VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D288/2006

CATCHWORDS

Application to set aside Terms of Settlement, illegal rectification costs specified in terms, duress, unfair terms, illegal terms, ignorance of rights and obligations

APPLICANT	Pham-Nguyen, Quoc-Anh: Pham-Nguyen, Viet-Anh: Pham, Van Luu: Nguyen, Thanh Thi (trading as P.N. & B. Design & Construction)
FIRST RESPONDENT	Vero Insurance Limited
SECOND RESPONDENT	Ms Huynh Anh
WHERE HELD	Melbourne
BEFORE	Senior Member R.J. Young
HEARING TYPE	Hearing
DATE OF HEARING	4 August 2006
DATE OF REASONS	31 January 2007
CITATION	P N and B Design & Construction v Vero Insurance Ltd (Domestic Building) [2007] VCAT 158

REASONS

1 This application was brought by the applicant builders (*'builders'*), who seek to impeach certain terms and, via this avenue, the whole of the Terms of Settlement (*'the terms'*) for a previous application in the Tribunal (File No. D900/2005), between the same parties. The terms were entered into at an on site mediation on 30 March 2006. The original application was lodged alleging defective work to a dwelling built by the builder for the second respondent owner (*'the owner'*) at 1152 Winfield Road, North Balwyn, 3104. The first respondent was the domestic building insurer, Vero Insurance (*'the insurer'*). Under the terms the parties agreed that the

builder would return to the site and carry out rectification works as well as making monetary compensation to the owner in the sum of $4,500.00. The builder commenced rectification works starting with Item 20, the rectification to the shower base to ensure that it was structurally sound and did not leak. After a week of working on this item and a small number of the other works agreed to be rectified under the terms, the builders abruptly left the site and brought this proceeding.

2 In this application the builders' claim that the terms of settlement are:

(i) illegal, in that Item 20 sets out a method of rectification of the shower base that is not a prescribed method of floor substructure construction under the Building Code of Australia ('*BCA'*);

(ii) outside the scope of the original building contract in that some items in the scope of the rectification works set out in the terms are not in the scope of the contractual works (however this was not explained further in evidence and I will not further address it);

(iii) void, as the builders signed the terms under undue pressure in that firstly, they were required to negotiate from 10 o'clock until 3.30 pm and were exhausted by the time that the terms of settlement were signed; and, secondly, in relation to undue pressure the builders were left for one and a half hours in the front garden of the dwelling on a very cold day;

(iv) void, in that certain terms are unfair, if not illegal, in that firstly, there are clauses that only give the owner and the insurer the right to reinstate the proceeding; as such these terms are inherently unfair as they should also give the applicants a right to reinstate- Clause 3: where the owner may reinstate on the builders defaulting on payment of the monetary compensation; Clause 63: where the insurer may reinstate if the builders fail to execute the works in accordance with its directions; and, finally, Clause 9: where rights of reinstatement are given to the owner and builders only.

3 The builders also maintain that Clause 5 is unfair in that it gives the insurer a right to direct how the builders are to produce satisfactory rectification work and the builders say that this is in contravention of Clause 27 of the major domestic building contract under which the house was constructed which states that no agents of the owner can direct the builder.

4 The builders submit that certain terms are also, either unfair or illegal, (I cannot quite understand which) on the basis that they can only be exercised by the Tribunal; the applicants referred specifically to Section 109 of the *Victorian Civil and Administrative Tribunal Act* in relation to costs.

5 Finally, the builders submit they were treated unfairly in that at the time of signing the terms the builders were not given the time to refer to vital documents to check their rights or obligations; specifically these documents were the *Domestic Building Contracts Act, Victorian Civil and Administrative Tribunal Act, Building Act, Building Code of Australia* and the signed new home contract.

6 In addressing these allegations of the builders we should first note that the law holds parties to their bargains. Where people by mutual agreement undertake commercial obligations ie. they create a contract, the parties are held to perform those obligations. If they fail it is a breach of the contract for which they can be brought to account before the courts and this Tribunal will, if a breach of their obligations are established, adjust the flow of money under the contract to put the innocent party in the same position, as far as money can, that it would have been if the contract had been performed: *Robinson v Harmon* (1848) 1 Ex 850. This applies equally to contracts which are entered into to settle proceedings, in *Compromise of Liability and Lawyers Liability*, a recent paper on settlement the second sentence on page 1 states:

> *'Public policy favouring settlement is one advocated by the courts with absolute unanimity. Judges construe statutory ambiguity so as to favour the result which promotes settlements. The law wants to see settlements.'*

7 I accept that the courts and this Tribunal are in favour of and, where possible within the rules of procedure for the conducting an impartial hearing of the proceeding, promote settlement between the parties. That being said contracts of compromise can obviously be attacked where a party can establish undue influences or other defences.

8 Undue influence arises where a party enters freely into a contract but by reason of either the relationship between the parties or circumstances where the other party puts the party with the disability in a situation where the contract cannot be allowed to stand because of a lack of freedom of judgment on the part of the party suffering from the disability: *The Law of Contract,* Grieg & Davis, page 187.

9 In addressing the applicants' allegations I will deal firstly with the allegation of undue influence, which is a recognised head of impeachment of a compromise. The *Law and Practice of Compromise* by Fosket QC, 6 Ed, 2005 at paragraph 4.52 states:

> *'Duress and Undue Influence: General.*
> *Certain forms of duress upon a contracting party have always operated to vitiate the agreement at common law. Each case depends on its own particular facts whether the matter be approached on the basis of evidence in a particular factual situation or presumption of undue influence in certain circumstances the court will intervene only if an unfair advantage has been taken of one party by another in the sense of domination or victimisation leading to a manifestly disadvantaged transaction. The concept of inequality of bargaining power is firmly rejected.'*

10 What is the evidence that has been presented by the builders of undue influence. That evidence is twofold, firstly, that the builders were required to negotiate from 10 o'clock in the morning until 3.30 pm in the afternoon and they were exhausted by the time the terms were signed. If the builders were so exhausted then it was in their own hands to cease the negotiations and retire. I can say from my own personal experience that negotiations in

mediations and compulsory conferences can continue well into the night. Long negotiations during mediations are common in the Domestic Building List. I find no undue influence or pressure in such a length of negotiation.

11 Secondly, the builders say were left outside at the subject premises for one and a half hours on a very cold day. I accept the evidence of Mr Huynh for the owner, which was not contradicted by the builders, that both parties were sent out of the room where the insurer and the mediator were discussing how to formulate a settlement where the builders could return to the site and carry out rectification works. He said that both parties would be requested at different stages to leave the room and that required them going outside. This evidence was not challenged by the builders, other than to allege they were left out in the cold for too long. I don't consider this would constitute undue influence. This allegation is not made out.

12 Further, even if undue influence could be made out, I do not see that the terms entered into by the parties resulted in a situation that was manifestly disadvantageous to the builders. On the evidence that I have been given as to the way that the shower basin and other works were constructed, there were defects in the work which were acknowledged by the builders and they were given an opportunity to return to the site and rectify those. This is the most advantageous position for the builders and the way that they can minimise their cost of rectification. No evidence was presented by the builders that the terms were manifestly disadvantageous to them and I can see none in the evidence that has been put before me. Therefore, the allegation of undue influences must fail. I can understand that the cost of rectification and work involved was greater than the builders expected, particularly the rectification of the shower base; but this is not a valid reason to impugn the terms.

13 As to the allegations of unfair terms being the default clauses, Clauses 3 and 6, allowing the reinstatement of the proceeding only by owner and insurer, the only executory obligations in the terms are placed on the

builders, who were required to return to the site and carrying out an agreed list of rectification works and to accept directions as to how to carry out such satisfactory rectification works from the insurer and also to pay the owners $4,500.00 by 6 April 2006. There is no need to give a right of reinstatement of a proceeding following terms of settlement to a party who is not entitled to any specific benefit under the terms of the compromise. The right of reinstatement is given so that that party entitled to the performance of an obligation can enforce performance of that obligation if it is not forthcoming. Secondly, such default clauses are always included in terms of settlement where there are executory obligations to be performed, otherwise a party that was required to perform obligations would just walk away and the innocent party would be left with no recourse. In relation to Clause 9, giving only rights of reinstatement to the owners and the insurer, I consider such a clause normal taking into account the two default clauses I have discussed above. This complaint is not made out.

14 Considering the effect and impact of Clause 5, where the insurer has a right to direct the builders as to satisfactory rectification works, I consider this term was freely entered into by the builders and they cannot now recant. I don't consider that this term is unfair. I consider the insurer, who is indemnifying the builders' rectification work to the owner, has an entitlement under its indemnity contract with the builder to see that such rectification work is satisfactorily carried out and to issue instructions where it considers it necessary to ensure the rectification work is satisfactory. Further, I consider such a term protects the builders, if they have carried out rectification work at the direction of the insurer then, *prima facie,* it seems to me such work must be regarded as satisfactory work; and, thereby, the applicants satisfy their obligation under the terms.

15 I dismiss the builders' submission that the insurer is the agent of the owner. The insurer gives a statutory indemnity to the owner that the builders' work will be satisfactory and under that indemnity the builders agree to accept the directions of the insurer, the insurer is not the agent of the owner under

the domestic building contract between the owner and the builder. Further, under the terms the builders agreed to accept the insurer's directions and they are also bound by that term.

16 In relation to items that were not within the scope of the contract of the building works I can't take this allegation any further; other than to say that, parties to a contract can agree to their own terms provided they are not illegal and the subject matter is real. A contract of settlement is not limited to dealing only with those works that are within the scope of the contract works under the domestic building contract; the parties are free to make their own bargain.

17 In regard to Item 20, the basis of the builders' claim is that the requirement to carry out this item is illegal on two grounds; firstly, that the method of rectification of the shower base proposed by the insurer, and as described in the terms, does not comply with either of the two prescribed methods of shower base construction described in the BCA at Figure 3.8. Secondly, that the method requires the notching of a load bearing member being a first floor joist and there is no assurance that such joist will now have structural integrity to carry the loads imposed upon it. Therefore, submit the builders, the rectification requires illegal work. Mr Nguyen gave evidence to this effect for the builders. Mr McNees, building consultant, gave evidence for the insurer that the approved methods of construction set out in the BCA did not mean you couldn't notch a joist, he considered that such notching would be satisfactory in this case as the span of the subject joist was much less than the maximum span of the same size joist elsewhere in the first floor; however, he acknowledged that it needed a structural engineer's opinion to be sure. Mr McNees is not a qualified engineer.

18 In relation to the methods of shower base construction described by Mr. P. Nguyen as 'prescribed', this is not correct; the methods depicted in Fig. 3.8 of the BCA are deemed to comply; however, another method can be used provided it has been designed and approved by a qualified structural

engineer or it has been approved by the Building Practitioner's Board. Mr McNees knew that the method of rectification described in detail at Item 20 was approved by the Building Practitioner's Board and that was the reason that he had written it in the terms. I consider that the builders cannot make out its claim that Item 20 is illegal.

19 However, the builder's claim involving Item 20 becomes irrelevant. Clause 5 of the terms of settlement, allowing the insurer to direct the builders to produce satisfactory rectification works, I have found, is a proper and appropriate term. By its letter to the builders of 30 April 2006 the insurer directed the builders to obtain an engineer's opinion as to the structural integrity of the notched first floor joist. In the face of this direction I do not see how the builders can challenge the requirement to rectify the shower base as per the terms.

20 Mr Nguyen produced Figure 3.8 from the BCA and stated that the figure showed two allowable methods of construction floors in shower base areas. He referred to the top diagram in this figure with structural flooring underneath the shower base. In the method of rectification directed by the insurer the structural flooring would have to be matched to properly refit the shower base and this, Mr Nguyen contended, could make the structural flooring weak and thereby unsound. Mr Nguyen said the structural flooring in the diagram was not shown matched, ie. with a gradient on it; therefore, it was outside the prescribed method of installation allowed by the BCA. Mr Nguyen agreed with the submission I put to him that if a qualified structural engineer's opinion was obtained that approved that method of construction then the method would be permitted but he observed that no such opinion had been obtained. He agreed that the insurer had directed the builders to obtain an engineering opinion of the supporting structure of the shower base if they were concerned as to its structural adequacy, see the insurer's solicitor's letter to the builders of 13 April 2006. He acknowledged that the letter had informed him he would be required to carry out the works necessary to ensure the floor was structurally adequate.

21 In the face of this and the insurers right to specify what is a satisfactory method of rectification under Clause 5 of the terms, I do not see how the builders can challenge the requirement to rectify the shower base as per the terms even with expert advice, the are bound by the terms to rectify in accordance with the instructions of the insurer where these are issued. Therefore, I don't consider that the builders can maintain its application against Item 20 in relation to the rectification of the shower base.

22 As to the builders' claim that they were not given sufficient time to refer to vital documents prior to signing to check their rights and obligations I reject this submission on a number of grounds. First, parties are responsible for preparing their own cases, and this must apply equally to parties representing themselves; therefore I cannot see how they can mediate and negotiate with any confidence that they can protect their own interests unless they know their rights and obligations before entering into the mediation process. Second, the builders did not refer to any specific evidence that established their ignorance of their rights and obligations or how such ignorance resulted in their suffering a detriment under the terms. Third, parties are responsible for running their own cases and if they were concerned at their ignorance as to their rights and obligations once there was general agreement as to the terms, they could have informed the mediator of their specific concerns and asked that the mediation be adjourned for a short period so they could check the relevant statutes and documents and satisfied their concerns. This happens in mediation and I have not known a mediator to refuse to allow this to happen.

23 It is incumbent on a party to run its own case; it cannot enter a contract such as the terms and then seek to have it overturned on the grounds of ignorance. If this submission was allowed parties upon pleading ignorance could strike down any contract. This would strike at the heart of the legal principles that parties should be held to their bargain and that there must be an end to litigation. It would lead to a significant increase in litigation which is not to be encouraged. This submission fails.

24 I consider the terms must stand and the builders' application for the orders sought is dismissed. I am strengthened in this decision in that the builders returned to the site as required by the terms and started to rectify the shower base, the builders worked there for approximately a week. Abruptly the builders abandoned the rectification works on the site and made this application of 3 May 2006 to overturn the terms of settlement; which is why we are here today. From this pattern of behaviour I don't consider that the builder's primary concern is the structural adequacy of the shower base or the unfairness of the terms. Rather, taking an overview of the builders' actions in this proceeding and the submissions it has put forward, I consider that an inference can be drawn that the builders realising the amount of work necessary to satisfactorily rectify the shower base; and, the predominant purpose of the application was to have the terms rescinded so that they could renegotiate the rectification works they would be required to carry out under any new terms.

25 The insurer made application for its costs on the basis that when considering the relative strengths of the parties' cases it was obvious that the builders' claim had no tenable basis in fact or law; no facts were put to the Tribunal that assisted in establishing the claims of the builders. The highest that the builders' evidentiary basis for his claims was the diagram from the BCA. However, the builders never answered the insurer's rebuttal that the diagram illustrated *'deemed to comply'* methods of shower base installation in the BCA which could be amended under the BCA, if the builders were concerned as to the method of rectification proposed by the terms they could satisfy themselves by obtaining a structural engineer's opinion that the method of rectification proposed by the insurer was technically sound. Further, from his previous experience with defective shower bases, Mr McNees considered such an acceptance would be forthcoming and given his experience in building matters I accept his evidence. Therefore, taking into account the provisions of Sections 109 of the *VCAT Act* the insurer submitted it was entitled to its costs.

26 Mr Huynh for Ms Huynh made application that he should get reimbursed for his foregone wages in attending the Tribunal to assist his relative.

27 Mr P. Nguyen in response said that the insurer had not produced an approval or a certificate to state that its proposed method was technically sound and possible. However, as a factual matter under the terms if the builders wish to challenge a method of rectification to which they have agreed then it is their responsibility to obtain expert advice that allays those concerns or confirms them; it is not the responsibility of the insurer who is standing by the advice it received from its expert, Mr. McNees. Further, under the terms, the builders agree to be carry out the insurer's instructions. Therefore, it is not incumbent on the insurer to produce the approval but as the applicants are seeking to discredit the insurer's directed method of rectification it is up to the builders to produce such proof; they did not and therefore their case factually was very weak.

28 Secondly, Mr P. Nguyen said that Mr McNees initially agreed in a telephone conversation with him to the builders' proposal for the method of rectifying the shower base and that he said he would provide written approval to such a method but it was never forthcoming; this put the builders at a serious disadvantage and they should not have to pay costs.

29 I questioned Mr P. Nguyen as to whether he had any evidence to establish either of these allegations; firstly, that Mr McNees had approved the builder's shower base rectification proposal; and, secondly, that Mr McNees had said he would give written approval to such a method. Such propositions had never been put to Mr McNees by Mr P. Nguyen when he was cross-examining Mr. McNees. I do not accept these contentions put by Mr. P. Nguyen. Such contentions, if true, are a very strong indicator that the builders had a method of rectification that was satisfactory to themselves and to the insurer; therefore, if the builders' considered that such contentions could be seriously put they would have been put early in their case and strong reliance would have been placed on them; I would have

expected if Mr. McNees did not confirm the method as he allegedly had advised, the builders would have written a confirming letter to him or written requesting an answer as advised. However, there was none of this, I do not accept either of Mr P. Nguyen's contentions.

30 On the basis of the strengths of the claims I consider the respondents' cases were far stronger. The builders' claims were extravagant, covering a whole gamut of claims of undue pressure, terms of the settlement were unfair, if not illegal and proposed methods of rectification that were illegal. None of these claims was grounded satisfactorily in law and no coherent or sufficient factual evidence was produced to substantiate any of the builders' claims on the balance of probabilities. I consider the builders' case was untenable in the terms of subsection 109(3)(c).

31 Taking into account that this was an interparties dispute and not in the review jurisdiction, I consider that the applicants should pay the costs of the insurer.

32 In relation to the application by the representative of Ms Huynh for wages forgone I accept his submissions that his wages were foregone. In his decision of *Aussie Invest Corporation Pty Ltd v Hobsons Bay City Council and C. Hayward et al*, Mr Justice Morris, President, held that:

> *'The Tribunal has power to make an order for costs in favour of an unrepresented person to compensate the person for wages and travelling expenses lost incurred in attending a hearing of a proceeding.'*

33 And, as the President noted, in *Re Cardinia Shire Council v Stoiljkovic* (2002) 12 VPR 61 the Tribunal concluded, albeit without the benefit of argument that *'costs'* in Section 109 of the *VCAT Act* extended to the costs of non-lawyers who were *'professional advocates'* under Section 62 of the Act. In his opinion the President concluded that this decision must be regarded as correct having regard to the constitution, purposes and practices of the Tribunal. In the instant case the person seeking the costs was

representing a relative who did not have the confidence to appear at the Tribunal and in this regard the *'advocate'* Mr T. Huynh could be regarded as assisting his relative. Mr T. Huynh participated meaningfully and helpfully in the hearing and he has been of assistance to the Tribunal in the Tribunal understanding the owner's submissions and the position she took in relation to the submissions of the other parties. Therefore, I can see no reason why, if the two decisions cited above are correct, that a representative of a party who makes a significant and positive contribution to the hearing of a proceeding should not get the costs of wages foregone.

34 Mr Lewis sought party and party costs for the insurer, such costs to be assessed in accordance with Scale D of the County Court Scale. Mr Pham Nguyen opposed the ordering of costs. I consider that County Court Scale *'D'* is an appropriate scale given the complexity both in fact and at law of this proceeding. There was no money amount cited as to the total estimated costs of the rectification works; therefore, I can only assess the appropriate scale with a view to the factual and legal complexity of the proceeding.

35 In relation to Mr T. Huynh's claim for lost wages he submitted that he had represented the owner at three directions hearings being 6 June 2006, 1 August 2006 and the hearing of 4 August 2006 which took one day. He claimed two days lost wages to which I agreed and he said that that amounted to $200 a day and he claimed $400. The builders' argued that $200 was too high as a daily wage; however, I disagree and I will allow the owner's costs fixed in the sum of $400.

36 That completes my reasons in this file. Subsequent to the orders I made after the hearing of this matter, a further proceeding was issued by a number of the applicants in this proceeding, seeking to resurrect their concerns about the method of rectification of the first floor shower base, Item 20 in the list of defects accepted by the applicants. It was agreed amongst the parties at the first directions hearing for that proceeding that as the applicants were proceeding to obtain independent quotations and would

either require the owner to engage a rectifying builder or undertake it itself, the final resolution of the issues between the parties in this proceeding and in the recent subsequent proceeding could be put to the test when the insurer seeks to enforce the indemnity it has been given by the builders as set out in the terms of the agreement between the insurer and the builders. I agree that on present indications this is the most effective and economical way that the issues between the parties as evidenced in this proceeding and in the subsequent one can be resolved via the resolution of the indemnity.

Senior Member R.J. Young

RJY:RB