VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D687/2004

DOMESTIC BUILDING LIST

CATCHWORDS

Application for reinstatement – acceptance of offer of settlement - proceeding struck out – whether breach of obligation under offer of settlement – costs.

APPLICANTS	George Debattista, Agnes Debattista
FIRST RESPONDENT	Vero Insurance Limited
SECOND RESPONDENT	J.M Quality Homes Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	1 June, 2006, 14 June, 2006
DATE OF ORDER	10 July 2006

Debattista v Vero Insurance Ltd (Domestic Building) [2006] VCAT 1360

ORDER

1. The proceeding is reinstated only insofar as it relates to the works set out in sub-paragraph (a) of the Offer of Settlement dated June 2005 and accepted by the Applicants on or about 16 June 2005.

2. **The proceeding is referred to mediation on a date and at a time to be advised to the parties by the Principal Registrar.**

3. By consent of the Applicants and the First Respondent, the application against the First Respondent is withdrawn with no order as to costs.

4. The Applicants shall pay the Second Respondent's party/party costs of and incidental to the application for reinstatement. In default of agreement such costs are to be assessed by the Principal Registrar on County Court Scale 'B'.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants	Mr G. Thexton, solicitor
For the First Respondent	Mr S. Waldren of Counsel (14 June 2006 only)
For the Second Respondent	Mr B. Miller of Counsel

REASONS

1. On 8 October 2004 the Applicants ('the owners') lodged an application with the Tribunal seeking a review of the decisions of the First Respondent ('the insurer') dated 13 August and 30 September 2004. They also sought damages from the Second Respondent ('the builder') for defective building works, and delay costs. By counterclaim dated 17 November 2004, the builder claimed the sum of $9,362.93. After an unsuccessful mediation, the proceeding was set down for hearing to commence on 18 July 2005 with an estimated hearing time of three days.

2. On 14 June 2005 Orders by Consent signed by all parties were filed with the Tribunal and the following Consent Order (in the terms agreed by the parties) made in Chambers on 15 June 2005:

> "That the above proceeding be struck out with no order as to costs".

3. On 21 February 2006, the owners' solicitors wrote to the Tribunal advising the Terms of Settlement had been breached and seeking reinstatement of the proceeding. The application for reinstatement initially listed for a directions hearing on 16 March 2006 was adjourned, at the request of the parties, to 16 April 2006. The hearing was again adjourned, at the request of the parties to 1 June 2006, when it proceeded. Mr Thexton, solicitor appeared on behalf of the owners, and Mr Miller of Counsel appeared on behalf of the builder. The hearing was adjourned part heard to 14 June 2006. At the adjourned hearing, Mr Waldren of Counsel appeared on behalf of the insurer. At the initial hearing, Mr Thexton advised that settlement had been reached with the insurer and handed up Minutes of Proposed Consent Orders dated 31 May 2006 in the following terms:

> 1. The Applicants agree to withdraw its application (sic) against the First Respondent – Vero Insurance Limited; and
>
> 2. No order as to costs".

4. These orders have not been made – the proceeding was struck out by consent on 15 June 2005, and unless it is reinstated, there is no jurisdiction to make further orders.

THE SETTLEMENT

5. On 1 June 2005, the insurer and the builder jointly made an Offer of Settlement ('the Offer') to the owners whereby the builder agreed to carry out certain rectification works as set out in the Vero Inspection Summary dated 16 August 2004. The builder also agreed to carry out certain additional works as set out in sub-paragraph (b) of the Offer.

6. The owners accepted the Offer by letter from their then solicitors dated 14 June 2005 ('the Agreement'). Formal Terms of Settlement were not entered into. Under the terms of the Offer the builder agreed to complete the works set out in sub-paragraph (a) to the satisfaction of Mr McNees, the insurer's inspector, within 60 days of the date of acceptance of the Offer.

The insurer was to notify the owners and the builder '*of the satisfactory completion of this said building* work'. There is no time frame stipulated for this notification. As the Offer was accepted on 14 June 2005 I calculate the completion date as 13 August 2005. If the owners were not satisfied with the additional works set out in sub-paragraph (b) it provided that the parties would engage an expert to determine whether the works had been satisfactorily completed, and, if not, to prepare a report as to any further works which were required. Alternatively, the parties could apply to the Tribunal for an order appointing an expert under s94 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the *VCAT Act"*). There was no provision as to what should occur if the works set out in sub-paragraph (a) were not carried out to Mr McNees' satisfaction.

7. By letter dated 11 August 2005, the builder's solicitors advised the owners' solicitors (with a copy to the insurer) that the works had been completed with comments about each of the agreed items, and:

> "We ask that you please provide your immediate instructions with respect to your client's satisfaction of the rectification of the works as outlined herein. In the event that your clients have any problems with the work undertaken by the builder, we ask that you please advise that writer forthwith (sic)".

8. The owners were not satisfied with the works carried out by the builder and it is common ground the parties agreed that Mr McNees should review the sub-paragraph (b) works when inspecting the sub-paragraph (a) works.

9. By letter dated 20 October 2005, the insurer directed the builder to carry out further works in accordance with an Amended Works Schedule dated 20 October 2005. In relation to a number of items, the direction remained unchanged from the original Vero Inspection Summary. In particular, although the builder indicated it had constructed a water tight barrier around the balcony posts and had been unable to identify any leaking around those posts, the Amended Works Schedule remained unchanged in relation to Item 6. Following apparent disagreement between the owners and the builder as to the works to be carried out, the builder's solicitors wrote to the solicitors for the owners and the insurer respectively, on 18 November 2005, confirming the works the builder was prepared to carry out by reference to the Amended Schedule of Works. In relation to Item 6 they advised:

> "Leaking balcony
>
> We are instructed that our client intends to rectify this issue in accordance with the Building Code of Australia. Attached to this letter as Annexure 'A' is a copy of a document reflecting the Australian Standard for rectification of this item. The home owner has instructed out client that they do not wish this item to be rectified in this manner. The home owners have indicated they wish tiles to be laid up the brick work as opposed to colourbond metal over flashing as required by the Australian Standards. This obviously will not

adequately deal with rectification of this issue. Should the home owners insist on this form of rectification we will be seeking a full release from the home owners once this item has been completed in accordance with their requests, we will assume no further liability for this item".

In relation to item (b)(i) they advised:

"Reduce gap at top of front door

Vero have instructed our client to remove the front door and have a top and bottom strip attached in order to rectify this issue. The home owners are not satisfied with this form of rectification. We have attached an alternative form of rectification to deal with the issue of the door which from our instructions is compliant with Australian Standards. Annexure 'B' to this letter reflects three alternatives to the issue of the door gap and to this extent we seek instructions from the home owners as to which alternative they would be agreeable to so that this item can be attended to".

and, in relation to item (b)(xi):

"This is to be done, Vero have requested that the flashing be painted to match the brick work which is a red colour, the home owners have requested that the flashing be painted a charcoal to match the roof tiles, We seek confirmation that the charcoal is acceptable by all parties.

Our client wishes to finalise all issues raised herein but requires additional instructions from your respective clients in particular with respect to items 6, (b)(i) and b(xi)".

…

10. Mr Thexton wrote to the builder's solicitors on 21 November 2006 advising he was now acting in lieu of the owners' former solicitors and that he would provide a detailed response to the letter of 18 November 2005 following a review of the file. Having had no response, the builder's solicitors wrote to Mr Thexton on 3 January 2006 seeking a reply, and again on 20 January 2006 as follows:

"We refer to the above matter and previous correspondence to you and seek your immediate instructions with respect to finalising these proceedings. In particular, we seek your instructions as to whether you continue to act on behalf of the home owners or whether we should correspond to them directly.

In the event that a reply is not received within 7 days from the date hereof, we have no option other than to forward all correspondence directly to the home owners.

The purpose of sending this correspondence is that we are now receiving pressure from Vero in relation to the completion of all issues relating to this property.

Looking forward to your prompt reply".

11. There was finally a response by letter dated 27 January 2006 whereby Mr Thexton advised:

> "We refer to the terms of settlement between the above parties dated 1 June 2005 ('the Terms of Settlement').
>
> Your client has failed to rectify the building works identified in the Terms of Settlement. Furthermore your client is now substantially out of time, given the works were to be completed within 60 days of entry into the Terms of Settlement.
>
> Our clients are now in a position wherein they have instructed our office to reinstate the proceedings against your client and the First Respondent. Such proceedings will of course deal with all defective items identified by our clients' expert consultant Mr Rob Lees, together with additional defective items that have come to light subsequent to the entry into the Terms of Settlement dated 1 June 2005.
>
> Please be advised that we have also corresponded with the First Respondent regarding our clients' instructions to re-instate proceedings and we shall shortly forward to you a copy of our client's VCAT application".

SHOULD THE PROCEEDING BE REINSTATED?

12. The Offer does not specifically provide for the proceeding to be reinstated in the event of default by the builder. However, in the absence of formal Terms of Settlement or any releases between the parties I am of the view that a right of reinstatement must be implied where it can be established that a party is in default of its obligations as set out in the Offer.

13. The material filed by the owners in support of their application for reinstatement was patently inadequate being comprised of an Affidavit sworn by Mrs Debattista on 6 March 2006 in which she set out the works she believed were outstanding. The only document exhibited to her Affidavit was the Settlement Offer by the First and Second Respondents dated June 2005. Although in her Affidavit Mrs Debattista states that Terms of Settlement were executed by the parties on or about 14 June 2005 it is clear, as was conceded during the initial hearing, that Terms of Settlement were never signed. Rather, all references to Terms of Settlement are to the Settlement Offer which was accepted by the owners on or about 14 June 2005 ('the Agreement').

14. A very detailed Affidavit of Joe Vella, director of the builder, sworn on 11 April 2006 was filed in reply to the application for reinstatement. Copies of all relevant documents and communications are exhibited to this Affidavit and somewhat incongruously it was those exhibits on which Mr Thexton sought to rely in support of the owners' application. During the course of the initial hearing it became apparent that there were some contentious issues. Although given leave to file and serve further affidavit material in

support of their application, prior to the adjourned hearing, the owners have not done so.

15. The application for reinstatement was adjourned at the request of the owners' solicitors to enable the owners to obtain evidence from Mr McNees in relation to the extent of the works the builder was prepared carry out and, in particular, whether it was prepared to install a waterproof membrane as required by the insurer to rectify item 6. Mr McNees attended the adjourned hearing, in response to a Summons to Appear issued at the request of the owners, and gave evidence that the builder's proposed method of rectification of the balcony was one of a number of viable alternatives.

16. Mr Thexton on behalf of the owners submitted that the builder has repudiated the Agreement, or at least breached it by not carrying out the works within the specified 60 days. Although Mr Thexton did not refer me to any specific clauses in the Offer to support his submission that the builder was in breach of its obligations, I have now had an opportunity of considering them. Unfortunately the paragraphs are not numbered. Suffice to say that sub-paragraph (a) provides that the builder will "carry out the building work necessary to rectify the defective work listed in the Vero Inspection Summary dated the 16th August 2004". Sub-paragraph (b) provides that the builder will carry out certain additional building works ((i) to (xii)) which are specified in detail. Of particular relevance are the following 2 paragraphs:

> 'The said building work necessary to rectify the defective work listed in the Vero Inspection Summary dated 16th August 2004 as referred to in sub-paragraph (a) above, shall be carried out in accordance with the remedial measures outlined in that inspection summary to the satisfaction of Ian McNees and be completed within 60 days of acceptance of this settlement offer. The First Respondent shall notify both the Applicant and the Second Respondent, in writing, of the satisfactory completion of this said building work.
>
> The said additional building work listed in sub-paragraph (b) above shall be completed within 60 days of acceptance of this settlement offer. Any dispute as to whether these said works have been properly carried out by the Second Respondent shall be settled by an expert agreed to by the Applicant and the Second Respondent. If the Applicant and the Second Respondent cannot reach agreement on the appointment of an expert, either of the said parties may request the Tribunal to appoint an expert pursuant to Section 94 of the *Victorian Civil and Administrative Tribunal Act* 1998 to inspect and assess the additional building work referred to in sub-paragraph (b) above."

17. On 11 August 2005 the builder's solicitor wrote to the parties advising the works had been completed. In relation to Item 6 they advised:

> Item 6: attended to, we advise that in relation to this item our client attended to the construction of a 30mm high water tight barrier around the base of the posts. This water tight barrier was then filed (sic) with

> water and left for a period of time. We are advised that there was absolutely no evidence as to leaking following the investigation by our client.
>
> We further advise that on Thursday the 4th of August 2005 there was considerably heavy rain. We advise our client also attended upon the premises on this day to investigate as to whether there was any evidence of leaking. We are advised that following this investigation there was again no evidence with respect to any leaking water. As a result, we advise our client has taken all reasonable investigations with respect to this leaking which has revealed there was no such problem …"

18. I refer to my decision in *N.Z. Constructions Pty Ltd v Vero Insurance* [2006] VCAT 7. In that case the builder had entered into Terms of Settlement whereby it agreed to carry out rectification works. The builder subsequently sought to resile from its agreement to rectify certain items on the basis that they were not his responsibility. As I observed in *N.Z. Constructions*, where a builder agrees to carry out certain works as directed by an insurer, it is bound to follow that direction. It is not open to the builder to subsequently assert that the insurer's decision or direction was wrong. In making the Offer of Settlement in this proceeding the builder agreed to carry out the work '*necessary to rectify the defective work listed in the Vero Inspection Summary dated the 16th August 2004 … in accordance with the remedial measures outlined in that inspection summary to the satisfaction of Ian McNees …*'

19. The builder failed to carry out the works set out under the heading 'Work Required' in relation to Item 6. Instead, it carried out a lesser scope of works – something it was not at liberty to do. This was a breach of its obligations under the Offer. However, I am not persuaded that it can be regarded as repudiatory conduct in circumstances where once it received the further direction from the insurer, and following further disagreement with the owners, it set out the works it was prepared to do in the letter of 18 November 2005.

20. In relation to items 8 and 14 I note that the only outstanding work in relation to Item 8 is 'Paint the quad' which is a minor item. In relation to Item 14 it seems that whilst further cleaning may be required the works the owners suggest are necessary are not as directed by the insurer.

21. In relation to the items set out in sub-paragraph (b) the Offer anticipated the possibility that further works may be required and provided a mechanism for inspection, and the carrying out of additional works. It is clear that the builder believed it had carried out the works, and wrote to the owners and the insurer so advising. The parties agreed that Mr McNees, who had carried out the initial inspection on behalf of the insurer, should review the works when inspecting the works set out in sub-paragraph (a). He did not inspect the works until sometime in September 2005 when he said he

attended the property twice. He specified further works to be carried out in relation to both the sub-paragraph (a) and (b) works. The builder's solicitors confirmed, in writing, the works it was prepared to do. The owners have not, on the evidence before me, given the builder an opportunity to carry out those works. There is simply no evidence to support Mr Thexton's submisison that the builder has delayed for 11 months in circumstances where, not only has the builder been denied an opportunity to carry out further works, but the hearing of the application for reinstatement made on 21 February 2006 was adjourned by consent.

The Open Offer

22. At the commencement of the hearing on 1 June 2006, Mr Miller restated his client's position, in an open offer, to carry out all the works as set out in the Amended Schedule of Works. By open letter dated 9 June 2006 sent by facsimile to the owners' solicitors on the same day, the builder's solicitors confirmed the offer as follows:

> …
>
> We advise that our client hereby makes an open offer to attend upon the subject site to carry out outstanding rectification works in accordance with the McNees Amended Work Schedule dated 20 October 2005.
>
> We confirm that the further rectification work includes inter alia:
>
> (a) the removal of the tiles to the balcony, the application of a waterproof membrane to the cement sheeting and the relaying of the tiles;
>
> (b) the installation of a metal flashing along the area where the balcony wall adjoins the balcony tiles;
>
> (c) the provision of additional pop rivets and seal to the metal cover plates to the bay window;
>
> (d) the installation of a spreader to the existing downpipe from the verandah roof;
>
> (e) the painting of the rumpus room roof flashing to match the surrounding brickwork.
>
> At all times our client has requested the opportunity to attend upon the subject site to rectify the remaining works but has been refused access by your clients.
>
> In an attempt to resolve these remaining items we request that access be provided so that the required rectification can be attended to.
>
> Should your client continue to refuse our client access to the site to complete these works our client intends to also rely upon this open offer and your clients continues refusal to provide access in its submissions to the Tribunal at the further hearing on the 14th of June 2006 (sic)".

23. Once again, inexplicably, there was no reply to this letter.

24. It is apparent from the evidence about each of the items as set out in Mrs Debattista's Affidavit that the owners seemingly misunderstand the terms of the Offer which they accepted. Further, it appears from considering Mrs Debattista's evidence about some of the items, that the owners are relying on the comments set out in the 'Item' column rather than those directions as set out in the 'Work required' column on the Amended Works Schedule. Mr McNees identified those additional works he considered necessary and they are as set out in the Amended Works Schedule.

25. The owners also seek to rely on the final paragraph of the letter of 18 November 2005:

> "Our client has been advised by Vero that in the event these items are not rectified within 14 days Vero will send its own tradespeople to rectify the same. To this extent your immediate reply is required. Should a reply not be received within this time frame our client reserves its rights to attend upon and rectify the issues identified herein".

26. Whilst the builder may have indicated this was a possibility if it did not complete the works within the 14 day period, it is not of itself evidence that the builder is in breach of its obligations. There is no evidence that the owners requested the insurer arrange for an alternative builder to carry out the works. In any event, the owners have agreed to withdraw their application as against the insurer.

CONCLUSION

27. I find that the builder in failing to carry out the sub-paragraph (a) works to the satisfaction of Mr McNees has breached its obligations in relation to those works. However, I am not satisfied that this means that the whole of the Agreement should be set aside, and the proceeding reinstated *ab initio* which I understand to be the application before me. It is clear that the builder had an absolute obligation to carry out the remedial works in relation to the sub-paragraph (a) items in accordance with the insurer's direction as set out in the Inspection Summary to Mr McNees' satisfaction. The builder did not carry out those works.

28. However, I am not persuaded that the builder is in breach of its obligations in respect of the sub-paragraph (b) works. The Offer specifically sets out a mechanism for the resolution of any dispute between the parties as to whether the works have been properly carried out. Although the parties agreed that Mr McNees should inspect the works, the owners have not given the builder a reasonably opportunity to carry out the further works that Mr McNees has reported are necessary.

29. It seems to me that the owners are relying on the builder's breach of the Agreement in relation to the sub-paragraph (a) works to set aside the entire Agreement, perhaps because they have changed their minds. Interestingly, Mr Thexton was unable to indicate what remedy the owners would be seeking in the event the proceeding was reinstated. The Offer clearly

distinguishes between the sub-paragraph (a) and the sub-paragraph (b) works. I am not persuaded that it is appropriate to reinstate the proceeding *ab initio*. However, I will reinstate it insofar as it relates to the sub-paragraph (a) works which have clearly not been completed to Mr McNees' satisfaction. If further defects have become apparent since the Offer was accepted, the owners can make a further claim on the insurer or make further application to this Tribunal. It is not appropriate to reinstate this proceeding to enable them to make new claims.

30. The builder's preparedness to carry out the works were confirmed by its solicitor in their letter dated 18 November 2006 to which a reply has never been received and again in their letter dated 13 February 2006 wherein they advised:

> 'Our client wishes to attend to the final items to be rectified in relation to our correspondence to your clients, Lovegroves Solicitors and yourself of last year. To this extent, we seek your immediate instructions as to whether your clients will permit our clients to return to attend to these issues once the items raised in our correspondence have been clarified by you.'

31. The builder restated this offer through its counsel at the commencement of the hearing of the application for reinstatement and again by letter from its solicitors to the owners' solicitors on 9 June 2006. Inexplicably the owners having accepted the builder's offer to carry out the rectification works have prevented it from doing so.

32. Mr Miller submitted on behalf of the builder that I should reinstate the proceeding to enable the making of orders requiring the owners to allow the builder to attend the site and carry out the rectification works. I am not persuaded this is the appropriate order in light of the builder's breach of its obligations in relation to sub-paragraph (a) works. However, I will reinstate the proceeding insofar as it relates to those works.

33. Mr Waldren submitted I should reinstate the proceedings so that the Proposed Orders by Consent as between the owners and the insurer could be made. As I have determined it is appropriate the reinstate the proceeding in relation to the sub-paragraph (a) works, I will make the orders in the terms consented to by the owners and the insurer.

COSTS

34. Mt Thexton indicated that the owners make no application for costs, nor would they be making any submissions on costs. Their primary concern was for the proceeding to be reinstated. This is a curious position and only serves to reinforce my view that the owners sought reinstatement of the proceeding because they had changed their minds.

35. The builder makes application for costs of this application for reinstatement. In support of this application, the builder relies on the letters from its solicitors dated 18 November 2005, 3 and 20 January 2006 and 9 June 2006.

Since the hearing on 14 June 2006, the builder's solicitors have forwarded a copy of a further letter to the owners' solicitors dated 13 February 2006 marked 'Without Prejudice Save and Accept as to Costs' (sic). This letter was not tendered at the hearing, and does little more than reinforce the failure of the owners' solicitors to respond the correspondence from the builder viz:

> "We refer to the above matter and previous correspondence and discussions entered into between our respective offices.
>
> Our client wishes to attend to the final items to be rectified in relation to our correspondence to your clients, Lovegrove Solicitors and yourself of last year. To this extent, we seek your immediate instructions as to whether your clients will permit our clients to return to attend to these issues once the items raised in our correspondence have been clarified by you.
>
> To this extent, we seek your most immediate reply".

36. The only written response to any of the correspondence that I have before me is the letter of 21 February 2006 whereby the owners' solicitors advised the owners were seeking reinstatement of the proceeding. There has been no explanation for the failure of the owners or their solicitor to respond to any of the communication from the builder's solicitor and this conduct is simply incomprehensible.

37. The builder has been put to the expense of defending an application for reinstatement where the owners have only been partially successful and in circumstances where they have not accepted the builder's various unqualified open offers to carry out the works as set out in the Amended Work Schedule which I have taken into account under s109(3)(e). I am therefore persuaded that this is an appropriate case for the exercise of the Tribunal's discretion under s109(2). I will order the owners to pay the builder's costs of and incidental to their application for reinstatement.

38. However, I am not prepared to make any orders for costs in favour of the First Respondent. As set out above, the owners and the insurer have resolved matters between themselves on the basis that the owners would withdraw their application against the insurer, and there would be no orders as to costs. The hearing of the application for reinstatement was adjourned to enable the owners to seek assistance from Mr McNees in support of their application. Mr McNees attended in response to a Summons to Appear and there is no evidence before me that the owners otherwise requested the insurer to attend. It was a matter for the insurer whether or not it chose to attend and be represented by counsel in circumstances where proposed consent orders between it and the owners had previously been filed.

39. I note in passing that Mr McNees indicated that a 'rough estimate' of the cost of carrying out the outstanding rectification works was somewhere in the range of $6,000.00 to $8,000.00. It is perhaps unfortunate the owners did not respond to the letter of 18 November 2005 and the subsequent

correspondence from the builder's solicitors and give the builder an opportunity to complete the rectification works. Given the only estimate of the cost of the outstanding sub-paragraph (a) works is that given by Mr McNees I consider that County Court Scale 'B' is the appropriate scale for the assessment of costs if the parties are unable to agree them.

DEPUTY PRESIDENT C. AIRD