

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 16/04/2020 10:44:55 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: QUD108/2020
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
YOUJI PTY LTD ACN 123 074 733
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 16/04/2020 1:06:46 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Federal Court of Australia
District Registry: Queensland
Division: General

IN THE MATTER OF YOUI PTY LTD (ACN 123 074 733)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
 Plaintiff

YOUI PTY LTD (ACN 123 074 733)
 Defendant

A. Nature of proceeding

1. The defendant, Youi Pty Ltd (ACN 123 074 733) (**Youi**), at all material times engaged in the business of offering to consumers contracts of insurance within the meaning of the *Insurance Contracts Act 1984* (Cth) (**ICA**).
2. The plaintiff, the Australian Securities and Investments Commission (**ASIC**), contends that Youi contravened s 13 of the ICA, in that it failed to act consistently with commercial standards of decency and fairness with due regard to the interests of an insured. In particular, when responding to a claim arising out of damage sustained to the roof of the insured's home, as caused by a severe weather event, Youi failed to handle the claim in a fair, transparent and timely manner. As a result, there were lengthy delays to the completion of repairs to the insured's home.

B. Relief sought from the Court

3. ASIC seeks declarations as set out in the Originating Process.

C. Important facts giving rise to the claim

C1. Background

4. In or about November 2012, Ms Sacha Murphy and Mr Darren Orr (together and individually, the **Insured**) took out a policy for home building and contents insurance with Youi in respect of their home at 339 Wolfram Street, Broken Hill in New South Wales (**Property**). The Insured thereafter renewed the policy annually, including in October 2015 with an effective renewal date of 16 November 2015 and an expiry date of 15 November 2016 (**Policy**).
5. There were terms of the Policy, inter alia:
 - (a) that:
 - (i) where Youi accepted a claim and the item could be repaired, at Youi's option Youi would arrange repairs with a repairer who was acceptable to Youi; and
 - (ii) wherever possible, Youi would offer the Insured a choice of repairer from Youi's 'network of recommended repairers',
(Recommended Repairer Term);

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(b) implied into the Policy pursuant to s 13(1) of the ICA, that Youi was required to act towards the Insured, in respect of any matter arising under or in relation to the Policy, with the utmost good faith (**Implied Term of Utmost Good Faith**).

6. On 11 October 2016, Youi entered into a service agreement with ProBuild Australia Pty Ltd (ABN 91 114 158 744) (**PA**), commencing 5 October 2016, for the provision of home building repairs (**PA Service Agreement**).

C2. Claim: Broken Hill hail event

7. On 11 November 2016, a severe hail storm damaged the roof of the Property. On 25 January 2017, the Insured made a claim under the Policy (**Claim**). On 15 February 2017, Youi accepted the Claim.

8. On 26 February 2017, Youi appointed and authorised PA, pursuant to the PA Service Agreement, to complete the repair works to the Property (**PA Engagement**). On 3 March 2017, PA issued a scope of works to the Insured. On 5 May 2017, the Insured returned a signed scope of works to PA.

C3. Claim: PA Issues

9. On or around 5 May 2017, having received a series of complaints made by other insureds regarding repairs carried out by PA in the Broken Hill area, Youi commenced an audit of PA's allocated repairs in the Broken Hill area. Further to the audit, on or around 19 May 2017 Youi determined to suspend PA in the Broken Hill area as PA was not meeting the requirements of, or Youi's expectations as to, the PA Service Agreement. The effect of this was that no new work was to be allocated to PA and existing work, where PA had not yet commenced repairs, was being re-allocated to The Roof Company Pty Ltd (ACN 126 346 236) (**RC**).

10. On 1 June 2017, Youi resolved internally to cancel the PA Engagement if PA had neither ordered the required materials nor commenced the works.

11. On 7 June 2017, PA notified Youi that it had ordered materials and was awaiting delivery to commence repairs on the Property.

12. As at 29 September 2017, PA had not commenced repairs to the Property. On that day, Youi notified PA that Youi would no longer engage PA for works in any region beyond the term of the PA Service Agreement, which ended on 5 October 2017.

13. (The facts and matters in paragraphs 9, 10 and 12 above are referred to as the **PA Issues**).

14. Further to the PA Issues, from 19 May 2017, 1 June 2017 or 29 September 2017, PA was not a repairer acceptable to Youi, and or a repairer from Youi's network of recommended repairers, for the purposes of the Recommended Repairer Term.

15. Prior to the PA Engagement Termination (referred to in paragraph 23 below) Youi failed to take reasonable steps to:

- (a) inform the Insured of the PA Issues;
 - (b) inform the Insured that PA was not a repairer acceptable to Youi, and or a repairer from Youi's network of recommended repairers, for the purposes of, and as required by, the Recommended Repairer Term;
 - (c) afford the Insured an opportunity to request the appointment of a repairer (other than PA) from Youi's network of recommended repairers, as required by the Recommended Repairer Term; and or
 - (d) seek to terminate the PA Engagement, notwithstanding the PA Issues and or Youi's obligations pursuant to the Policy,
- (**PA Issue Failings**).

C4. Claim: Delay in commencement of works

16. PA did not commence repair works to the Property until on or about 4 October 2017.
17. From 5 May 2017 until on or about 4 October 2017, Youi failed to take reasonable steps to ensure that PA or any other builder commenced the repairs to the Property (**Commencement Delay Failings**).
18. On or about 4 October 2017, PA commenced removing the roof of the Property. PA removed solar panels, air conditioning, corrugated iron and capping. On or about 4 October 2017, PA determined that further structural works would be required. PA left the site. PA issued an invoice direct to the Insured for 'private works' in the amount of \$3,340.91 and required payment of 50% before it would commence repairs.
19. On 19 October 2017, Youi authorised a variation to the scope of works to permit the repair works to proceed with the required additional structural works included.
20. On 20 October 2017, PA notified Youi that, upon further investigation, more structural issues had been identified. PA again left the site.
21. On 30 October 2017, PA notified Youi that the cost of the further structural works would be an additional \$13,695 and that the repairs in respect of the Property were to remain on hold, pending further instructions from Youi.
22. On 7 November 2017, Youi requested RC to provide a quotation for the repairs to the Property.
23. In or about late December 2017 or January 2018 Youi terminated the PA Engagement (**PA Engagement Termination**). As at the time of the PA Engagement Termination, PA had removed the roof but had otherwise not commenced repair works to the Property.

C5. Failure to ensure adequate make safe works, notwithstanding risk of lead poisoning

24. At all material times, Broken Hill was and remains affected by lead contamination. As a result of lead mining, lead dust is to be found mixed with dust, soil, dirt, and in open water areas, in places throughout Broken Hill. As a result, there is a known risk of lead contamination in Broken Hill area.
25. When PA left the site on or about 4 October 2017, it did not complete make safe works by reattaching roof sheets it had removed. Neither did PA attach a temporary roof cover.
26. By telephone call, around 8.48pm on 5 October 2017, the Insured informed Youi that "*part of the room is open and its about to rain*". Youi contacted PA and asked PA to send someone out to undertake make safe works by covering the roof with a tarpaulin to prevent further damage. PA did not cover the roof.
27. On 6 October 2017, Ms Murphy advised Youi that she was pregnant, that PA had left the roof uncovered and interior exposed to lead dust, and that she was being exposed to high levels of lead (**6 October 2017 Notification**).
28. On 9 October 2017, Youi requested that PA undertake make safe works and cover the roof.
29. On 20 October 2017, Ms Murphy again advised Youi that she was concerned about her family's exposure to lead. Youi authorised four days' temporary accommodation for the Insured and family. Later, on 20 October 2017, PA told Youi that, despite Youi's instruction given on 5 October 2017, the roof was still uncovered and the works necessary to temporarily

enclose the roof would cost \$2,882. Youi instructed PA to close the roof, ensuring it was water tight. This instruction was later confirmed by an authorisation dated 23 October 2017.

30. On 24 October 2017, the Insured provided Youi with the results of EPA testing that had been carried out at the Property on 27 February and 17 March 2017 (unrelated to the Claim), recommending the replacement of gravel, wood chips, loam and grass around the Property to remove lead contamination. Also on 24 October 2017, the Insured and family returned to the Property. PA had by then conducted some make safe works to the roof. However, the make safe works were inadequate in that the temporary roof was flimsy and insecure.
31. On 15 November 2017, Broken Hill experienced significant rainfall. There was water ingress as a result of the inadequate make safe works. This led to internal damage to the Property, including to the bathroom such that it needed to be repaired.
32. It was not until RC completed the roof repairs on 18 May 2018 (as referred to below) that the 6 October 2017 Notification was resolved.
33. Further to the above, from on or about 4 October 2017 to at least 17 November 2017, notwithstanding the 6 October 2017 Notification Youi failed to take reasonable steps to effect make safe works to the Property (**Make-Safe Failings**).

C6. Inadequate response to formal complaint

34. On 2 November 2017, the Insured made a formal complaint to Youi (**2 November 2017 Complaint**). Among other matters, the complaint referred to the fact that as a result of the delays in the roof repairs, the remedial works recommended by the EPA to the Property to deal with the lead contamination could not be completed.
35. Youi sent an automatically generated letter on 22 November 2017 stating that the 2 November 2017 Complaint was resolved on the basis of “[a]n explanation ... *provided to you over the phone*”. Youi provided no explanation, or no sufficient explanation, to the Insured in response to their complaint.
36. The 2 November 2017 Complaint was never formally resolved. The effective resolution was the completion of the repairs, the other matters as referred to in paragraph 41 below, and the apology referred to in paragraph 40 below.
37. Further to the above, from 2 November 2017 to at least 18 May 2018, Youi failed to take reasonable steps to consider and respond to the 2 November 2017 Complaint (**Complaint Failings**).

C7. Further delays in completion of works

38. On 15 February 2018, Youi authorised and appointed RC to proceed with the repairs. On 20 February 2018, RC sent a scope of works to the Insured for review. Later on 20 February 2018, the Insured sent an email to Youi regarding RC’s scope of works, raising a number of concerns to the effect that the scope did not address all of the damage (**20 February 2018 Email**). The Insured also sent the email to RC.
39. Youi did not respond in writing to the 20 February 2018 Email until 5 April 2018, and then to ask the Insured to (re)state the concerns as to the scope of works.
40. On 11 April 2018, Youi wrote to the Insured inter alia apologising for the delay. On 13 April 2018, RC sent the Insured a revised scope of works. The Insured signed and return the scope of works on the same day.

41. In or around early May 2018, RC began the repairs to the roof of the Property. These repairs were completed on or around 18 May 2018. In the meantime, repairs to the bathroom, necessary as a result of water ingress resulting from PA's inadequate make safe works, were ongoing. The repairs to the bathroom were not completed until 8 November 2018.
42. Further to the above, from 20 February 2018 to 5 April 2018 Youi failed to take reasonable steps to respond to the 20 February 2018 Email thereby further delaying the completion of the repairs (**Completion Delay Failings**).

D. Primary legal grounds for the relief sought

D1. Duty of utmost good faith

43. The Policy was a contract of insurance to which the ICA applied.
44. Pursuant to s 13(2) of the ICA, a breach of the Implied Term of Utmost Good Faith referred to in paragraph 5(b) above was a breach of the ICA.

D2. Breaches of the duty of utmost good faith

45. By the PA Issue Failings, as outlined in section C3 above, Youi failed to handle the Claim with full and frank disclosure and with fairness.
46. By the Commencement Delay Failings as outlined in section C4 above, Youi failed to handle the Claim in a timely manner.
47. By the Make-Safe Failings as outlined in section C5 above, Youi failed to handle the Claim in a timely manner.
48. By the Complaint Failings as outlined in section C6 above, Youi failed to handle the Claim with full and frank disclosure, with fairness, and in a timely manner.
49. By the Completion Delay Failings as outlined in section C7 above, Youi failed to handle the Claim in a timely manner.
50. Further to each, alternatively all, of the matters referred to in paragraphs 45 to 49 above, Youi failed to act consistently with commercial standards of decency and fairness with due regard to the interests of the insured, and Youi thereby breached the Implied Term of Utmost Good Faith in contravention of s 13 of the ICA.

E. Harm suffered

51. Youi accepted the claim on 15 February 2017. The completion of the repairs, including the further repairs necessitated by reason of the inadequate make safe works, was delayed until 8 November 2018. Until the completion of the roof repairs on 18 May 2018, the Insured's Property was structurally insecure and in a condition that allowed further damage to the Property including through further water ingress. The Insured was not treated fairly.

Date: 16 April 2020

(Electronically) Signed by Christine Sheree Small
Solicitor for the Australian Securities and Investments Commission

This concise statement was prepared by Dean Luxton and Albert Ounapuu, both of counsel.

Certificate of lawyer

I, Christine Sheree Small, certify to the Court that, in relation to the Concise Statement filed on behalf of the plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 16 April 2020



(Electronically) Signed by Christine Sheree Small
Lawyer for the plaintiff, Australian Securities and Investments Commission