

'ABSOLUTE WARRANTY OF FITNESS FOR PURPOSE'—JUST MAKE SURE YOU IDENTIFY THE PURPOSE!

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Justice Hargrave's decision in *Barton v Stiff* [2006] VSC 307 stands as a reminder that the absolute warranty for fitness for purpose has limitations—it only relates to the 'purpose' as properly identified. Without a clause expressly providing that the contractor is to bear all risk of failure of materials due to adverse site conditions, a claim by the owner for breach of the fitness for purpose warranty may be defeated.

THE WARRANTY

Barton v Stiff involved the construction of a house at Wodonga in 2000. Clause 11 of the contract contained express terms which were identical to the statutory fitness for purpose warranties contained in section 8 of the *Domestic Building Contracts Act 1995* (Vic) and provided:

11.2: The builder warrants that all materials to be supplied by the Builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new.

11.5: The builder warrants that if the work consists of the erection or construction of a home, or work is intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed.

The contract also contained a clause which required the contractor to give the owners a soil report, however the only soil report that existed at the time of construction had been prepared eight years earlier and was given to the contractor by the owner.

Disputes arose between the owner and the contractor as to the quality of the works shortly after construction was completed

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in November 2000. The owner was successful in the Victorian Civil and Administrative Tribunal for a claim that the bricks used by the contractor in the footings (below the damp proof course) were not suitable for their intended purpose as the bricks had been damaged by salty groundwater.

On appeal to the Supreme Court of Victoria, the contractor did not dispute the presence of an absolute fitness for purpose warranty but maintained that the intended purpose of the bricks was to meet the groundwater conditions actually prevailing at the time of construction or which were likely to be encountered on the construction site during the expected design life of the house. As the presence of salty groundwater was found by the Tribunal member to be 'highly unusual' at the construction site, the contractor argued that the bricks used were reasonably fit for their intended purpose.

DECISION AND REASONS

Justice Hargrave accepted the contractor's argument. He applied the reasoning of the English Court of Appeal in *Independent Broadcasting Authority v EMI Electronics Ltd* (1978) 11 BLR 29, which involved a claim against a contractor who had been responsible for the design and construction of a television mast in Yorkshire. The mast had subsequently fallen down due to 'vortex shedding' caused by high winds and the presence of ice on the mast. The English Court of Appeal, while accepting that there was an implied fitness for purpose warranty in the contract, said that this still left unresolved the extent of the contractor's obligation and concluded that:

The contractual obligation upon [the contractor] and [the subcontractor] was to provide a mast which would be proof

against any meteorological conditions likely to be encountered in that area.

Justice Hargrave applied this reasoning, concluding:

If [it] is not the case [that the reasoning in Independent Broadcasting is applicable], it would be tantamount to finding that the contract provided for the builders to be insurers of the house. The parties could not have intended this. 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.

Justice Hargrave noted that this did not mean the warranty of fitness for purpose was not absolute, only that the absolute warranty relates to the purpose as properly identified.

DRAFTING IMPLICATIONS

Given that (as Justice Hargrave's reasons make apparent) the scope of the 'purpose' element of any fitness for purpose warranty is determined by the intention of the parties, it is clear that it is possible to draft contractual provisions that avoid the limitations on such a warranty found by Justice Hargrave in *Barton v Stiff* by expressly stating that the contractor is liable for the risk of failure of materials, regardless of whether unusual conditions are encountered. That is not to suggest that contractors are likely to accept such drafting!

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