

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D310/2006

CATCHWORDS

Application for reinstatement – settlement – acceptance of liability by insurer – whether any breach of settlement agreement

APPLICANT	Body Corporate No PS430656W
RESPONDENT	Allianz Australia Insurance Ltd (ACN 000 122 850)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	14 August 2008
DATE OF ORDER	3 September 2008
CITATION	Body Corporate PS430656W v Allianz Australia Insurance Ltd (Domestic Building) [2008] VCAT 1795

ORDER

- 1 The application for reinstatement is dismissed.
- 2 Costs reserved – liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird – allow 2 hours.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr B.J. McCullagh of Counsel
For Respondent	Mr S. Waldren of Counsel

REASONS

- 1 By application dated 11 May 2006 the applicant sought a declaration that the respondent insurer was deemed to have accepted liability for its claim, under the relevant policy of builders' warranty insurance, because it had failed to make a decision within the prescribed 90 day period. A claim had been lodged with the respondent on or about 13 September 2005 in respect of works carried out by Yarraman Construction Group Pty Ltd ('the builder'), and a decision was made on 16 March 2006.
- 2 The applicant completed the 'Details of Claim' on the insurance claim form 'As attached in "amended points of claim" doc'. This refers to the amended Points of Claim, dated 8 June 2005, filed in an earlier proceeding (D795/04) where the applicant sought damages from Yarraman Construction Group Pty Ltd and National Stone Constructions Pty Ltd. Both companies have subsequently gone into liquidation. For the sake of completeness only I note that a claim was also made under the relevant policy of insurance in respect of works carried out by National Stone – this was lodged on 16 May 2006 and also refers to the Amended Points of Claim filed in D795/04 – this claim was denied by the respondent.
- 3 On 10 March 2006 the respondent wrote to the applicant advising that a number of items were to be rectified by the builder. A copy of its decision and the direction to the builder were sent by the respondent's solicitor to the applicant's solicitor under cover of a letter dated 16 March 2006. Three of the items for which liability was accepted are relevant, as is the direction in relation to each of them – details of the directions were set out in the letter to the Body Corporate dated 10 March 2006 under the heading: **'Items to be referred to builder for attention'** and repeated verbatim in the Schedule of Works sent to the builder:

Insurer's item no	Applicant's item no	Insurer's direction
6	F-Head flashing	Test all window penetrations for moisture ingress, carry out all necessary rectification, flashing and or sealant to ensure compliance with the Building Code of Australia section 2.2.2 repair and reinstate all subsequent damage as necessary.
12	L-Rainheads	Make good all penetration of external façade in particular corbels cut to facilitate the installation of rainheads and down pipes. Make good the wall finish to match existing surrounds, treat and seal to ensure building remains water proof.
14	N-Balcony tiling	Carry out destructive testing investigation to ascertain the cause of water ingress to units.

		Establishment of the source will determine the scope of rectification and reinstatement.
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On 21 December 2006 the respondent issued a revised decision in which, in addition to the three items referred to above, it also accepted liability for Item 4 – façade spalling. The respondent requested the applicant to obtain *‘two competitive quotations from the open market with respect to each of the [accepted] items’* and *‘If the quotations obtained reasonably reflect the accepted items my client agrees to pay the lesser of the two quotations’*.

- 4 The parties agreed to adjourn the hearing which was scheduled to commence on 29 January 2007. On 3 April 2007 the applicant’s solicitors wrote to the insurer’s solicitors advising:

Our clients have agreed to accept your client’s offer outlined in your fax of 21 December 2007. Our clients are currently obtaining two quotes for the items listed in your fax and we will forward them to you for consideration and payment as soon as possible.

- 5 They proposed that consent orders be filed whereby the proceeding would be struck out with no orders as to costs, and signed Minutes of Consent Orders were subsequently filed and the orders made on 10 April 2007.

THE APPLICATION FOR REINSTATEMENT

- 6 On 5 May 2008 the applicant’s solicitors wrote to the tribunal advising, after setting out the background whereby the consent orders were made:

Shortly thereafter the respondent resiled from its position wherein it admitted liability and revisited an earlier argument that had been dealt with early on in this proceeding...

We now request that this matter be reinstated as this order was made pursuant to an agreement by the defendant [the respondent insurer] to accept liability. To date we have not received any payment from them subject to the agreement, and they are now denying liability on the basis of the arguments which we have previously addressed.

- 7 On 10 June 2008, the date on which it was to be heard, the applicant’s solicitors advised that as the application for reinstatement had not been made in accordance with the ‘VCAT Practice Note’ (I believe this is a reference to PNDB1 (2007)) they were withdrawing the application. The hearing proceeded as a directions hearing and directions were made for the parties to file and serve Lists of Grounds and supporting affidavit material. These directions have been complied with, although, somewhat unusually, a large number of the documents on which the applicant relies are simply attached to the Applicant’s Grounds as a bundle of documents, rather than as exhibits to one of the affidavits filed in support of the application.
- 8 Mr McCullagh of Counsel appeared on behalf of the applicant, and Mr Waldren of Counsel appeared on behalf of the respondent.

Background to the application for reinstatement

- 9 In considering the application for reinstatement it is important to understand the background and context in which it is made.
- 10 The estimated cost of rectification of the four accepted items as set out in the Amended Points of Claim (which formed the basis of the claim under the policy) was \$39,498. The cost of rectification had been assessed by the respondent's assessor at \$37,650 but with the following qualification in relation to item 14:

Allow \$30,000. Subject to further investigation.

It is unclear whether the allowance of \$30,000 was for the rectification works, or the destructive testing or both.

- 11 In early 2007 the applicant obtained three quotations which were forwarded to the respondent's solicitors on 26 July 2007. The quotations were in the range of \$140,300 to \$144,900. On 30 July 2007 the respondent's solicitors requested a copy of the letter sent to the quoting builders noting that the scope of works was set out in its letters of 21 December 2006, and 10 March 2006 (the first decision letter).
- 12 On 4 October 2007 a copy of an affidavit by David Jellett, Body Corporate Chairperson, was provided to the respondent's solicitors. Mr Jellett deposed to having provided the quoting builders with a copy of the 'Body Corporate Services Report' dated March 2004. There is no explanation as to why this report, which did not form part of the claim under the policy, and which not brought to the respondent's attention until it was served with Mr Jellett's affidavit, was provided to the quoting builders.
- 13 Following receipt of this letter correspondence passed back and forth between the parties' solicitors. As noted above, the applicant applied for the proceeding to be reinstated on 5 May 2008 and directions for the hearing of the application were made on 10 June 2008. On 3 July 2008 the respondent's solicitors forwarded a detailed Scope of Works to the applicant's solicitors. This is identical to the Scope of Works/Direction to the builder dated 10 March 2006 except that it now includes the following scope for rectification of the façade spalling:

4	D-Façade spalling	Allow to break out and remove concrete spalled areas of the building façade, expose and treat corroded reinforcement making good façade repair with an approved purpose concrete repair product suitable for the application, leave façade surface smooth and finished to match existing surface.
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- 14 The applicant's solicitors responded on 7 July 2008, enclosing a fourth quotation - for \$143,300. On 10 July 2008 the respondent's solicitors responded by way of a three page letter setting out various concerns about

the material provided by the applicant to the quoting builders, and seeking itemised quotations so that the amount allowed for each item could be readily identified.

- 15 The applicant provided a further quotation, this time from Scotia Property Maintenance Pty Ltd, dated 7 July 2008. By letter dated 16 July 2008 Mr McLaughlin, on behalf of Scotia confirmed that its quotation:

‘does meet all the necessary works contained in the scope [as set out in the Scope of Works provided by the respondent on 10 July 2008]. It is assumed that Item 4, where the request states that the builder “carry out destructive investigation to ascertain the cause of water ingress” has in fact been carried out.

Our quote for this work is based on the assumption that the tiles and the window frames are the cause of the water ingress. (emphasis added)

- 16 Having filed the ‘applicant’s grounds’ under cover of a letter dated 10 July 2008, the applicant’s solicitors wrote to the tribunal on 5 August 2008 advising the applicant was seeking to amend its application to ‘*seek in the alternative a determination by the VCAT of the cost of rectification works to the Applicant’s property*’. This application had been foreshadowed in correspondence to the applicant’s solicitor dated 28 July 2008.
- 17 On 30 July 2008 the respondent’s solicitors wrote to the applicant’s solicitors advising it considered the application for reinstatement to be misconceived and premature, and that once a decision on quantum was made by the respondent, the applicant could apply for a review of that decision under s61 of the *Domestic Building Contracts Act 1995*. It invited the applicant to withdraw the application for reinstatement.

Discussion

- 18 As raised during the hearing with counsel for the applicant it is difficult to conceive of there being any utility in reinstating this proceeding, even if I were persuaded there were sufficient grounds for doing so. There is no evidence that the respondent is in breach of the ‘settlement’. It accepted liability and consent orders were made whereby the proceeding was ‘struck out’. It requested the applicant to provide it with two competitive quotations, and agreed to pay the lesser of the two with the important qualification ‘*If the quotations obtained reasonably reflect the accepted items*’. Most of the correspondence between the parties’ solicitors has been concerned with whether the quotations satisfy that qualification.
- 19 It seems that the applicant has not understood the import of the qualification and believed that the lower quote would be paid irrespective of the scope of works quoted for. Perhaps the applicant and/or its solicitors are not familiar with the two step process whereby an insurer first makes a decision on liability and then makes a decision on quantum. I think it is unfortunate that the respondent did not make a decision on quantum when presented

with the quotations. There was no impediment to a decision being made, at least in relation to three of the four items. Its own assessor had estimated the cost of the works at \$37,650 with an allowance of \$30,000 for item 14 'subject to further investigation'. It seems that a decision on quantum for Item 14 cannot be made until those investigative works are completed, although this does not seem to have been traversed in any of the correspondence. Much time and expense could have been avoided, for both parties. I understand that the respondent has recently arranged for its inspector to return to site in contemplation of making a decision of quantum.

- 20 Counsel indicated that the applicant is concerned about the possible cost of the recommended destructive testing for Item 14 (relating to balcony tiling). It seems to me that this is something which should be discussed with the respondent. As noted above, it is not clear to me whether the \$30,000 recommended allowance for Item 14 is for the carrying out of rectification works, for the destructive testing or for both.
- 21 In response to my enquiry during the hearing counsel for the applicant indicated that it was not intended that the 'amended application' be treated as an application under s62 of the DBCA Act which allows the tribunal to make a decision '*if the insurer fails or refuses to decide the claim within a reasonable time of the claim being made and the building owner applies to the Tribunal to decide the claim*'.
- 22 Accordingly I will dismiss the application for reinstatement and reserve the question of costs, although I draw the parties' attention to the provisions of s109 of the VCAT Act which enables the tribunal to make an order for the payment of costs '*in a proceeding*'.

DEPUTY PRESIDENT C. AIRD