly, I conclude that the fact that Vero issued a Residential Policy and not a Developer Policy is not in itself an answer to Vero's claim.

The Reasonable Consideration Point

50 By cl 2 of the indemnity, Mr Kalnin and Kalnin Corporation agreed to indemnify Vero against claims, payments, costs (and so on) that Vero "reasonably and properly" sustained resulting from (a) the builder's acts or omissions; and (b) a claim made by (relevantly) the owners corporation under the policy.

51 As I have mentioned, it is common ground that whatever policy was issued by the time the owners corporation made its claim in March 2009, Vero was liable only to indemnify it in respect of "structural defects" as that expression was defined in the HB Act.

52 At the relevant time, the definition of "structural defect" for the purpose of the HB Act was contained in reg 57AC of the HB Regulation, to which I will return.

53 Mr Elliott, who appeared for Mr Kalnin and Kalnin Corporation, submitted that:

(1) on its proper construction, cl 2 imposed an obligation on Vero to "reasonably and properly" consider whether the claims made by the owners corporation fell within the ambit of the policy (and, in particular, whether the claims were in respect of structural defects);

(2) Vero failed to give any consideration at all (and thus no reasonable or proper consideration) to that question; and

(3) accordingly, Mr Kalnin's and Kalnin Corporation's obligations under cl 2 were not enlivened (even if some, or indeed all, of the owners corporation's claims under the policy were for structural defects).

54 I do not accept this submission.

55 Although Mr Feller made a submission to the contrary, albeit in a different context, I think it clear that the obligation under cl 2 to indemnify only arises if:

(1) the payments Vero made resulted from the builder's acts or omissions (and not, for example, as a result of lack of maintenance of the building by the owners corporation); and

(2) the payments were in respect of matters to which the policy responded (and thus, relevantly, to claims in respect of structural defects to the building).

56 Further, the obligation to indemnify only arises if Vero has sustained or incurred the expenses "reasonably and properly". Those words have the effect of excluding from the indemnity expenses that Vero sustains or incurs otherwise than "reasonably and properly".

57 But if Vero made a payment that was, in fact, a result of both the builder's act or omission and caught by the terms of the policy, that payment would in my opinion be one that it "reasonably and properly" sustained or incurred; whether or not Vero turned its mind to these questions when it made the payment.

58 Acceptance of Mr Elliott's submission would lead to the extraordinary result that assuming, as he submitted, that Vero paid no attention at all to the question of whether the owners corporation's claim under the policy related to structural (as opposed to non-structural) defects, and that it was thereby in breach of its obligation to act "reasonably and properly", then Mr Kalnin and Kalnin Corporation would have no obligation under the indemnity, even if every cent that Vero paid out to the owners corporation in fact resulted from structural defects resulting from the builder's acts or omissions. The parties cannot have intended such a result.

59 This construction still leaves work for the words "reasonably and properly" to do.

60 As I discuss below, cl 6 of the indemnity obliges Vero promptly to inform Mr Kalnin and Kalnin Corporation of the details of any claim made under the policy and of any proposed settlement for such a claim. Payments made by Vero without compliance with those obligations would not be "reasonably and properly" sustained. Further, for reasons I discuss below in the context of cl

6(b), a payment made by Vero following notification by it to Mr Kalnin and Kalnin Corporation of a "proposed settlement", which did not take into account alternative means put forward by Mr Kalnin or Kalnin Corporation to address any building defects in question, would also not be "reasonably and properly" sustained.

The Clause 2 Point

61 As I have said, cl 2 of the indemnity is only enlivened if the payments made by Vero resulted from both an act or omission of the builder and from a claim made by an insured (here, the owners corporation) under the policy.

62 As to the latter requirement, it is common ground that what is required is a claim by an insured to which the policy in fact responded; that is, in the events that have happened, a claim by the owners corporation in respect of structural defects.

Did the payments result from an act or omission by the builder?

63 In order to be an "act or omission" by the builder for the purpose of cl 2(a) of the indemnity, the relevant act or omission must, as Mr Elliott submitted, be one constituting a breach by the builder of the statutory warranties incorporated into the building contract by the HB Act: for example, to perform the work in a proper and workmanlike manner: s 18B(a).

64 Almost all of the evidence relied on by Vero to establish that the payments made by it to the owners corporation resulted from the builder's acts or omissions, comprised of reports prepared by the various consultants Vero engaged to evaluate and assess the defects of which the owners corporation complained or documents purporting to show what work had been done and what price was charged for the doing of that work.

65 Vero did not call as a witness any person who carried out the remedial work.

66 I allowed the material referred to at [64] only as:

(1) evidence of the material available to Vero when considering whether, and if so, to what extent to indemnify the owners corporation;

(2) conveying information to Vero that Vero was entitled to assume was correct; and

(3) to the extent that such material comprised opinions, as conveying opinions Vero was entitled to treat at face value.

67 In relation to this aspect of the case, both parties called expert evidence. Vero called Mr John George (a licensed builder of many years' experience). Mr Kalnin and Kalnin Corporation called Mr Andrew Montgomery (a structural engineer and surveyor, also of many years' experience). Neither Mr George, nor Mr Montgomery played any role in Vero's assessment of the damage to the building prior to the carrying out of the remedial works.

68 Both expressed a range of views, principally as to whether the defects of which the owners corporation complained, and which were the subject of payment by Vero, were in fact structural defects.

69 Each party contended, not without justification, that the other's expert report was to a large extent inadmissible. Nonetheless, it was agreed that the reports should be admitted to evidence "for what they were worth" and each witness was cross-examined to some extent.

70 Accordingly, there is little, if any, evidence before me that proves that the matters of which the owners corporation complained were in fact the product of any act or omission of the builder of the relevant type, or which proves what work was done to repair the alleged defects, or what that work cost.

71 Mr Feller submitted that it was not necessary for Vero to establish that, in fact, the damage in respect of which it made payments to the owners corporation was the result of structural defects in the building, nor that such defects were the result of an act or omission of the builder. Mr Feller submitted that, on the proper construction of cl 2 of the indemnity, Vero need only establish that it "reasonably and properly" concluded that this was so.

72 I do not agree.

73 The plain wording of cl 2 is that the obligation to indemnify only arises if Vero incurs expenses (and so on) that, in fact, result from the builder's act or omission (as well as from a claim under the policy to which the policy in fact responds).

74 To the extent that Vero has not proven these matters, its claim against Mr Kalnin and Kalnin Corporation must fail.

Structural defect – the proper construction of reg 57AC

75 At the relevant time, s 103B of the HB Act dealt with the period of cover for contracts of insurance required by reason of s 92 of the HB Act. It provided, relevantly, that such contracts of insurance must provide cover for "a loss arising from a structural defect within the meaning of the regulations" for six years after the completion of work.

76 "Structural defect" was defined in reg 57AC of the HB Regulation. The parties are divided as to the proper construction of this regulation.

77 The regulation is in the following terms:

> "**57AC Meaning of 'structural defect'**
>
> (1) For the purposes of section 103B (2) of the Act, ***structural defect*** means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:
>
> (a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or
>
> (b) prevents, or is likely to prevent, the continued practical use of the building or any part of the building, or
>
> (c) results in, or is likely to result in:
>
> (i) the destruction of the building or any part of the building, or
>
> (ii) physical damage to the building or any part of the building, or
>
> (d) results in, or is likely to result in, a threat of imminent collapse that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.
>
> (2) In subclause (1):
>
> ***structural element of a building*** means:
>
> (a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and
>
> (b) any component (including weatherproofing) that forms part of the external walls or roof of the building." [Emphasis in original]

78 Regulation 57AC(1) states that a “structural defect” is a defect in a “structural element of a building” that is attributable to either defective design, defective or faulty workmanship, or defective materials (or any combination of those three matters).

79 I think it clear from the plain words of reg 57AC(1) that, in order for a defect to be a “structural defect”, it must be a defect in a “structural element”.

80 My attention was drawn to a statement made by the Appeals Panel of the Civil and Administrative Tribunal of New South Wales in *Wesfarmers General Insurance Limited v Jameson* [2016] NSWCATAP 136 at [34] (Cowdroy ADCJ and Senior Member Titterton) that any such interpretation of these words (which, in that case, were reproduced in a home warranty insurance policy) “does not accord with the clear manner in which the definition appears in the policy”. I respectfully disagree.

81 Regulation 57AC(1) thus directs attention to the definition of the expression “structural element of the building”. That expression is defined in reg 57AC(2).

“Structural element of a building”

82 Regulation 57AC(2) gives two meanings to the expression “structural element of a building”.

Regulation 57AC(2)(a)

83 The first, in reg 57AC(2)(a), refers to “any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it”.

84 The sub-regulation then gives examples of such components: “things such as foundations, floors, walls, roofs, columns and beams”.

85 As these particular elements of a building are given as examples of the components more generally described in the preceding words of reg 57AC(2)(a), the regulation should be read as if words to the effect “having these characteristics” appeared at the end of the sub-regulation. The sub-regulation is thus referring to “foundations, floors” and so on, that are themselves load-bearing components essential to the stability of the building.

86 An arguably inconsistent view was expressed by Mossop AsJ in *The Owners – Units Plan 1917 v Koundouris* [2016] ACTSC 96 concerning a similar, although not identical, provision in s 24(2) of the Building Regulation 2004 (ACT). His Honour's view was, to a large extent, informed by the dictates of the local legislation concerning the construction of statutory instruments (s 132 of the *Legislation Act 2001* (ACT)). However, to the extent that his Honour's view is inconsistent with the one I have expressed at [85], I respectfully disagree.

87 Mr Feller referred me to the observation of the High Court in *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 330 that "there is no rule of construction which requires inclusive words to be read as exclusive of any elements which otherwise fall within the meaning of the word or expression being defined". I am not able to gain any assistance from that passage. The High Court was considering a provision very different to that now before me.

88 Some "load-bearing components" will have attached to them, building elements which are neither intended or designed to, and which do not in fact, contribute in any way to the bearing of load.

89 For example, a load-bearing balcony or a load-bearing bathroom floor might be overlaid with a waterproof membrane, screed, or tiling.

90 Some elements (for example, tiling) may be designed and intended to perform no more than a cosmetic function. Some elements may be designed and intended to perform more than a cosmetic function, but not a load-bearing function. For example, water proofing in a bathroom may be designed to prevent water egress from a shower area to the general bathroom area, but not be designed or intended to promote or ensure the bearing of load by the floor to which it is attached. Similarly, waterproofing on a balcony may be designed to prevent water egress from the balcony to the interior of the building, but not be designed or intended to play any role in the bearing of load.

91 Bearing in mind that the matter being defined is a "structural element" in a building, I do not think the legislature can have intended that those elements, themselves, be constituents of the "load-bearing component" to which they are attached.

92 Otherwise, for example, a waterproofing membrane attached to a load-bearing bathroom floor, or a balcony, would be part of that "load-bearing component" so that (moving to reg 57AC(1)) a defect in that membrane would, itself, be a "structural defect" even if such membrane played no role whatever in promoting the structural integrity of the building. That cannot be what the legislature intended.

93 For those reasons, my conclusion is that, on the proper construction of reg 57AC(2)(a):

(1) for a "component" of a building (whether that component be foundations, floors, walls, roofs, columns, beams, or any other component) to be a "structural element" of the building for the purposes of reg 57AC(2)(a) it must be "load-bearing" such as to be "essential to the stability of the building" or any part of it;

(2) building elements (such as waterproofing membranes, tiling and the like) attached to such load-bearing components will not themselves comprise a part of such component, unless they are designed or intended to, and in fact, promote the bearing of load.

Regulation 57AC(2)(b)

94 Regulation 57AC(2)(b) gives a second example of a "structural element of a building", namely:

> "[A]ny component (including weatherproofing) that forms part of the external walls or roof of the building".

95 This part of the regulation could be construed very widely, and to include within the definition of "structural element of a building" some elements which have no structural function or characteristic at all.

96 For example, on one reading of reg 57AC(2)(b), paint on an external wall could be seen to be a "component" of the wall "that forms part of" the wall and, thus, fall within the definition of "structural element of a building". Indeed Vero made that very submission. But that would be an absurd result, and one that parliament could not have intended.

97 Prior to the introduction of reg 57AC to the HB Regulation, the expression "structural element" was defined (in reg 3) to mean:

> "In relation to a building…a component or part of an assembly which provides necessary supporting structure to the whole or any part of the building."

98 It was common ground that this definition remained in the HB Regulation following the enactment of reg 57AC.

99 Thus, during the operation of reg 57AC, the HB Regulation provided that definition of “structural element” (in reg 3) and also “structural element of a building” (in reg 57AC(2)).

100 I think it unlikely that the legislature intended, by enacting reg 57AC(2), to introduce a special species of “structural element” for the purposes of the part of the HB Act that dealt with insurance which was different, and radically broader, than the definition which applied generally to all matters governed by the HB Regulation.

101 Regulation 57A(2)(b) directs attention to any “component” that “forms part” of the external walls or roof of the building.

102 “Component” is stated to include “weather proofing” which suggests a legislative intention that “components” need not themselves be load-bearing.

103 But the definition requires that such components must “form part of” the external wall or roof of the building.

104 Bearing in mind that the question is whether components forming part of an external wall or roof are, themselves, “structural elements” of the building as a whole, and bearing in mind that the definition of “structural element” in reg 3 speaks of “components” of a building that provide “necessary supporting structure to the whole or any part of the building”, I read reg 57AC(2)(b) as referring to components forming part of the external walls or roof of the building which themselves are intended or designed to contribute to the “necessary supporting structure” of those external walls or roof of the building.

105 “Weatherproofing” is necessarily one of these components. It is referred to in terms and can be seen to support the structure of the building. Brickwork or a steel beam forming part of an external wall would be another such component; or, tiling on the roof. Flashing, if it contributes to weatherproofing by diverting moisture out from the cavity between load-bearing walls, may also be such a component.

106 But components that serve a merely decorative function, even if they have some connection with, or are attached in some way to an external wall or roof, and can in that sense be seen to "form part" of such wall or roof, could not have been intended by the legislature to be a "structural element of a building".

107 Otherwise, absurd results would follow. As I have said, paint would then be a structural element; as would purely cosmetic render; or a basketball hoop or letterbox attached to an external wall; or a ventilation grill in the roof.

108 This cannot be what the legislature intended.

109 My conclusion is that, on its proper construction, reg 57AC(2)(b) includes as a "structural element of a building" any component forming part of the external walls or roof of a building that itself is intended or designed to contribute to the necessary supporting structure of the building. That includes weatherproofing. It does not include components forming part of the external wall or roof of the building that have a purely cosmetic function.

Regulation 57AC(1)

110 As I have noted, reg 57AC(1) provides that a "structural defect" is a defect in a "structural element" attributable to defective design, workmanship or materials.

111 The regulation thus posits a causal nexus between the defective or faulty workmanship or materials and directs attention to the manner in which the construction of the building took place. This raises similar considerations to those relevant to the question of whether the costs paid by Vero result from the acts or omissions of the builder.

112 The regulation goes on to state that, in order to be a "structural defect", the defect in question must result in one of the circumstances set forth in regs 57AC(1)(a), (b), (c) or (d).

113 Regulations 57AC(1)(a), (b), (c)(i) and (d) speak of major or catastrophic results (the closure of the building, prevention of the continued practical use of the building, destruction of part of the building or the building's imminent collapse).

114 However, reg 57AC(1)(c)(ii) is of wider scope and does not stipulate the degree or seriousness of the physical damage of the building necessary for the

structural defect to arise. It speaks, rather, of a defect resulting in, or likely to result in, "physical damage to the building or any part of the building".

115 Nonetheless, of course, the "defect" in question must be one such as to enliven the regulation as a whole.

116 One matter that divided the parties as to this aspect of the regulation was the proper construction of reg 57AC(1)(b) which refers to a defect that prevents, or is likely to prevent, the "continued practical use" of the building or any part of it.

117 Mr Feller submitted that the words "continued practical use" must refer to the use of the building, or the relevant part of the building "as designed or intended". I see no reason to impose such a gloss on the words used in the regulation. If, notwithstanding a "structural defect", the relevant part of the building can still, as a practical matter, be used, this aspect of the regulation is not enlivened.

The way forward

118 Having expressed these opinions as to the proper construction of cl 2 of the indemnity, and of reg 57AC, and as foreshadowed at [21] above, I now invite Vero identify any evidence that proves the payments it made to the owners corporation were in respect of structural defects in the building which resulted from an act or omission of the builder.

The Condition Precedent Point

119 Clause 6(b) of the indemnity obliged Vero to notify Mr Kalnin and Kalnin Corporation "promptly of the proposed settlement of any such claim".

120 Vero accepts that, upon the proper construction of cl 6(b) of the indemnity, compliance with it by Vero was a condition precedent to Mr Kalnin's and Kalnin Corporation's liability to indemnify it: see *O'Neill v Vero Insurance Ltd* [2008] VSC 364 and *Vero Insurance Ltd v Harden Jones* [2009] WADC 70.

121 Mr Kalnin and Kalnin Corporation contend that:

(1) Vero did not notify them "promptly of the proposed settlement" of the claim (but, rather, simply announced that it had settled with the owners corporation);

(2) the condition precedent has not been satisfied; and

(3) for that reason alone, they are not liable under the indemnity.

122 I agree.

123 The evident purpose of cl 6(b) was to oblige Vero to give Mr Kalnin advance notice of its intention to settle a claim under the policy. Although (or, perhaps, because) the chapeau of cl 6 makes clear that Mr Kalnin was not entitled to direct Vero as to how to "deal with" such a claim, cl 6(b) shows that the parties contemplated that Mr Kalnin, as the party liable to indemnify Vero for the amount of any finalised settlement, might wish to take some steps before any settlement was finally struck.

124 I do not accept Mr Feller's submission that the only purpose of cl 6(b) was to give Mr Kalnin notice of the amount Vero would contend he was liable to pay under the indemnity. That purpose was served by cl 3, which obliged Mr Kalnin to pay the amount due under cl 2 "within 28 days of receiving written demand for payment" and thus, in effect, obliged Vero to give the notice inherent in such a demand.

125 When read in conjunction with cl 3, it is clear that cl 6(b) was intended to give Mr Kalnin more than just notice of the amount Vero would claim. It must have been intended to give Mr Kalnin an opportunity to consider the amount of the proposed settlement; for example, to enable him to debate with Vero the amount for which Vero proposed to settle or to seek alternate means to resolve the claim made under the policy (for example, by arranging for the defective work to be remedied).

126 Thus, in *O'Neill v Vero Insurance Ltd* (see [120] above), Beach J considered an identical clause and said at [19]:

> "[I]t seems to me that what [cl 6(b)] is also doing is giving an important right to the class of people who might enter into the standard national general indemnity document to be informed when a significant amount of money is going to be paid (a settlement with an owner) of the fact of the settlement so as to ensure that whatever steps are open to such a person can be taken and whatever provisions that person might need to make can be made."

127 In *Vero Insurance Ltd v Harden Jones* (see [120] above), O'Neal DCJ also considered the same wording and said at [48]:

> "Normally the people who are called upon to give these indemnities will be people intimately connected with the business of the relevant builder. Where

> that builder's project runs into difficulty for one of the reasons for which cover is granted by the insurer, it is hardly absurd to think that those most intimately connected with the business of the builder might have something useful to say about mitigating any loss that might be incurred. There might be many cases, for example, where a builder's insolvency would not necessarily reflect on the technical competence of those associated with the builder. They might well have useful information that would assist the insurer and the home owner in ensuring that the building project was rectified or completed at the lowest possible cost. In the course of handing over a project from one builder to another the cooperation of the former builder, or those directing its affairs, might well be a factor that helps reduce the ultimate cost of completion."

128 In this context, my opinion is that reasonable business people in the position of the parties to the indemnity would understand that a "proposed settlement" means a settlement that is "put forward [by Vero] for consideration" by Mr Kalnin and Kalnin Corporation (see first of the definitions of "propose" in the Oxford English Dictionary Online (Oxford University Press, 2017)) or "put forward [by Vero] for consideration, acceptance or action" (see the definition in the Macquarie Dictionary Australia Online (Macmillan Publishers, 2017)) rather than simply as something Vero "intends to do" (see the second of the definitions in the Oxford English Dictionary Online).

129 An announcement by Vero to Mr Kalnin and Kalnin Corporation, as a fait accompli, that it had determined to settle at a particular figure would not, in my view, constitute informing Mr Kalnin and Kalnin Corporation of a "proposed settlement" so understood.

130 But that is what happened.

131 I have mentioned that in November 2008, the owners corporation notified Vero of allegedly defective work in the building and foreshadowed a claim under the policy.

132 On 3 December 2008, Vero wrote to Kalnin Corporation notifying it and Mr Kalnin that it had been contacted by the owners corporation "regarding alleged defective building works" at the Redfern property, stating:

> "If the Owners Corporation submit a claim, which is accepted in part or whole, you will be directed to arrange for any rectification works deemed necessary to be undertaken. Vero will seek a full recovery of any indemnity paid in respect of the claim should you fail to comply."

133 Mr Kalnin replied on 5 December 2008 stating that Vero's letter had been forwarded to the builder "who will contact your office and address this matter in due course".

134 As I have mentioned, in March 2009, the owners corporation made a claim for indemnity under the policy.

135 Thereafter, in May 2009 (in a letter that Mr Kalnin only received on 6 August 2009) Vero notified Kalnin Corporation, and thus Mr Kalnin, that it had received that claim for indemnity from the owners corporation, enclosed a detailed investigator's report, stated that an assessor had been appointed to inspect the property and concluded:

> "Vero will seek a full recovery from you of any monies paid under the policy in respect of this claim.
>
> We therefore urge you to contact the Owners Corporation to resolve this matter."

136 On 11 August 2009, shortly after receipt of that letter, Mr Kalnin wrote to Vero making a number of detailed enquiries about the matter. He received no response and did not hear from Vero until it wrote to him on 4 December 2009 stating:

> "We are currently liaising with the Owners Corporation in relation to finalising an agreed scope of works for the purposes of proceeding further with the claim. We suggest you review the enclosed information [further detailed inspection reports] outlining the rectification works and advise us of you [sic] position in regarding [sic] your obligations pursuant to your legislative obligations and to those outlined in the [indemnity]."

137 Mr Kalnin replied on 14 December 2009 stating:

> "I confirm that I have engaged a licensed builder to make good and complete defective and incomplete works in accordance with my company's obligation."

138 The next day, on 15 December 2009, Mr Kalnin wrote a further letter to Vero stating that he required access to the property "for a registered building inspector and my licensed builder to overview" the proposed work, proposing that "all parties…agree [on] a list of any works for which I am liable" and concluded that:

> "Following the completion of an agreed list of works, I advise that I have engaged the services of a licensed builder to commence the works at the convenience of the owner corporation".

139 In cross-examination, Mr Kalnin explained that the "licenced builder" to whom he referred was Mr Carpenter. He also said that his reference in his letter of 14 December 2009 to "my company's obligation" was a reference by him to what he understood to be Kalnin Corporation's obligation to indemnify Vero under the indemnity in respect of any loss that Vero had suffered by reason of any structural defects.

140 At around this time, Mr Carpenter told Mr Kalnin that he believed the defects of which the owners corporation was complaining were "likely to be non-structural and…therefore outside the two year warranty period" in the HB Act (and thus not claims to which the policy responded).

141 Mr Kalnin spoke to an officer at Vero and said:

> "I have had a look at the documents which you sent on 4 December 2009 and I have spoken to the builder Brian Carpenter. I do not believe there is any basis for Vero to accept the claims because the defects are non-structural and the claims are therefore outside the two year limitation period which applies from when the building was completed which was in November 2004".

142 Mr Kalnin said that the officer to whom he spoke said something to the effect:

> "That could well be the case. We are still investigating the matter. At this stage, there hasn't been a decision on liability and there is no agreed scope of works".

143 Mr Kalnin heard nothing further from Vero for over three years.

144 In the meantime, as referred to at [15] above, Vero evaluated and assessed the defects complained of by the owners corporation.

145 On 5 February 2013, Vero wrote to the owners corporation as follows:

> "We advise that we reviewed the tenders received by our panel builders, and have accepted your claim to the following extent:
>
> Accepted Tender $1,503,817.00
>
> Your contribution (Excess) $500.00
>
> Vero's Liability $1,503,317.00
>
> Please sign the attached Terms of Settlement. Once they have been signed we shall formally engage the builder to carry out the works."

146 The attached "Terms of Settlement" provided for a payment by Vero to the owners corporation of $1,503,317 in exchange for a release from indemnity.

147 Mr Feller submitted that this letter merely bespoke "acceptance" by Vero of the owners corporation's claim at the amount stated, and thus, only a proposed acceptance of it; conditional on the owners corporation's consideration and acceptance of it.

148 But the correspondence Vero then sent to Mr Kalnin and Kalnin Corporation revealed that Vero had determined to settle at the figure in its 5 February 2013 letter to the owners corporation.

149 On 19 February 2013, Vero wrote to Mr Kalnin and Kalnin Corporation, stating:

> "Please note that we have now obtained quotations for the rectification of work as listed in our previous correspondence and will now proceed to settle the claim with the owner for $1.6M. Please see attached copy quotation and copy Assessment Summary.
>
> As indicated in our previous correspondence Vero holds a Job Specific Deed of Indemnity to which we will call upon for recovery of all monies ultimately paid by it in respect of this claim, and take all necessary action to recover same from you.
>
> This claim file will now be referred to our Recoveries Department." [Emphasis added]

150 This was the first time Mr Kalnin had heard from Vero since December 2009.

151 On 22 February 2013 Mr Kalnin rang the author of the letter, Ms Anita Arena and said:

> "I am shocked to have received two letters from you saying that you will settle the claim for $1.6 million and claim it from me. I have not heard from Vero for about 4 years. When I last spoke with your department, I told them that the claims were out of time because they were non structural. I also said that, if there was any liability, the builder Brian Carpenter would complete the work at no cost to the Owners Corporation or to me. I was told that I would be informed if any determination was made on liability or there was an agreed scope of works so that I could arrange rectification if that became necessary."

152 On the same day, Ms Arena sent an email to Mr Kalnin in the following terms:

> "Thanks for your call today…
>
> I note your comments that you considered the defects were of a non-structural nature and that therefore you made a decision not to contact Vero in respect of the claim and to discard our subsequent correspondence.
>
> As previously advised we have made a determination in this matter and consider that Kalnin Corporation Pty Ltd are liable as the developer under the Home Building Act 1989 s18(c).
>
> Furthermore, both you personally and Kalnin Corporation Pty Ltd are listed as indemnifiers under the Deed of Indemnity. Please note that we will call upon

> for recovery of all monies ultimately paid by Vero in respect of this claim, and take all necessary action to recover same from the indemnifiers." [Emphasis added]

153 As the emphasised passages in Vero's letter of 19 February 2013 and Ms Arena's email of 22 February 2013 make clear, Vero had by now decided to settle the owners corporation's claim for $1.6 million and to recover that amount from Mr Kalnin and Kalnin Corporation. There is no suggestion in these communications of Vero having any interest in any view Mr Kalnin or Kalnin Corporation might have about such a settlement or being given any opportunity to propose an alternative solution.

154 Yet, it is clear that this is what Mr Kalnin sought to do.

155 Thus, on 24 February 2013, Mr Kalnin sent an email to Vero's "Litigated Claims" section:

> "…I have advised your claims department, that in the event that any rectification works be attributed to L. Kalnin and or Kalnin Corporation, that Mr B. Carpenter, former director of Definite Dimensions Pty Ltd, a licenced builder would engage qualified builders and tradesmen to complete these works, at no cost to the building owners, owners corporation or to myself. This arrangement is still in place. Accordingly, I advise that any rectification works for which Kalnin [Corporation] may be approved in writing by Kalnin [Corporation]. Any other costs for rectification works will not be considered, for apparent reasons…".

156 Vero did not respond to this email.

157 Mr Feller accepted, indeed asserted, that by now, Vero had adopted an "immutable" position, and submitted that Vero was entitled to tell Mr Kalnin that it had decided to settle the claim; that is, without inviting any response from Mr Kalnin. Indeed, Mr Feller submitted that Vero was entitled to not listen to whatever Mr Kalnin said in response.

158 I do not agree.

159 As Mr Elliott submitted, the entire point of cl 6(b) was to create an opportunity for Mr Kalnin to respond in a meaningful way to what Vero proposed to do.

160 Mr Kalnin engaged a solicitor, who on 8 March 2013, sought from Vero "a full copy of your entire file". Vero supplied some documents on 21 March 2013, but on 3 May 2013 stated that "we are under no obligation to provide you the material on our file as requested" and said:

> "The claim has been resolved with the Owners Corporation in the respect that the scope of works has been agreed to, and the tender has been approved for the rectification panel builder to remedy the defects at the property". [Emphasis added]

161 In the meantime, Vero pressed the owners corporation, and its solicitor, for the executed terms of settlement, which were finally provided (dated 8 February 2013) sometime between 24 May 2013 and 6 June 2013.

162 There is no suggestion in the correspondence between Vero and the owners corporation between February and May 2013 of any further negotiation.

163 By 5 February 2013, Vero had accepted the owners corporation's claim to the extent of $1.6 million and had decided to settle with the owners corporation on that basis. In those circumstances, its 19 February 2013 announcement to Mr Kalnin and Kalnin Corporation of that decision did not, in my opinion, constitute compliance by it of its obligation under cl 6 (b) of the indemnity to notify them of the "proposed settlement" of the owners corporation's claim. By 19 February 2013, the settlement with the owners corporation was no longer merely "proposed" by Vero. It was something Vero had decided to do.

164 Vero did not satisfy the condition precedent to Mr Kalnin's and Kalnin Corporation's liability constituted by cl 6(b). The fact that a binding contract of settlement may not have occurred between Vero and the owners corporation until the owners corporation returned the signed terms of settlement in late May 2013 is beside the point.

165 Furthermore, by proceeding to then make payment to the owners corporation, Vero did not act "reasonably and properly" for the purposes of cl 2 of the indemnity (see [56] above).

166 This is, of itself, an answer to Vero's claim.

The Misleading or Deceptive Conduct Point

167 By their cross-claim, Mr Kalnin and Kalnin Corporation claim that:

(1) Vero engaged in conduct that was misleading or deceptive for the purposes of s 52 of the TPA or, alternatively, s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) by failing to disclose to them that it had:

(a) "concerns" about the "builder's financial stability and the extent of the risk that the builder would not remedy any defects [in the construction of the Redfern development] so as to give rise to claims against [Vero] under a policy issued by it"; and

(b) accordingly imposed conditions on the builder's application for certification of eligibility to be issued home building insurance that it obtain an additional capital injection of $800,000 and obtained the indemnity from Mr Kalnin and Kalnin Corporation, and that accordingly;

(2) I should order pursuant to s 87 of the TPA that the indemnity be avoided or not enforced.

168 My conclusion is that this claim should fail.

169 On 11 July 2002, the builder applied to Vero for a certificate of eligibility to be issued with home building insurance. My attention has not been directed to any separate document whereby the builder actually proposed for such insurance. As a practical matter, it appears the two processes occurred concurrently.

170 Vero made a prudential assessment of the builder's financial position.

171 The builder, through its broker, provided to Vero, information about its financial position (as well as the financial position of Kalnin Corporation) in September and October 2002.

172 On 18 October 2002, a member of Vero's underwriting department analysed the builder's financial position as at 31 August 2008 and concluded that it had a deficiency of liabilities over assets of $832,000.

173 Accordingly, Vero required that, as a condition of writing the insurance, the builder should either have a capital injection of $850,000, or provide a bank guarantee in the sum $1.7 million.

174 On 23 October 2002, the builder wrote to its broker stating:

> "Paid-Up Capital: as at 30 June, 2002 our financial statements indicated that we had a paid-up capital of $50,000. Now as at 23 October, 2002 the paid-up capital has been increased by 800,000 $1 shares. A Form 207 is enclosed to verify this transaction. Also verification can be obtained from ASIC."

175 There was attached to that letter a "Form 207 Notification of Share Issue" that the builder had lodged with the Australian Securities and Investments Commission which stated that 800,000 $1 shares had been issued in the builder for cash.

176 The broker forwarded this information to Vero.

177 Documents produced on subpoena by the liquidator of the builder show that, in fact, the builder's share capital had not been increased as reported in the document the builder lodged with ASIC and that, at all relevant times, its share capital remained at $50,000. But this was not known to Vero.

178 Vero did not disclose to Mr Kalnin or Kalnin Corporation the fact that it engaged in a consideration of the builder's financial position, nor its requirements of a bank guarantee or capital injection.

179 Silence may amount to misleading or deceptive conduct. The question is whether, in all the circumstances, including acts, omissions, statements or silence, there has been conduct likely to mislead or deceive: *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357; HCA 31, *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; 110 ALR 608; *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477 and *Stone v Chappel* [2016] SASC 32 at [106] (Stanley J).

180 As Black CJ said, in the well-known passage in *Demagogue* at 32:

> "Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose a general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive."

181 Further, in *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 53,193 at 53,195 French J (as his Honour then was) said in a passage cited with approval by Gummow J in *Demagogue* at 41:

> "[U]nless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist."

182 Later cases make clear that it is not necessary to point to a duty at common law or in equity to speak in order for silence to be misleading or deceptive; it is necessary to look at the circumstances of the case and consider whether the failure to speak renders the conduct misleading or deceptive: *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84 at 88C (Samuels JA).

183 However, unless there is a duty to disclose relevant facts, or the circumstances are such that there is a reasonable expectation that a relevant factor will be disclosed if it exists, it is difficult for silence to constitute misleading or deceptive conduct: *Norcast S.ar.L v Bradken Limited (No 2)* [2013] FCA 235 at [310] (Gordon J).

184 I do not find Vero's silence concerning the fact and results of its prudential assessment of the builder's position to be misleading or deceptive.

185 That is for a number of reasons.

186 The first is that Mr Kalnin and Kalnin Corporation had executed the indemnity some months before Vero made its assessment of the builder's financial position. I see no basis in the evidence to conclude that Vero's decision to seek an indemnity from Mr Kalnin and Kalnin Corporation was born of any concern Vero then had as to the builder's financial position. The indemnity is dated 14 August 2002. The only information as to the builder's financial position then available to Vero was that annexed to the builder's 11 July 2002 application for eligibility. The information attached to that document showed that, between them, the builder and Mr Carpenter had a significant excess of assets over liabilities. The evidence is silent as to what prompted Vero to seek the indemnity from Mr Kalnin and Kalnin Corporation. I am not prepared to infer that it was because of any misgivings Vero had about the builder's financial position.

187 As I have mentioned, Vero's underwriting department did not conduct its analysis of the builder's financial position until 18 October 2002.

188 By then, Kalnin Corporation had entered into the building contract.

189 There is nothing to suggest that there was anything unusual about the prudential analysis that Vero made of the builder's financial position. So far as Vero was concerned, such misgivings as it may have had about that financial position were answered by the builder's representation that its paid up capital had been increased to $850,000.

190 In that regard, Vero was, in my opinion, entitled to accept the accuracy of the Form 207 document that the builder had lodged with ASIC; and was entitled to

accept, as that form stated, that the builder had made the capital injection that Vero had required as a condition to writing the policy.

191 I would infer that such a concern as Vero had about the builder's financial position was thereby allayed and that, in those circumstances, it was not misleading or deceptive of Vero to not inform Mr Kalnin and Kalnin Corporation of what had occurred.

192 In any event, as Mr Feller pointed out, Mr Kalnin had already committed himself to the building contract and, by the time Vero made its assessment of the builder's financial position, there was no "simple path" that Mr Kalnin or Kalnin Corporation could follow to withdraw from the transaction.

The result

193 I will now hear submissions as to the matters at [21].

****