45/08; [2008] VSC 364

SUPREME COURT OF VICTORIA

O'NEILL v VERO INSURANCE LIMITED

Beach J

10, 18 September 2008

CIVIL PROCEEDINGS – DOMESTIC BUILDING DISPUTE – BUILDING COMPANY OBTAINED INSURANCE FROM INSURANCE COMPANY – BUILDER PERSONALLY ENTERED INTO A DEED OF INDEMNITY – ONE OF THE CLAUSES IN THE DEED PROVIDED THAT THE INSURANCE COMPANY WOULD INFORM THE BUILDER PROMPTLY OF THE PROPOSED SETTLEMENT OF ANY CLAIM – DEFECTIVE BUILDING WORKS RAISED BY HOME OWNER – INSURANCE COMPANY AGREED TO INDEMNIFY HOME OWNER FOR COSTS OF REPAIRING DEFECTS – BUILDER NOT INFORMED OF SUCH SETTLEMENT – CLAIM MADE AGAINST BUILDER – CLAIM UPHELD – FINDING BY MAGISTRATE THAT BUILDER INFORMED OF THE PROPOSED SETTLEMENT – WHETHER MAGISTRATE IN ERROR.

1. Where a Deed of Indemnity contained a clause that the Insurance Company inform the builder promptly of the proposed settlement of any claim, and a claim was settled, a fair reading of the clause in its context required the Insurance Company to inform the builder. The words "proposed settlement" are ordinary English words and fall to be given their ordinary meaning. There was no warrant for limiting the expression "proposed settlement" to some initial acceptance of liability for a particular defect or defects. Whilst those circumstances might also come within the meaning of the expression "proposed settlement", the clause gives 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. It is not necessary to give notice pursuant to the clause in respect of incurring engineers' or lawyers' costs or other disbursements that are not settlements.

2. Accordingly, a magistrate was in error in finding that the builder had been informed of the proposed settlement of the various claims that had been made.

BEACH J:

1. This is an appeal from a final order of the Magistrates' Court made at Melbourne on 25 January 2008 in which the appellant, Ronald Edward O'Neill was ordered to pay the respondent, Vero Insurance Limited the sum of $76,320.58. For the reasons given below, I have determined that the appeal should be allowed and that the case should be remitted for re-hearing in the Magistrates' Court in accordance with these reasons.

The claim

2. The facts underlying the claim may be briefly stated as follows:

(a) On 9 August 2001, Mr O'Neill's now defunct building company, Sabroni Pty Ltd obtained domestic building contract insurance from Vero as required by a Ministerial Order issued pursuant to s135 of the *Building Act* 1993. The insurance was for a house that Sabroni was to build for Ms Suzie Linden under a domestic building contract dated 27 July 2001 ("the contract").

(b) Vero agreed to issue the insurance policy for the contract to Sabroni on the basis that Mr O'Neill entered into a Deed of Indemnity ("the Deed"), the terms of which I will refer to below.

(c) Ms Linden made claims on Vero alleging that the building works were defective.

(d) After inspecting the building works, Vero accepted many of Ms Linden's claims and directed Sabroni to fix certain identified defects.

(e) Sabroni appealed Vero's directions to fix the identified defects to the Victorian Civil and Administrative Tribunal ("VCAT"), only to subsequently enter into two separate settlement agreements (about which I will say more below), agreeing to fix the bulk of the defects that it had been directed to fix.

(f) Ms Linden subsequently complained that Sabroni had not fixed the agreed defects properly.

(g) After re-inspecting the property, Vero agreed with Ms Linden in respect of some of the defects and paid for these matters to be attended to again.

(h) On 16 October 2003, Vero and Ms Linden entered into terms of settlement whereby Vero agreed to indemnify Ms Linden for the sum of $51,700 – which was an amount to be paid to Yarrayea Grove Pty Ltd on receipt of invoices or receipts in respect of works accepted on 10 February 2003.

(i) As a result of the various defects in the building works, Vero incurred consultants and legal costs, as well as the costs of having the agreed defects the subject of the various settlements rectified.

(j) By a letter of demand dated 25 September 2006, Vero demanded from Mr O'Neill the sum of $76,320.58 pursuant to the Deed.

3. The Deed is headed "FORM 1 – STANDARD NATIONAL GENERAL INDEMNITY". Under that heading, there is a sub-heading: "General Deed of Indemnity". Underneath the sub-heading, the following appears:

"(To be used for indemnity given by the builder's associates, directors, parent and/or associated companies and/or other third parties)".

4. The key provisions of the Deed for present purposes are clauses 1, 2 and 8. Clause 1 relevantly provides that "costs" includes "legal costs and expenses (including experts/consultants fees) incurred by you [Vero] in handling a claim by an insured under a policy ...".

5. Clause 2 provides:

"We [Mr O'Neill] indemnify you [Vero] 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 [Sabroni] act or omission; and

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

6. Clause 8 provides:

"We [Mr O'Neill] have no right to direct you [Vero] as to how you [Vero] deal with any claim made under the policy. You [Vero] must:

(a) inform us [Mr O'Neill] promptly of the details of any claim under any policy to which this Deed relates;

(b) inform us [Mr O'Neill] promptly of the proposed settlement of any such claim."

7. It is the proper construction of clause 8(b) which is central to the resolution of the claim and this appeal.

The proceedings below

8. In the Court below, Vero claimed to be entitled to the sum of $76,320.58, being the total of the amounts it had paid in respect of the claims made by Ms Linden in relation to Sabroni's defective building works. Vero claimed that Mr O'Neill was liable to pay this sum pursuant to the terms of the Deed.

9. The Magistrate found in favour of Vero and ordered Mr O'Neill to pay Vero the sum of $76,320.58. In the course of giving judgment, the Magistrate dealt with Mr O'Neill's argument that no prompt, written notice was provided to the defendant (as distinct from Sabroni) as required by clause 8(b) of the Deed by saying that although the correspondence passing between the parties showed a considerable sloppiness by Vero, Mr O'Neill's argument in this regard must fail. In essence, the Magistrate considered that there was a body of evidence (to which, for reasons that will become apparent, I need not refer) that informed Mr O'Neill of the proposed settlement of the various claims that had been made.

The appeal

10. At the outset, counsel for Mr O'Neill stated that the point of the appeal was a very narrow one, being whether clause 8(b) of the Deed was complied with. The issue is formulated by Vero in its outline of submissions as "a narrow issue; whether it was open on the evidence for the Court below to find that Vero had complied with ... [the] Deed ... sufficiently to enforce it against Mr O'Neill". Whilst the amended notice of appeal formulates the question of law upon which the appeal is brought in terms of whether it was open upon the evidence to find that there had been compliance with clause 8(b) and whilst the parties originally formulated the issue in those terms, in the course of argument it became apparent (and the parties accepted) that the question of law in this case is the construction of the Deed (and in particular clause 8(b) thereof).[1]

11. At the hearing of the appeal, counsel for Vero conceded that if clause 8(b) was to be construed in accordance with Mr O'Neill's submissions, then there was no evidence of compliance with it. Similarly, counsel for Mr O'Neill conceded that if clause 8(b) was to be construed in accordance with Vero's submissions, then there was evidence upon which the Magistrate could conclude that clause 8(b) had been complied with and the decision below would thus not be liable to attack. Both of these concessions were properly made.

12. It falls then to determine the proper construction of clause 8(b). Mr O'Neill contends that the Deed falls to be strictly construed and that, by its terms, it covers the settlement of 16 October 2003 in which Vero agreed to indemnify Ms Linden in the sum of $51,700. He submits that the words "settlement" is to be given its ordinary meaning and that at some time prior to the entering into of the terms of settlement of 16 October 2003 there must have been a proposed settlement between Vero and Ms Linden, the terms of which are ultimately recorded in the terms of settlement referred to in paragraph 2(h) above. As I have said above, it is common ground between the parties that there was no specific notice given by Vero to Mr O'Neill (or no "informing") of the existence of the 16 October 2003 settlement for many months.

13. Vero's response to Mr O'Neill's contention is encapsulated in paragraph 11 of its outline of submissions.[2] Vero contends:

> "Mr O'Neill's contention does not reflect what the Deed requires. The Deed only requires that Vero must inform Mr O'Neill promptly of the details of any claim under any policy to which the Deed relates and <u>of the proposed settlement of any such claim</u>. The Deed does not require that the information about the proposed settlement of a claim must descend into details about the how (sic) the quantum of an already accepted claim has been calculated, or must be contained in a particular form of document, or a separate document to the advice about the claim or a written communication personally addressed only to Mr O'Neill." (Underlining in original.)

14. In argument, counsel for Vero amplified this submission, stating that a proposed settlement in clause 8(b) is one where Vero accepts an owner's claim about a particular defect or defects, but does not include terms of settlement which merely involved the quantification of that claim. Specifically, the terms of settlement of 16 October 2003 are not a settlement within the meaning of clause 8(b) and any proposal to enter into any such agreement was not a proposed settlement within the meaning of that clause.

15. There was debate before me as to whether the Deed should be construed strictly against Vero and whether, in the case of ambiguity, it should be read *contra proferentem*. Counsel for Mr O'Neill submitted that the Deed should be so construed. The Magistrate accepted counsel for Mr O'Neill's submissions as to the principles to be applied in construing the Deed. Whilst counsel for Vero never explicitly contended otherwise, in his submissions he sought to distinguish *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[3] and *Andar Transport Pty Ltd v Brambles Ltd*.[4] These were the principal decisions relied upon by Mr O'Neill's counsel in support of his argument as to the principles to be applied in construing the Deed.

16. In *Ankar*,[5] Mason ACJ, Wilson, Brennan and Dawson JJ 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. The doctrine of *strictissimi juris* provides a counterpoise to the law's preference for a construction that reads a provision otherwise than as a condition. A doubt as to the status of a provision in a deed should therefore be resolved in favour of the surety."

17. Whilst *Andar* (*supra*) was a case concerning an indemnity rather than a guarantee, Gleeson CJ, McHugh, Gummow, Hayne and Hayden JJ said:[6]

> "However, notwithstanding the differences in the operation of guarantees and indemnities, both are designed to satisfy a liability owed by someone other than the guarantor or indemnifier to a third person. The principles adopted in *Ankar*, and applied in *Chan*, are therefore relevant to the construction of indemnity clauses. [Footnote omitted]."

18. In my opinion, it is not necessary to resolve whether Mr O'Neill can call in aid the principles his counsel seeks to rely upon in the resolution of this case. This is because I have reached the conclusion that on a fair reading of clause 8(b) in its context (both within the Deed and within the circumstances in which the Deed came into existence) a settlement of the kind entered into on 16 October 2003 (or more correctly the proposal to enter into that settlement at or shortly before the time at which it came into existence) is one in respect of which clause 8(b) requires Vero inform Mr O'Neill. To limit the operation of clause 8(b) as Vero contends would, in my opinion, artificially restrict the meaning of the ordinary words "proposed settlement" so as to exclude proposed settlement that would, in any other circumstances, be undoubtedly so described.

19. In my view, there is no warrant for limiting the expression "proposed settlement" to some initial acceptance of liability for a particular defect or defects. Whilst those circumstances might also come within the meaning of the expression "proposed settlement", it seems to me that what clause 8(b) is also doing is giving an important right to the class of people who might enter into the standard national general indemnity document[7] 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.

20. In opposition to this construction, Vero's counsel submitted:[8]

> "Mr O'Neill is really urging upon Your Honour that you should interpret this Deed in a manner that would give succour to every incompetent and recalcitrant builder in this State because it would enable them to bog down the process of processing owners' claims and in circumstances where there is not a dispute that these items were defective."

21. In order to give further force to this submission, it was submitted that, upon the construction contended for by Mr O'Neill, if Vero decided that it was going to engage a structural engineer to provide a report or, if it were to brief lawyers, then it would need to send Mr O'Neill a letter in advance notifying him that it was proposed to incur these costs. The argument ran that because those costs were recoverable as part of the indemnity provided by clause 2 of the Deed, clause 8(b) would require Mr O'Neill to be informed. However, the argument overlooks the text of clause 8(b) which only requires Mr O'Neill to be informed about proposed settlements – not the proposed incurring of costs in respect of which an indemnity might be granted by the terms of the Deed.

22. Further, I am unpersuaded by the notion that the interpretation I have placed on clause 8(b) would permit builders ("recalcitrant", "incompetent" or otherwise) to "bog down" the process of processing claims. All that is required is that, on the relatively few occasions when Vero proposes to settle with an owner in respect of a matter in which an indemnity is given by the Deed, that Vero inform the indemnifier (in this case Mr O'Neill) of the proposed settlement.

23. When one considers the sorts of claims that might be governed by the Deed, it seems to me likely that, ordinarily, there will be a very small number of proposed settlements as I have explained them in respect of which prompt notice must be given. It is, of course, not necessary to give notice pursuant to clause 8(b) in respect of the incurring of engineers' or lawyers' costs or other disbursements that are not settlements.

24. To the extent that there is any ambiguity in the expression "proposed settlement" in clause 8(b), I would have (in reliance upon the decisions of *Ankar* (*supra*) and *Andar* (*supra*) and the authorities referred to therein) resolved that ambiguity against Vero. However, in my opinion, the words "proposed settlement" are ordinary English words and fall to be given their ordinary meaning, and include what was clearly a proposed settlement at all times up to the actual entering into of terms of settlement on 16 October 2003. Nothing within the legislative scheme within

which the Deed might be said to operate[9] cuts across this interpretation. The interpretation I have preferred, in my opinion, accords with what a reasonable person would understand by the language of clause 8(b) in the context of the terms of the Deed and the purpose for which it was entered into.[10]

25. Both in its written submissions and oral argument, Vero contended that the argument advanced by Mr O'Neill concerning clause 8(b) was in conflict with his pleaded position down below. Reference was made to a finding to this effect by the Magistrate. However, I have analysed Mr O'Neill's pleadings and particulars as they were before the Magistrate and have concluded that there is no inconsistency. The point relates to paragraph 2(b) of Mr O'Neill's further and better particulars of defence.[11] In that paragraph, it is stated:

> "Clause 8 of the Deed requires the insurer to inform the insured *promptly of the details of any claim under any policy to which the Deed relates*. The defendant has not been informed of any claim(s) or settlement(s) referred to above, save and except claims that were subject to Terms of Settlement in VCAT proceedings D123/2003 and D104/2004. The scope of works and terms that were agreed pursuant to the settlement in the VCAT proceedings have been completed and executed. There has not been any notice of a claim in respect of any other matter relating to Linden, the property ... or policy #165714 that would be required to be given under the terms of the Deed, if any such claim was to be made." (Emphasis in original.)

26. In my opinion, those particulars make complaint in respect of each settlement that Vero has entered into, save the ones identified therein (neither of which are the settlement that led to the terms that were executed on 16 October 2003). Whilst there may have been a submission made on behalf of Mr O'Neill to the Magistrate that no notice was given of any claim or proposed settlement and whilst it might be said that such a broad submission is in conflict with the particulars I have referred to above, it is clear from a full reading of the submissions below that complaint was being made concerning the failure of Vero to promptly inform Mr O'Neill of the proposal to enter into the terms of settlement that were completed on 16 October 2003. In my opinion, there is no inconsistency between Mr O'Neill's case as advanced on this appeal and Mr O'Neill's case as advanced below. The argument he seeks to agitate in this Court was encompassed within his pleadings below and put by him below (albeit without the specificity with which it was put before this Court).

27. It follows from what I have said above that the Magistrate erred in his construction of clause 8(b) of the Deed and therefore erred when he concluded that there had been no breach of it by Vero. It now remains to determine the consequences of this error.

28. Counsel for Mr O'Neill, in support of an argument that there should be judgment for his client in the proceeding below, submitted that all he now had to establish was "the mere possibility of detriment"[12] to bring about the discharge of the indemnity. He submitted that Vero's non-compliance prejudiced Mr O'Neill by denying him, *inter alia*, opportunities to:

> (a) arrange inspection of the alleged defects by alternative tradespeople who might have been cheaper;
>
> (b) arrange inspection of the alleged defects by potential expert consultant witnesses who might have been able to testify in Court in answer to Vero's own expert witnesses; and/or
>
> (c) insist upon Vero's compliance with earlier terms of settlement which required a specified number of quotes to be obtained as a prerequisite to any settlement or rectification works being carried out at Sabroni's expense.

29. Counsel for Mr O'Neill invited me to resolve these matters in his client's favour on the hearing of this appeal. However, counsel for Vero submitted that the so-called opportunities referred to by counsel for Mr O'Neill were illusory. It seems to me that this is a matter which must be remitted to the Magistrates' Court for determination (perhaps after the calling of further evidence). I am not in a position to resolve the factual issue as to whether any real opportunity has been denied to Mr O'Neill by reason of Vero's failure to comply with clause 8(b). Further, it is not this Court's function to resolve such a dispute on an appeal which is limited to one on a question of law only.

30. Similarly, counsel for Vero would have me determine this appeal by resolving against Mr O'Neill the question of whether clause 8(b) was a condition precedent to the operation of the

indemnity or a mere warranty, the breach of which would entitle Mr O'Neill only to sue for damages. Counsel for Vero contends that, at its highest, the term is a mere warranty and submits that the fact that there may have been a breach of it is irrelevant because Mr O'Neill does not have a claim for damages in the alternative to the position he took below. There is no doubt that before the Magistrate Mr O'Neill did not have an alternative position in which he sought damages. He relied upon a breach of clause 8(b) as disentitling Vero to recover any indemnity from him (or at least any indemnity in relation to any settlement of which he was not promptly informed).

31. The test concerning essentiality of a term was set out by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Limited*.[13] His Honour said:[14]

> "The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor."[15]

32. The test of essentiality is concerned with the objective importance of the term in question (in this case, clause 8(b)). An objective assessment of its practical importance based upon all of the evidence (including evidence of events that occurred after the Deed was entered into) is required.[16] Further, a term is more likely to be held to be essential if damages for its breach are inadequate or inappropriate in the circumstances.

33. Whilst I have reached a tentative view that clause 8(b) is a condition rather than a mere warranty, it seems to me that this is a matter that again must be determined by the Magistrates' Court upon a consideration of the whole of the evidence (including, if necessary, further evidence as to events that post-date the entry into of the Deed). It is enough at this stage to say that the submission made by counsel for Vero that the term was unarguably a warranty and that the appeal should therefore fail cannot succeed.

34. During the course of the appeal, counsel for Vero made a number of further submissions raising different issues, stating that in the event that his client succeeded in respect of these (as yet) undetermined issues, then even if Mr O'Neill persuaded me that there had been a failure to comply with clause 8(b) of the Deed, the appeal should be dismissed because the resolution of any one or some of these issues would ultimately lead to a judgment in favour of Vero. The various issues were set out in Vero's written submissions on the appeal, and in particular the summary table contained within paragraph 19 thereof. Further elaboration was given of these arguments during the course of the appeal and by reference to the written submissions made to the Magistrate. It is enough to say that none of these matters presents a pure question of law which must be resolved in Vero's favour. They are matters of mixed fact and law or matters that should be (but have not yet been) determined by the Magistrates' Court. This includes the issue of whether the breach of clause 8(b) disentitles Vero to recover the whole of the amount claimed or merely the amount of the settlement of 16 October 2003.

Conclusion

35. It follows from what I have said above that the appeal should be allowed and the matter should be remitted for rehearing in the Magistrates' Court in accordance with these reasons. I will hear counsel on the question of costs.

---

[1] The construction of a written contract is a question of law: See the judgment of Brooking J in *FAI Insurance Co Ltd v Savoy Pty Ltd* [1993] VicRp 76; [1993] 2 VR 343, 351; [1993] ANZ Conv R 469; [1993] Aust Contract Reports 90-025; [1993] V Conv R 54-466

[2] Dated 2 September 2008

[3] [1987] HCA 15; (1987) 162 CLR 549; 61 ALJR 245; [1987] ASC 57

[4] [2004] HCA 28; (2004) 217 CLR 424; 206 ALR 387; (2004) 78 ALJR 907; [2004] Aust Torts Reports 81-752

[5] *Supra* at 162 CLR 561

[6] At paragraph [23]

[7] Builder's associates, directors, parents, associated companies and other third parties

[8] Transcript 25.4 – 25.10

[9] Cf paragraph 5 of Vero's outline of submissions dated 2 September 2008

[10] See generally *Pacific Carriers Limited v BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451; (2004) 208 ALR 213; 78 ALJR 1045 per Gleeson CJ, Gummow, Hayne, Callinan and Hayden JJ at CLR paragraph [22]; *Toll*

(FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204 per Gleeson CJ, Gummow, Hayne, Callinan and Hayden JJ at CLR paragraph [40]
[11] Dated 31 August 2007
[12] cf *Ankar* (supra at CLR 559)
[13] (1938) 38 SR (NSW) 632; 55 WN (NSW) 228
[14] At pp641-2
[15] See also *Ankar* (*supra* at CLR 561)
[16] See *Tropeano v Riboni* [2005] VSC 229 at [117]

APPEARANCES: For the appellant O'Neill: Mr P Duggan, counsel. Mark G Bramich, solicitor. For the respondent Vero Insurance Limited: Mr A Laird, counsel. Spark Helmore, solicitors.
