

Fitness for Purpose

The judgment of Hargrave J in the Supreme Court of Victoria in *Barton v Stiff* [2006] VSC 307 is of interest, particularly in a domestic building context.

The builder constructed a house in accordance with plans and specifications it had prepared. The owners had provided a soil test report prepared in 1992 – eight years before construction commenced.

The builder warranted in the Contract “that the work and any material used in carrying out the work would be **reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result**” (emphasis added).

A dispute arose as to the quality of the works; in particular that the bricks below the damp proof course were not suitable. The owners alleged therefore that the house was not reasonably fit for its intended purpose.

The Victorian and Administrative Tribunal (VCAT) found there was severe salt efflorescence and spalling of brick work on sections of the walls beneath the damp proof course, salt had entered the bricks from salty ground water present on

the land, the bricks were “unsuitable in any environment where there is salty ground water,” and the presence of salty ground water on the land was “highly unusual.” VCAT held that the bricks used below the damp proof course were not suitable and therefore the house was not reasonably fit for its intended purpose.

The builder appealed to the Supreme Court, contending that the intended purpose for which the house was constructed was to meet the ground water conditions **actually prevailing at the time of construction or which were likely to be encountered during the expected life of the house (emphasis added)**. The bricks were reasonably fit for their intended purpose because, under the prevailing conditions, it could not be expected that the bricks would be subject to attack by salts in the ground water.

Hargrave J agreed, holding that the warranty was limited to ground water conditions “likely to be encountered,” and as the presence of salty groundwater was “highly unusual,” the fitness for purpose warranty was not breached.

Clearly Hargrave J considered it was the owners, not the builder, who assumed the risk of the actual ground conditions encountered being different from, and inferior to, those reasonably anticipated at the time the contract was entered into.

Therefore, ordinarily fitness for purpose of materials or completed works will be limited to that which reasonably could have been expected or likely to be encountered.

Builders should avoid giving any warranty of fitness for purpose extending to conditions actually encountered thereby transferring the risk from the owner.

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