VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D161/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Reinstatement, failed builder, insurer, release, owner's right of action against insurer.

APPLICANT	Caroline Mary O'Neill
FIRST RESPONDENT	Steer Developments Pty Ltd (ACN 081 590 598)
SECOND RESPONDENT	Victorian Managed Insurance Authority
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young
HEARING TYPE	Reinstatement Hearing
DATE OF HEARING	9 September 2008, 21 October 2008 and 5 November 2008
DATE OF ORDER	12 January 2010
CITATION	O'Neill v Steer Developments Pty Ltd & Anor (Domestic Building) [2010] VCAT 21

ORDERS

1 This proceeding is reinstated as of this day.

2 Any further submissions in regard to this application and the future course of this proceeding will be dealt with at a directions hearing set down for 2:15 p.m. on 16 February 2010 at 55 King Street Melbourne before Senior Member Young.

3 Costs reserved.

SENIOR MEMBER R. YOUNG

APPEARANCES:

For the Applicant	Mr S. Smith of Counsel
For the First Respondent	No appearance: in liquidation
For the Second Respondent	Mr J. Collier, Solicitor

REASONS

1 This is an application by the Applicant for reinstatement of this proceeding as a result of the First Respondent Builder's failure to satisfactorily carry out the rectification works set out in the Terms of Settlement entered into by the Builder with the Applicant Owner ("the Owner") and the Second Respondent Domestic Building Insurer ("the Insurer") on 7 February 2008. By consent orders of 29 January 2008 the proceeding was struck out with a right to apply for reinstatement and there was no orders as to costs. The Builder was wound up by order of the Federal Court on 14 July 2008 without having completed the scope of the rectification works agreed between the parties under the terms of settlement.

2 Now that the Owner can no longer proceed against the Builder, she seeks to reinstate the proceeding and amend her application to plead a right of action directly against the Insurer. By her Amended Points of Claim of 22 September 2008 the Applicant seeks a remedy against the Insurer under a number of headings. The Owner claims under sub paragraph 8(c) of the Amended Points of Claim that if the Builder became insolvent the Insurer would appoint an alternative builder or pay the Owner a reasonable cost to satisfactorily complete the agreed rectification works, and at sub paragraph 8(f) that the Insurer shall act towards the Insured Owner with the utmost good faith. At paragraph 9, the Owner pleads that the term at sub-paragraph 8(c) was for the benefit of the Insurer. She pleads at sub paragraph 12(c) that the Insurer drew the written terms; at sub paragraph 12(b), that the Insurer was liable to the full extent of the owner's claim if in circumstances where the Builder became insolvent; and by sub-clause 12(f) the Insurer failed to warn the Owner that under the express works of the release at paragraph 2 of the Terms of Settlement if the Builder became insolvent then she would have no claim upon the Insurer. The Owner claimed at paragraph 14 that the Insurer's conduct was misleading and deceptive in accordance with the *Fair Trading Act* 1999; and, at paragraph 16, that the Insurer was estopped from denying that it was liable to appoint an alternative builder or pay the reasonable cost of the rectification of the agreed defects. She also claimed at paragraph 19 that the Insurer's conduct displayed a contumelious disregard to her rights and entitlements and thereby she was entitled to an award of exemplary damages.

3 The basis of the Insurer's opposition to the Owner's reinstatement application was that, firstly, the release under the Terms of Settlement of 7 February 2008 was comprehensive in releasing the Insurer from any further proceedings against it by the Owner; and, secondly, such release was operative immediately. Thus, upon the signature of the Terms of Settlement the Insurer maintains it was immediately released from indemnifying the Owner against failure of the Builder to satisfactorily complete the agreed rectification works under the Terms of Settlement. The Insurer submitted that none of the claims of the Applicant as set out in the Points of Claim of 22 September 2008 could be made out and even if

they could there was insufficient evidence as set out in the affidavits of the Applicant's Solicitor, Mr W. de Graaf of 28 July 2008 and 22 September 2008 to establish that such claims were tenable or arguable.

4 The Insurer submitted that in assessing a reinstatement application that this is akin to a joinder application under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 and that the appropriate test is whether on the pleadings and the facts set out in the accompanying affidavits the claim made on the party sought to be joined is open and arguable; see *Zervos v Perpetual Nominees Limited* [2005] VSC 380 per Cummins J. at paragraph11. The evidence for the Insurer is set out in the affidavit of Mr M. Czapnik sworn 17 October 2008.

5 The Insurer submitted that the Owner's Points of Claim are neither open or arguable on the grounds that:-

(a) in relation to the claims of breaches of the Terms of Settlement in relation to the appointment of an alternative builder or payment of a reasonable cost of rectification these terms must be implied and applying the five tests set out in *BP Refinery (Western Port) Pty Ltd* v *Shire of Hastings* (1997) 16 ALR 363 at 375 then none of the five tests there set out, which are cumulative, were met, indicating that the implication of such terms cannot be made;

(b) in relation to the allegation that the Insurer must act with utmost faith it submits that this must be under s13 of the *Insurance Contracts Act* 1984 (Cth); however, the Insurer was not a party to the actual insurance contract; therefore, it is not contractually bound to any implied duty of good faith; and, secondly, the requirement of utmost good faith does not extend to the conduct of litigation, see *Imaging Applications Pty Ltd & Anor v Vero Insurance Limited* & Ors [2008] VSC 178 at paragraph 55;

(c) the conduct of the VMIA was not misleading and deceptive; there are no factual allegations in the affidavits of her Solicitor to support an allegation that the Insurer warranted or represented to the Applicant that the Builder would satisfactorily perform the agreed rectification works;

(d) the Insurer submitted that even allowing for some paragraphs 12(b), if the allegations in sub paragraphs 12(c) and 12(e) of the Points of Claim of 22 September 2009 could be made out they do not factually establish an estoppel, a claim of unconscionability or of misleading and deceptive conduct.

6 During the hearing the Insurer made a number of interlocutory applications. At the hearing of 9 September 2008 the Insurer objected to a number of statements in the Applicant's affidavits. In the affidavit of Mr de Graaf of 28 July 2008 it objected to the third sentence in paragraph 6 which states:-

> *"Immediately prior to the terms of settlement both Respondents were jointly and severally liable to the full extent of the Applicant's claim".*

The Insurer submitted that this sentence should be struck out as it was a legal conclusion and not evidence.

7 The Insurer also objected to the first sentence of paragraph 7 of the affidavit of 9 September 2008 which states:-

> *"It was clear to all parties that the Second Respondent would remain "apart from payment of costs" equally responsible to the Applicant until the rectification works as identified in the Terms of Settlement were complied with".*

The Insurer submitted that this sentence should be struck out on the basis that it deposed as to the belief of the parties to the proceeding and this was not permissible.

8 Lastly, the Insurer objected to the second sentence of paragraph 7 of his affidavit of 28 July 2008, which states:-

> *"I am informed by the Applicant and verily believe that she entered into the Terms of Settlement in reliance upon the Second Respondent ensuring the First Respondent would carry out the rectification works."*

The Insurer submits that this statement was heresay and as such it should be struck out of the affidavit.

9 The Applicant submitted that in relation to paragraph 7(a) that it was irrelevant whether it was a question of law. In my opinion this was a statement of a legal conclusion but the statement was necessary to ground a cause of action against the Insurer and I will allow it. The Insurer is an indemnifier of the Builder's work and if the Builder completely satisfied the requirements for producing a satisfactory and competent result for the Owner then the Insurer would not be liable.

10 In relation to the first sentence complained of in paragraph 7 of the Points of Claim I accept that this affidavit was made from the deponent's own personal knowledge save where stated otherwise to be information and belief. As such I consider that it is satisfactory. In relation to the last sentence objected to by the Insurer I accept that it is heresay but I am not bound by the rules of evidence and I will allow it, however, the issue becomes one of weight.

11 In considering the parties' submissions I should consider whether on all of the evidence and the surrounding circumstances of the application one of the submissions put by the Owner is arguable. I consider that the Owner put a number of submissions that are arguable.

12 Firstly, dealing with the Owner's submission that there was an implied term that the Insurer would indemnify the Owner against the failure of the Builder to satisfactorily carry out the rectification works I cannot accept that such an implied term is arguable in the face of the wording of the

release set out in the Terms of Settlement. On the basis of the test set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1997) 180 CLR 266 at 283 the terms sought by the Owner cannot be made out as it would be contradictory to the last test of the five in the *BP Refinery* case that the implied term could not contradict any of the express terms of the contract; in this case the terms of the release.

13 In relation to the Owner's claim that the Insurer's conduct was misleading and deceptive, I consider this claim is arguable in relation to the manner in which the Insurer drew up the terms of the release. Where it is likely that a party understands that the other party was substantially at risk of being left without a remedy due to the manner in which the release was drawn up then that party's failure to inform the other party at the time it draws up the release could mislead and deceive that party. If the Insurer when drawing the release had sufficiently informed the Owner of the operation of the release then it is highly likely the Owner would not have agreed to settle the proceedings on such terms. Misleading and deceptive conduct was found in a somewhat similar situation in *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26, where the Court of Appeal held that a supplier of equipment who failed to advise the purchaser of a risk in relation to the functionality of the equipment to be supplied, of which the supplier was aware; then, that supplier had engaged in misleading and deceptive conduct. I consider it is arguable that the Insurer's conduct in this case may fall under the same sort of behaviour as arose in *Environmental Systems*.

14 It also appears to me to be arguable whether the Insurer's failure to advise the Owner of the immediate operation of the release of the Insurer from the proceeding or any future proceedings was a representation, albeit by silence, that caused the Owner to change her position by signing the Terms of Settlement without a full understanding of the operation of the release.

15 It was not raised by the Owner but I also consider that there may also be an arguable proposition that as the Builder's rectification work would be domestic building work under the *Domestic Building Contracts Act* 1995; therefore, the Terms of Settlement, which is in effect a contract to compromise the proceeding, is itself a domestic building contract. Therefore, I consider that where an insurer has indemnified the Builder's work in accordance with the HIH rescue legislation, it may be possible to put an argument that the interpretation of the release as put forward by the Insurer breaches the prohibition against contracting out of *Domestic Building Contracts Act* 1995 via s132 of that Act. Sub section 132(1)(b) states that:-

> "*Any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void*".

16 Therefore, I consider that the Owner has a number of arguable claims against the Insurer for indemnity and I will reinstate the matter.

17 I will set the matter down for a one hour directions hearing whereby I will hear any further applications in relation to this application.

18 This case although small contained a large number of complex matters for its size. These matters, which I found necessary to research and analyse carefully, took me a great deal of time. Further,under the pressure of work at the Tribunal, the completion of this determination was delayed too long, and, I apologise to the parties for the delay.

SENIOR MEMBER R. YOUNG