

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D656/2006

**CATCHWORDS**

Discovery – confidential terms of settlement – implied undertaking

<b>APPLICANTS</b>	Gavin Wood, Sarah Wood
<b>FIRST RESPONDENT</b>	Australian Unity General Insurance Limited
<b>SECOND RESPONDENT</b>	Archicentre Ltd
<b>FIRST AND SECOND JOINED PARTIES</b>	John Sinnott, Vicki Sinnott
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C. Aird
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	12 June 2007
<b>DATE OF ORDER</b>	26 June 2007
<b>CITATION</b>	Wood v Australian Unity General Insurance (Domestic Building) [2007] VCAT 1305

**ORDER**

By consent of the Applicants and Craig and Peta Knell the Tribunal orders:

1. By 7 July 2007 Craig Knell and Peta Knell will produce copies of all documents in their possession as described in paragraphs 3(a), (b) (c) and (d) of the Applicants' Application for Directions/Orders filed on 1 June 2007 and heard on 12 June 2007.
2. No order as to costs.

The Tribunal further orders:

3. By 7 July 2007 the First Respondent must file and serve a List of Documents in respect of the documents and categories of documents set out in paragraph 1(a) of the Applicants' Application for Directions/Orders filed on 1 June 2007 and heard on 12 June 2007.

4. By 7 July 2007 the Joined Parties must file and serve a List of Documents in respect of the documents and categories of documents set out in paragraph 1(b) of the Applicants' Application for Directions/Orders filed on 1 June 2007 and heard on 12 June 2007.
5. By 7 July 2007 the parties must file Minutes of Proposed Consent Orders amending the timetable, failing which I direct the Principal Registrar to list the proceeding for further directions hearing before Deputy President Aird with priority allowing one hour.
6. Costs reserved – liberty to apply.

**DEPUTY PRESIDENT C. AIRD**

**APPEARANCES:**

For Applicants	Mr J. Forrest of Counsel
For First Respondent	Mr P. Rodriguez, Solicitor
For Second Respondent	Ms R. Carageorgos, Solicitor
For Joined Parties	Mr J. Quilty, Solicitor

## REASONS

- 1 By application lodged on 14 September 2006 the Applicant owners seek a review of the First Respondent insurer's decision to reject their claim for indemnity under the relevant policy of warranty insurance. The certificate of insurance dated 23 May 2002 was issued to the Joined Parties as owner builders. The subject property was sold by the owner builders to Mr and Mrs Knell from whom the owners subsequently purchased it in 2004.
- 2 A claim was also made under the relevant policy by Mr and Mrs Knell who made application to this Tribunal in 2003 seeking a review of the insurer's decision in respect of their claim ('the earlier proceeding'). The owner builders were Respondents to that proceeding as were BSS Design Group Pty Ltd. That proceeding was compromised between the parties and Terms of Settlement executed which apparently included a confidentiality clause.
- 3 By Application for Directions/Orders filed on 1 June 2007 the owners seek discovery of all documents relating to what I will call 'the Knells' claim' including all documents relating to the settlement of the earlier proceeding, the sale of the property by the Knells to the owners, the Buildcheck report dated March 2003, and all reports in the insurer's possession relating to both the owners' claim and the Knells' claim.
- 4 They also seek discovery of various documents from the owner builders relating to the restumping works carried out prior to 2000, those relating to the renovations and improvements they subsequently carried out, correspondence as itemised in their application, and all documents in relation to the settlement of the Knells' claim.
- 5 The application for a third party discovery order against Joe Barbalaco, who I understand was the relevant building surveyor who issued the building permit in May 2000, was withdrawn at the hearing. At the commencement of the directions hearing Mr Forrest of Counsel, who appeared on behalf of the owners, handed up Proposed Minutes of Consent Orders in relation to the application for third party discovery signed by the owners' solicitors and Mr Knell on behalf of himself and his wife.
- 6 At the commencement of the directions hearing Mr Rodriguez, solicitor who appeared on behalf of the insurer, indicated that his client neither consented to nor opposed the application for further discovery. However, it became apparent during the course of the hearing, that he had a number of things to say about the application. Not least of which was the submission that all parties to the Terms of Settlement should be heard as to whether an order for discovery of those Terms should be made in light of the confidentiality clause. For reasons which will become apparent I reject this submission.
- 7 Ms Carageorgos, solicitor for the Second Respondent, indicated that whilst her client neither consented to nor opposed the application, she considered

it to be in the interests of all parties that the Terms of Settlement be discovered.

8 Mr Quilty, solicitor for the owner builders indicated that his client opposed the application on three grounds:

- i in relation to the majority of the categories in respect of which discovery is sought, the owner builders have either made full discovery or do not have any documents. Further, that until they received the Application for Orders/Directions they had not received any notice that further discovery of documents in specific categories was required.
- ii until Points of Defence have been filed the issues in dispute are unknown.
- iii in relation to documents obtained by them through discovery in the earlier proceeding there is an implied undertaking not to use those documents for a collateral purpose or to release them to another person – to do so, would constitute contempt.

9 In my view, if the owner builders maintain they have either discovered documents in the categories sought, or they do not exist, it will not be an undue burden to include such details in a further List of Documents. Further, I reject any suggestion by the owner builders that this application is premature; and that until Points of Defence are filed and served identifying the issues in dispute they will be unable to determine which documents are relevant to this proceeding and should be discovered. This proceeding concerns an application for review of a decision of the insurer to deny indemnity to the owners on the basis that the damage is not attributable to works carried out by the owner builder. I note that the insurer's expert now appears to be less than certain about the cause of the damage because of difficulties experienced in carrying out an inspection of the sub-floor area. Who carried out what works will be fundamental to a determination of the owners' application for review. Discovery of all documents relating to the renovation and extension works and the carrying out of the restumping works are clearly relevant and discoverable. Discovery of all documents relating to the earlier proceeding, including the Terms of Settlement, are relevant in determining who carried out any further works, and also the role of the insurer in relation to those works. Such documents are clearly discoverable. They may also assist the owners and Archicentre in understanding why Mr Knell made a Statutory Declaration confirming that all works as recommended by Mr Atchison (of Buildcheck) had been completed.

10 Mr Quilty raised an objection to discovery of documents, which had been discovered in the earlier proceeding, relying on an implied undertaking not to disclose such documents for a collateral purpose. He conceded during the directions hearing that such an implied undertaking, if it still applies,

only relates to documents which the owner builders obtained from other parties in that proceeding. However, I am not persuaded that the implied undertaking continues following finalisation of a proceeding. In any event, the Tribunal is empowered under s53 of the *Domestic Building Contracts Act 1995* to make any order which it considers fair to resolve a domestic building dispute, and under s97 of the *Victorian Civil and Administrative Tribunal Act 1998* (the 'VCAT Act') is required to 'act fairly and according to the substantial merits of the case'. I also rely on the very broad powers implicit in the terms of s98 of the *VCAT Act*. In my view, it would be unfair if discovery of all such documents, however they were acquired by the owner builders, was not ordered.

- 11 The owners are also entitled to know the extent of the indemnity still available under the policy of warranty insurance. Mr Rodriguez said, from the bar table, that no moneys had been paid to the Knells under the Terms of Settlement. Nevertheless, the owners are entitled to know the basis on which the earlier claim was settled, particularly in circumstances where the owners suspect that the damage which was the subject of that claim, was similar to the damage the subject of their claim.
- 12 I have noted the concerns expressed by Mr Rodriguez as to whether Mr Knell understands the potential impact of the consent orders he has signed on behalf of himself and his wife. However, as I would have made the orders sought in any event, being of the view that the documents sought from them are clearly relevant and discoverable, I consider it appropriate the orders be made. As they were not made at the directions hearing, I will amend the date for compliance.
- 13 It seems to me that an application such as this would not be necessary if there was a positive obligation imposed under s32 of the *Sale of Land Act 1962* for vendors under a contract of sale of land to include in the s32 Statement details of matters such as, but not necessarily limited to:
  - i any/all claims made under a relevant policy of warranty insurance,
  - ii whether such claim was accepted by the insurer,
  - iii whether there were any proceedings arising out of the decision of the insurer (including proceedings the vendor may be aware of but which occurred before the vendor purchased the property), and
  - iv the outcome of those proceedings including details of any moneys paid by one party to another, or work carried out.
- 14 Where Terms of Settlement are entered into in resolution of an application for review of a insurer's decision under a policy of warranty insurance, it may be inappropriate to include a provision in Terms of Settlement that they must be disclosed to any prospective purchaser. However, in my view, it is undesirable that that such settlement should be confidential insofar as any prospective purchaser is concerned.

- 15 I note in passing that I find it surprising that this application has been made when many of the documents are available on the earlier file and there has been no attempt by, or on behalf of, the owners to inspect the earlier file. Whilst I accept that this should not act as an impediment in relation to the determination of such application, it may well be a matter which will be relevant on the question of costs.
- 16 I will make the orders sought by the Applicants but am not persuaded that I should depart from the usual orders that Lists of Documents be filed and served and order that Affidavits of Documents should be made as submitted on behalf of the owners. I will reserve the question of costs with liberty to apply. I foreshadowed at the Directions Hearing that I may make orders otherwise amending the timetable. However, it seems appropriate that the parties file Minutes of Proposed Consent Orders amending the timetable, in default of which the matter will be referred to a further directions hearing.

**DEPUTY PRESIDENT C. AIRD**