

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT Reference: D809/2005

CATCHWORDS

Review of Insurer's decision – Terms of Settlement – obligations under Terms of Settlement

APPLICANT: N.Z. Constructions Pty Ltd

RESPONDENT: Vero Insurance Limited

WHERE HELD: Melbourne

BEFORE: Deputy President C. Aird

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 19 December 2005

DATE OF ORDER: 25 January 2006

[2006] VCAT 7

ORDERS

1. The application is dismissed.
2. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant: Mr Norman Zisin, Director

For the Respondent: Mr M Farrelly, Solicitor

REASONS

1. By application dated 30 October 2005 the Applicant ('the builder') seeks to appeal a decision of the Respondent ("the insurer"). Although the application indicates that the decision, the subject of the appeal, is dated 30 September 2004, it became apparent, during the hearing, that the builder is seeking orders that it has complied with the Terms of Settlement dated 4 April 2005, it has no further obligation in relation to Items 5 and 10 of the insurer's decision of 30 September 2004 and it is entitled to payment of \$1,250.00 under the Terms of Settlement. Mr Zisin, director, appeared on behalf of the builder, and Mr Farrelly, solicitor, appeared on behalf of the insurer. Mr Hall, carpenter, and Mr Richardson, plumber, were called to give evidence by the builder although neither of them carried out any of the rectification works.

Background

2. The Builder was engaged in July 2001 to carry out rectification and completion works after the original builder went into liquidation. At that time the house was at lock up. The parties agree the particle board flooring had been exposed to the elements for a considerable period of time – at least six months.
3. The owners lodged a claim with the insurer on 5 August 2004. On 30 September 2004 the insurer accepted liability in respect of, and directed the builder to carry out rectification works to, items numbered 1, 2, 3, 4, 5, 6 and 10. Items 7, 8 and 9 of the owners' claim were denied. On 4 October 2004 the builder sought a review of the insurer's decision in respects of items 4, 5 and 10. Item 4 relates to bricks cracked in piers, item 5 to an enclosed leaking downpipe in the brick pier at the back of the house and item 10 relates to a squeaking floor in the second bedroom. The insurer maintained its decision and confirmed its direction to the builder to carry out rectification work. In December 2004 the builder issued an application in this Tribunal appealing the

insurer's decision in respect of items 4, 5 and 10 (proceeding no. D818/2004). On 4 April 2005 the parties entered into Terms of Settlement with a denial of liability. It is helpful to set out the following clauses from the Terms of Settlement.

...

3. *The Builder agrees that the Builder will, within a reasonable time period as to be agreed between the Builder and the Owners, attend the property for the purpose of completing all of the rectification works in respect of the "items accepted" set out in the decision on the insurance claim ("the rectification works").*
4. *The Insurer and the Builder hereby acknowledge that the Builder's agreement to carry out the rectification works as set out in paragraph 3 above does not constitute any admission by the Builder as to his liability in law in respect of items number 4, 5 and 10 of the "items accepted" in the decision of the insurance claim. The Builder's agreement to carry out the rectification works in respect of the said items numbered 4, 5 and 10 is acknowledged as being made in order to avoid the time and expense of further litigation.*
5. *Upon the Insurer's receipt of notification from the Owners that the rectification works have been satisfactorily completed, the Insurer shall within 20 days of receipt of such notification make payment to the Builder in the sum of \$1,250.00.*
6. *It is hereby acknowledged by the Insurer and the Builder that the Insurer's agreement to make the payment referred to in paragraph 5 above does not constitute any admission of liability in law by the Insurer in respect of the claims made by the Builder in the VCAT proceeding. It is acknowledged that agreement to make such payment has been made in the order to avoid time and expense of further litigation.*
7. *In the event the Builder fails to satisfactorily complete the rectification works within a reasonable time period the Insurer shall be entitled to appoint an alternative builder to complete such works and to take legal proceedings against the builder in any competent Court or tribunal and obtain an order/judgement in such proceedings against the Builder for the sum of the costs and expenses incurred by the Insurer in relation to the completion of rectification works in the bringing of the said legal proceedings.*

4. On 16 May 2005 the owners wrote to the insurer advising that:

'The front peer (sic) have been done very neatly, item 5, the back peer (sic) with the drain pipe leaking had the bricks replaced but I am sure whether the leak in pipe was actually sealed.

Item 10 has not been fixed at all, this is a very inconvenient situation as the

room, cleared for access, is my son's who is studying Year 12 ...'

5. The insurer wrote to the builder on 14 September 2005 confirming the agreement as set out in the Terms of Settlement and advising that the owners had alleged the works had not been 'satisfactorily carried out'. Reference was made to an inspection carried out on 19 July 2005, which was attended by the builder, which the insurer advised confirmed that items 5 and 10 'had not been satisfactorily completed in that:

Item 5 – The moisture meter check showed high moisture readings indicating water penetration/leak. No water leak can be observed because the downpipe and stormwater pipe and fittings are concealed.

Item 10 – Inspection revealed that the floor in the first floor bedroom 2 is still squeaking. There is non-adhesion/fixing of the structural plywood sheet flooring to the originally installed particle board flooring.

You have informed us that you are prepared to attend to item 5 ('item 1 the downpipe) although you have not yet done so. You have also advised us that you are unwilling to carry out any further works in respect of the squeaking floor (item 10).

Your refusal to satisfactorily complete those works in a timely manner and in particular your refusal to carry out works in respect of squeaking floor, constitutes a breach of your obligations under the Terms of Settlement.

You are hereby advised that if you do not attend to the satisfactory completion of items 5 and 10 (scope attached) within 21 days of the date of this letter we shall exercise our rights pursuant to clause 7 in the Terms of Settlement and in so doing, we shall set off the sum of \$1,250.00 against the cost we incur.

6. On 12 October 2005 the insurer again wrote to the builder advising of its intention to appoint an alternative builder to rectify the works but allowing the builder '10 days from today's date to provide to us the "evidence" referred to in your letter to us dated 19 September 2005'. I have not been provided with a copy of the letter of 19 September 2005.
7. On 27 October 2005 the builder wrote to the insurer advising, omitting the formal parts:

'I have received your letter dated 12 October 2005.

I have endeavoured to make contact by phone, as per your invitation and have left two messages which have not been responded to.

Consequently, after seeking both professional and legal advice and based upon the evidence I have in my possession, I have decided to apply to VCAT to test the voracity (sic) of your findings and subsequent rulings. This should be taken into consideration should you wish to appoint an alternative builder to rectify works. I shall also pursue the sum of \$1,250.00 as per our agreement.

Item 5 – cracked brickwork and leaking downpipe

8. The builder alleges that all necessary works in relation to item 5 have been completed. Mr Zisin gave evidence that when the rectification works to the brickwork were carried out he did not observe any leaking water and therefore no rectification works to the downpipe were undertaken. Mr Ian Lennox gave expert evidence on behalf of the insurer. He said that when he inspected the works in July 2005 he obtained what he described as an extreme moisture meter reading on the brick pier at the point where the downpipe penetrates. He said that other areas on the brick pier were relatively dry indicating the presence of a leaking downpipe and confirmed that the absence of running water was not evidence that the downpipe was not leaking. He conceded that high moisture readings were evident in other parts of the house, but suggested this was because such readings were taken on walls where there were openings and brick window sills.

9. Although the evidence as to whether the downpipe is leaking may be inconclusive, the builder agreed to attend to and rectify the leaking downpipe when it entered into the Terms of Settlement with the insurer. The insurer's direction of 30 September 2004 in relation to item 5 is quite clear:

5. Repair and make good water leakage and cracked brickwork/concrete coping to rear verandah post and column.

Item 10 – squeaking floor

10. The Builder's initial application in D818/2004 which included an appeal of the insurer's decision of 30 September 2004 insofar as it related to item 10, was on

the basis that any squeaking in the floor was due to the works carried out by the previous builder. Mr Zisin alleges that the insurer has not carried out sufficient or adequate testing or investigation to determine the cause of the squeaking and that may be so. Whether or not the owners' claim in respect of the squeaking floor should have been accepted and the builder directed to rectify is immaterial. The builder entered into Terms of Settlement with the insurer on 4 April 2005 whereby it agreed to ... *attend the property for the purpose of completing all of the rectification works in respect of the items accepted ... (which included item 10)*. Mr Zisin said that he had returned to site and carried out those works he considered necessary to rectify any problem that he believed could have been attributable to the builder's workmanship. He confirmed that plywood flooring had been laid over the existing flooring when the builder's works were carried out in 2001. Mr Lennox speculated that the cause of the squeaking floor was lack of adhesion. Mr Zisin said that when he returned to carry out works this year he had lifted the carpet and inserted a number of additional screws and nails but that this had not solved the problem.

11. Mr Zisin did not seem to understand and appreciate that when it entered into the Terms of Settlement the builder agreed to carry out the rectification works as set out in the insurer's direction of 30 September 2004, and that it was therefore obliged to do so. There is nothing in the Terms of Settlement to indicate that the builder's obligations only relate to further securing of the plywood flooring to the original flooring. By agreeing to attend to item 10 the builder agreed to carry out whatever works were necessary to rectify the squeaking, whether or not the squeaking was attributable to its work. Similarly, in agreeing to rectify Item 5 the builder agreed to carry out whatever works were necessary to rectify the leak. Although the Terms of Settlement were entered into with a denial of liability by both parties this does not enable the builder to resile from the agreement to rectify.

Conclusion

12. I therefore find that the builder is in default of its obligations under the Terms of Settlement. The insurer is entitled to make alternative arrangements for the rectification of items 5 and 10, and to seek recovery of the cost of such works from the builder in accordance with clause 7 of the Terms of Settlement dated 4 April 2005. The sum of \$1,250.00 should be offset against the cost of those works.

13. I will reserve the question of costs but note this is a small claim proceeding, and I draw the parties' attention to the provisions of s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C. AIRD