

### LIMITS TO THE SCOPE OF THE WARRANTY OF FITNESS FOR PURPOSE—ACTUAL OR ANTICIPATED?

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*Barton v Stiff* [2006] VSC 307 concerned the construction of a house at Wodonga in 2000. Under the contract, the contractor agreed to construct the house in accordance with plans and specifications it had prepared and supplied and in accordance with engineering designs prepared on its behalf. The only soil test report was one prepared in 1992, eight years before the construction of the house, and which was given by the owners to the contractor.

The contract contained express warranties that, inter alia, all materials to be supplied would be 'good and suitable for the purpose for which they are used'. The contractor further warranted 'that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might be reasonably be expected to achieve that result'.

Shortly after the owners took possession, disputes arose between the parties as to the quality of the works. The owners commenced proceedings in the Victorian Civil and Administrative Tribunal against the contractor. One of the items in respect of which they were successful in the proceedings was a claim that the bricks used by the contractor below the damp proof course were not suitable for the purpose for which they were used with

the result that the house was not reasonably fit for its intended purpose. From the Tribunal's finding the contractor appealed to the Supreme Court of Victoria.

The Tribunal member had found that there was severe salt efflorescence and spalling of brickwork on specified sections of the brick walls beneath the damp proof course, that the source of the salt which had entered the bricks was salty groundwater present at the land, that the bricks were 'unsuitable in an environment where there is salty groundwater' and that the presence of salty groundwater at the land was 'highly unusual'.

Upon appeal, the contractor did not dispute the presence of a warranty of fitness for purpose in relation to the materials. What it maintained was that the intended purpose for which the house was constructed was to meet the groundwater conditions actually prevailing at the time of construction or which were likely to be encountered at the land during the expected design life of the house. As those conditions were not such as to give rise to the expectation that the bricks would be subject to attack by salts in the groundwater, the contractor maintained, the bricks were reasonably fit for their intended purpose.

Hargrave J expressed his conclusion in the following manner:

I hold that the warranties of fitness for purpose in this case required the builders to provide materials, and a completed house, which would be proof against any groundwater conditions likely to be encountered at the land. As the presence of salty groundwater at the land was 'highly unusual', the failure of the bricks for this reason does not constitute a breach of those warranties.

Plainly, Hargrave J considered it was the owner, not the contractor, who assumed the risk of the actual conditions encountered being different and inferior to the conditions reasonably anticipated at the time of contract. Seen in that way, the decision contains within it a clear message to those charged with drafting warranties in design and construct contracts.

If a principal wishes the common law warranty of fitness for purpose to extend to that which is actually encountered (as distinct from that which could reasonably have been expected or likely to be encountered) then the contract will have to provide expressly for that result, thereby transferring the risk to the contractor.

Contractors will doubtless not be pleased to see such contracts drafted in that manner but at least no-one will be in doubt as to which of the parties, as between the principal and the contractor, has agreed to bear that risk.

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