VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D48/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – defective workmanship – terms of settlement – release – agreed that builder would enter into contract to buy house – contract of sale entered into in performance of terms – contract of sale not proceeded with – breach of contract of sale not a breach of the terms of settlement – owner's rights derived from contract of sale - claim for breach of contract of sale not justiciable by Tribunal -

APPLICANT	Peter Eckberg
RESPONDENT	Grant Wharington
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20 July 2009
DATE OF ORDER	10 September 2009
CITATION	Eckberg v Wharington (Domestic Building) [2009] VCAT 1899

ORDER

1. Declare that as to the sum of $99,000, the claim by the Applicant for damages against the Respondent has not been heard or determined as it can only be brought against the Respondent by Vero Insurance Limited, whether by way of subrogation or assignment.
2. Declare that the claim by the Applicant for damages is otherwise compromised by the terms of settlement entered into between the parties and dated 4 April 2007.
3. Declare that this Tribunal has no power to hear and determine the First Respondent's claim against the Third Respondent for alleged breach of a contract for the sale of the land at 21 Scarborough Drive Patterson Lakes.
4. Liberty to any party to apply for any further orders or directions as may be appropriate to give effect to the accompanying reasons for decision.
5. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	In person

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D275/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – acceptance of insurance claim and agreement of insurer to pay certain sum - terms of settlement entered into between owner and builder incorporating general release – whether general release affects insured part of claim – interpretation of release – principle of law that insured and third party not competent to affect subrogated rights of insurer – provision in policy that insurere's rights not to be released – whether term inconsistent with ministerial order or s.68 of the *Insurance Contracts Act* 1984 (Commonwealth) – whether insurer estopped from relying upon clause

APPLICANT	Vero Insurance Limited (ACN 005 297 807)
FIRST RESPONDENT	Peter Eckberg
SECOND RESPONDENT	Hassall & Byrne
THIRD RESPONDENT	Grant Wharington
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	20 July 2009
DATE OF ORDER	10 September 2009
CITATION	

ORDER

1. The Applicant's claim is dismissed.
2. On the counterclaim, declare that the Applicant is not prevented by reason of the terms of settlement entered into between the First Respondent and the Third Respondent from recovering by way of subrogation or assignment the sum of $99,000.00 to be paid by it to the First Respondent.

3. The First Respondent's claim against the Second Respondent is dismissed.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr S. Waldren of Counsel
For the First Respondent	In person
For the Second Respondent	Mr D. Masel of Counsel
For the Third Respondent	In person

REASONS

Background

1. The Applicant in proceeding D48/2006 and the First Respondent in proceeding D275/2007 ("Mr Eckberg") is and was at all material times the owner of a dwelling house at 21 Scarborough Drive Patterson Lakes ("the House"). The House was constructed by the Respondent in proceeding D48/2006 and the Third Respondent in proceeding D275/2007 ("Mr Wharington") between 1996 and 1997. It forms part of a larger development ("the Development") of eight connected houses built with common boundaries upon a single monolithic concrete slab ("the Slab").
2. The Applicant in proceeding D275/2007 ("Vero") issued policies for domestic building insurance for each of the houses constructed by Mr Wharington in the Development.
3. The Development formed part of a large land reclamation project which created the suburb of Patterson Lakes out of the Carrum swamp. The project involved the creation of a marina connected to the sea. The marina was enclosed by a wall behind which a large amount of soil was deposited in order to raise the level of the land to accommodate the houses that were proposed to be built.
4. As part of the larger project a number of piles were sunk into the ground on the landward side of the marina wall. The precise purpose of these piles is unclear but they were some distance inland from the marina wall and they were put there by the developer of the whole area, Cavendish Properties Pty Ltd. The location of each pile was known to Cavendish and to the engineer, Mitford Engineering Pty Ltd ("Mitford Engineering"). The relevant piles appear on a map produced at the hearing.

5. In 1996 Mr Wharington purchased the land upon which the Development was to be constructed, poured the Slab and built the eight houses on it. There was a design for the Slab prepared by Mitford Engineering. Neither before nor during the construction of the Slab did Mr Wharington take any steps to ascertain the location of any piles that might be beneath it, despite a notification on the engineering drawings to the effect that a gap of no less than 300mm had to be left between the underside of the Slab and the top of any of the piles.

6. Construction of the Development took place between August 1996 and January 1997 when the House was sold to a predecessor in title to Mr Eckberg. A certificate of occupancy for the House was issued by the building surveyor on 8 January 1997.

7. On 31 May 2007, the First Respondent, Mr Eckberg, offered to purchase the House from the then owners, Mr and Mrs David. The offer was accepted and the sale was completed on 30 June 2003. Immediately before settling the sale Mr Eckberg became aware that there were problems with the floor levels of the House but nonetheless settled the sale as he was contractually obliged to do so. It appears that Mr and Mrs David were aware of problems with the Slab.

The insurance claim on Vero

8. On 21 August 2003 Mr Eckberg submitted a claim to Vero with respect to the defects in the House. The claim was declined by Vero and, on 1 February 2006, Mr Eckberg issued proceedings (D48/2006) in this Tribunal against Mr Wharington, Vero and Mr and Mrs David with respect to the defects in the House.

9. The rejection by Vero of Mr Eckberg's claim was dealt with as a preliminary issue in the proceeding. On 29 August 2006 the Tribunal declared that Mr Eckberg was entitled to be indemnified by Vero under the policy and Vero was directed to assess quantum in accordance with the policy and the relevant Ministerial Order. Vero was ordered to pay Mr Eckberg's costs and the claim against Vero was otherwise dismissed. The proceeding then continued against the other parties namely, Mr Wharington and Mr and Mrs David. The costs ordered to be paid by Vero were paid.

Assessment of the claim

10. On 12 December 2006, following a further order by the Tribunal directing it to do so, Vero assessed Mr Eckberg's claim at $63,307.51. Mr Eckberg appealed that decision and that appeal became the subject of proceeding D894/2006 which was commenced on 14 December 2006 ("the Quantum Appeal").

11. The Quantum Appeal proceeded through an unsuccessful mediation and on 19 March 2007 an affidavit was filed by Mr Wharington, who was not then a party to the Quantum Appeal, seeking to be made a party to the proceeding. In the affidavit filed in support of his application to be joined,

after referring to the fact that he was the builder of the House, he said, in paragraph 7:

> "The second proceeding is concerned with assessing the amount of damages against the Respondent, Vero Insurance Ltd. I verily believe that Vero Insurance Ltd will seek to recover from me whatever damages are assessed by VCAT to be paid by it to the Applicant".

12. Mr Wharington's application to be joined as a party was fixed for hearing before me on 21 March 2007. On that occasion, Mr Wharington, Vero and Mr Eckberg all appeared and were represented. I was then told by the representatives of Vero and Mr Eckberg that Vero had determined to pay the full limit of indemnity under the policy and that the proceeding was to be struck out with a right of reinstatement and I so ordered. Mr Wharington's application for joinder was not proceeded with.

13. It appears from the evidence that Vero reassessed the quantum on Mr Eckberg's claim in the amount of $100,000.00, being the policy limit, less $1,000.00 being the excess payable under the policy. This was conveyed to Mr Eckberg's solicitors by a letter from Vero's solicitor, Mr Rodriguez, on 20 March 2007. After stating Vero's decision to revise the assessment of the claim, the letter goes on to say that both parties have 28 days from receipt of that decision within which to appeal.

14. It is important to note that the order I made striking out the Quantum Appeal was not as the result of any settlement between the parties but rather, that the Applicant had no need to appeal against the decision because, by a later decision, it had been reviewed in his favour. In making the later decision Vero was not contractually undertaking to make the payment of $99,000 to Mr Eckberg. Mr Wharington had 28 days within which to appeal that later decision.

15. A compulsory conference was held in proceeding D48/2006 involving the remaining parties to that proceeding. These were Mr Eckberg, Mr Wharington, Mr and Mrs David and McCann's Real Estate Pty. Ltd, which was the real estate agent that sold the House on behalf of Mr and Mrs David. Each of the parties was legally represented. Mr Eckberg was represented by his Counsel, Mr Squirrell and his solicitor, Miss Watson of the firm of Hassall & Byrne who were Mr Eckberg's then solicitors.

16. The Tribunal had notified Vero's solicitor, Mr Rodriguez, about the Compulsory Conference the day before it was held, but since the proceeding was dismissed against Vero he considered that it was no longer involved in the proceeding and he ignored the notification.

The Compulsory Conference in D48/2006

17. At the compulsory conference, the proceedings by Mr Eckberg against Mr and Mrs David and McCann's Real Estate Pty Ltd were settled on the basis that they would be struck out with all parties paying their own costs. The proceeding as between Mr Eckberg and Mr Wharington was settled upon

terms to the effect that Mr Wharington would not challenge Vero's decision to pay Mr Eckberg $99,000.00 or in any way interfere with the payment by Vero of that sum to him, that he would purchase the House from Mr Eckberg for $550,000.00 and would enter into a Contract of Sale to do so. There would be general releases. Terms of Settlement were entered into ("the Terms") to record the agreement reached.

18. By Clause 6 of the Terms, Mr Wharington was granted a license to enter the House and carry out rectification works, subject to certain conditions. In reliance upon this, he undertook large scale works at the House, including reconstructing the kitchen, levelling the floors, replacing the fibro-cement cladding of the wall facing the Marina with foam blocks and re-rendering it and plastering and painting. He said in evidence that the value of this work and materials was in excess of $100,000, although the amounts that he paid out were less than $70,000. There was no building permit obtained for this work.

19. In the course of carrying out the rectification work Mr Wharington removed certain fittings and furnishings, including a bar and the curtains, from the House without Mr Eckberg's consent.

20. Although he had agreed to purchase the House and entered into a Contract of Sale to do so, Mr Wharington failed to settle the purchase. After some correspondence and the service of some notices, Mr Eckberg rescinded the Contract of Sale.

Vero's refusal to pay

21. In the meantime, following correspondence between Mr Eckberg's solicitors and Vero's solicitors concerning the payment of the $99,000, a copy of the Terms was sent to Vero's solicitor, Mr Rodriguez. Following receipt of the Terms, Vero then declined to pay any part of the assessed sum of $99,000.00 to Mr Eckberg, claiming that its rights of recovery against Mr Wharington in regard to any amounts that it might pay to Mr Eckberg were adversely affected by the release contained in the Terms.

22. On 1 May 2007 Vero issued proceedings in the Tribunal (D275/2007) seeking a declaration that, by entering into the Terms, Mr Eckberg breached clause 20 of the policy and that by operation of that clause Vero was entitled to refuse to pay the claim to the extent that it was prejudiced by that breach. It also sought a declaration that the prejudice that it suffered by reason of the breach was $99,000.00.

23. On 17 July 2007 Hassall and Byrne, Mr Eckberg's former solicitors, were joined as Second Respondent to the proceeding. On 21 February 2008 Mr Wharington was joined as Third Respondent to the proceeding.

24. On 18 June 2008 the Tribunal ordered that D275/2007 and D48/2006 should be heard and determined at the same time.

The hearing

25. The two matters came before me for hearing on 20 July 2009 with 10 days fixed. Mr Waldren of Counsel appeared for the Applicant; Mr Eckberg was represented by his wife, Drajica Eckberg; Hassall and Byrne were represented by Mr Masel of Counsel and Mr Wharington appeared on his own behalf.

26. I heard evidence from Mr Rodriguez on behalf of Vero, Mrs Eckberg on behalf of her husband, Irina Watson, solicitor, on behalf of Hassall & Byrne and Mr Wharington on his own behalf. Expert evidence was given by Mr Russell Brown, an engineer and by Mr Rob Lees, a building consultant, on behalf of Mr Eckberg and by Mr Laugier, a building consultant on behalf of Mr Wharington.

27. The issue to be determined in proceeding D48/2006 is whether and to what extent the building work carried out by Mr Wharington in constructing the House was defective and what follows from that. Mr Eckberg claimed:

    (a) the cost of rectifying the defects of "approximately $310,100.00";

    (b) damages of $42,575.50, being the alleged value of the various fixtures and fittings removed from the house by Mr Wharington during his renovations;

    (c) loss of rental opportunity arising from the inability of Mr Eckberg to rent the property between 14 August 2005 and 1 March 2008, amounting to $53,362.00.

28. By his defence, which was prepared by his former solicitors, Vadarlis & Associates, Mr Wharington does not plead to some allegations, does not admit others and denies the principal allegations. In regard to the fixtures and fittings removed from the House, he says that he did that pursuant to the Terms. Finally and most significantly, he pleads that Mr Eckberg has compromised his claim and is only entitled to pursue his rights (if any) under the Terms.

The defect in the Slab

29. Evidence as to the defects in the Slab was given by Mr Russell Brown, a structural engineer. No other engineer gave evidence. It is quite apparent from the evidence that most of the defects in the House arise from the fact that the Slab has settled unevenly, resulting in the ground floor of the House being higher at the marina end than at the main entrance at the driveway end. It also tilts from one side to the other.

30. Mr Brown inferred from his observations that the fall from the highest to the lowest spot in the House was at about 110-120mm. He referred to the results of the bore log investigation and described the material upon which the Slab had been constructed as "filling or swamp residue" including "some very, very strange material". He concluded in regard to that:

> "By definition, by not removing this material before putting what went on top of it and then building on it begs the question as to adequacy at the time of construction."

31. He referred to the notation on the engineering drawing which states: "all footings must have at least 300mm below their bases and above any existing piles or ground anchors". He said that the proper interpretation of that was that the tops of the piles should be broken down so that there would be a layer of at least 300mm of sand between the underside of the footing to the top of the pile. He continued (on p.7 of his report):

> "From our observations – see photo 10 in particular – this is not the case where number 21 is concerned, in that the top of one of the piles is certainly straight and hard underneath one of the ribs, and by definition the other one is either the same or very close. Therefore it would appear that a condition set up on the documentation for the construction has not been met by either the builder, and also by definition the building surveyor who has it on his documents as being part of the approval procedure." (sic).

32. He suggested that there may have been some sand which had since gone but that the layer of sand would have been very thin over the pile in the north west corner. It is in this position where the highest point of the floor of the House is. He suggested on page 8 of the report that the ground upon which the House sits is going to move and continue to move but at a slower and slower rate than it has in the past.

33. The solution that he suggested was to inject a product known as "Uretek" below the slab to lift it up. He said (on p. 9 of his report):

> "I think it needs to be budgeted on a 10 year/repeating basis in conjunction with other owners agreeing to same, I do not believe it will cure the long term movements but will hide and partially correct the long term movements that have already occurred (and/or are going to occur).

34. In regard to long term repair he suggested the complete piling of all 8 units would be the obvious one but that the cost would clearly preclude that. Another option would be to cut the tops of the piles so that the units could settle in a uniform manner, which he described as "a long bow". He added on the final page of his report:

> "We also point out that no individual unit owner can possible take out the piles in the west of the units only, as in all cases we know such piles are on boundary lines between units, hence to take out one affects your neighbour and without a full understanding of what's being done it thus cannot be recommended. It, like piling and lifting all of the units, requires all owners to agree to it, I cannot see that occurring hence, an ongoing Uretek method to, in part only, is the best way. Therefore you may need to increase/allow for the amount required for Uretek to incur a life span of the building approach, for which there is a clouded attitude as to whether it is 25 years, 50 years or 100 years." (sic.)

35. In cross examination, Mr Wharington put to Mr Brown that no Australian Height Datum reference had been taken of the top of the slab when it was first laid and so it could not be said exactly how much it had settled. Mr Brown agreed that there was no such data but confirmed his view that there had been very little sand over the pile in question which he described as being "straight and hard underneath one of the ribs". He suggested that there had been more sand above the other one.

36. Mr Brown is a structural engineer whereas Mr Wharington is not. Further, Mr Wharington acknowledged that, when excavating for the Slab and constructing it, he made no attempt to ascertain where the piles were, saying that this would have required an over excavation of the site by 300mm which he said was unreasonable. He is therefore not in a position to contradict Mr Brown's conclusions.

37. Further, where the House faces the marina, there is a timber deck attached to it supported at the other end by piles set into the floor of the marina. If the House had settled by as much as 300mm the differential movement between the House and the deck would have been very apparent on inspection and it was not. I am therefore satisfied that, as Mr Brown says, Mr Wharington failed to allow the required 300mm between the underside of the slab and the top of the piles in question and that this has caused the differential floor levels and all of the resultant damage. I therefore find that the building work done by Mr Wharington was defective.

Internal defects

38. Evidence as to the defects in the House was given by Mr Lees and Mr Laugier.

39. Mr Lees inspected the House before the Terms were entered into and also after Mr Wharington had carried out his renovation. In his report of 5 December 2005 (ie, pre-renovation), he assessed the cost of rectification at $124,551.00. This did not include any rectification work for the Slab, but allowed for some internal re-levelling which Mr Wharington subsequently did, to an extent. Even after expending this amount of money doing the work that Mr Lees had costed, Mr Eckberg would still have been left with a defective building.

40. Mr Lees again costed the rectification work in his report of 2 April 2007. His figure then was $178,898.00. Again, this did not include rectifying the underlying problem which was the differential settling of the Slab.

41. In his report of 14 April 2008, Mr Lees considered the condition of the House after Mr Wharington had carried out his renovation work. Noting the work that had been done, Mr Lees pointed out that the ground floor still had variations in floor levels and that a step had been put in to the ground floor to take account of the greater height at the marina end of the building. There was considerable discussion about this step at the hearing and it was suggested that it would have required a special exemption to allow it, since

it was not within the permissible height range for a riser. This had not caused Mr Wharington any difficulty, presumably because no building permit had been obtained for the remedial work and no building surveyor had inspected it.

42. Mr Lees pointed out that foam cladding had been installed to the west wall of the building and rendered but that cracking had since developed in the cladding. The levels of the decking area had not been altered and it dropped from the high side down to the low side by a maximum of 108mm.

43. Mr Lees' biggest criticism related to the windows which, he said, admit water. He said that the windows are in an exposed position facing west over the marina and do not have sufficient loading for that application. There was considerable argument about that with Mr Wharington pointing out that the drawings did not require any particular type of window. The notes on the plans that he tendered state:

> "Typically provide powder coated aluminium frames to all windows. Window/door combinations to be timber frame."

44. Those notes are silent as to the performance requirements of the windows that were to be installed. Accordingly, Mr Wharington was required to install windows that would have been suitable for the purpose for which they were to be used (*Domestic Building Contracts Act 1995 s.8(b)*). Mr Lees said that the windows installed were, by their nature and quality, unsuitable for use in that position.

45. Mr Lees prepared a budget, dated 23 May 2008, of $56,202.00 for what then had to be done to the House. This comprised $11,199.00 for the floor slab, $11,914.00 to remove and replace the windows, $26,546.00 to remove and replace the sliding door units to the rear wall on the first and second floors and $6,543.00 for balcony tiling.

46. Mr Lees concluded in his most recent report that the rectifications would be dependent upon the structural report relating to the Slab.

47. Mr Laugier inspected the house for the first time on 11 June 2009. Some of the cracks he described as minor or within tolerance and, in regard to the vertical cracking between panels, he suggested that a control joint be inserted. He said that he thought that the majority of settlement had occurred and that only minor fluctuations would occur in the future. In saying this of course he is a building consultant and not an engineer and so I have to prefer Mr Brown's evidence in that regard.

48. Mr Laugier allowed $1,800.00 for the installation of control joints, $1,450.00 to render them, $820.00 to replace water damaged skirting and repaint. With a builder's margin and GST, he assessed the cost of carrying out his scope of works at $5, 360.85.

Site visit

49. I attended the House with the parties and their experts during the course of the hearing. I observed several points of water entry through windows which lends support to Mr Lees' opinion that these are inadequate for the location and ought not to have been used. I observed continued cracking of the building following Mr Wharington's work which supports Mr Brown's view that the building is continuing to move. As a result of the inspection I prefer the evidence of Mr Lees and Mr Brown to that of Mr Laugier.

Damages in D48/2006

50. At the time the Terms were entered into the damages for defective workmanship were well beyond $100,000, which was the amount upon which the revised decision of Vero was based. Even looking at the amount of damages that would be assessed now, I would have to add to Mr Lees' figure of $56,202.00 an allowance to take account of the fact that the House is on a continually moving slab that not only affects the value of the House but will lead to a continuing need for further cosmetic repairs. Any such allowance would mean that the damages suffered by Mr Eckberg should be assessed at least at $100,000.00. It is unnecessary to go further than that.

51. Mr Eckberg seeks to recover damages against Mr Wharington for defective workmanship and for breach of the contract for the sale of land entered into pursuant to the Terms. In regard to the former, he seeks to recover substantially more than the $100,000.00 that Vero determined to pay him. With respect to the latter, he claims for the removal of the items from the House and loss of rent following the breach of the contract of sale.

52. Mr Wharington's answer to this claim is that Mr Eckberg's rights are now to be found in the Terms. I think that is right. By the Terms it was agreed that Mr Eckberg would have the benefit of the Contract of Sale to be entered into with Mr Wharington and also the benefit of the $99,000.00 that was to be paid to him by Vero. That is all he was to be entitled to. The Contract of Sale was entered into and he had the benefit of the rights that accrued to him under that. In entering into the Contract of Sale, Mr Wharington fulfilled his obligation under the Terms. Any subsequent breach of the Contract of Sale does not amount to a breach of the Terms themselves. Since the Terms remain on foot they define what Mr Eckberg is entitled to.

53. Apart from his claim to the $99,000 Mr Eckberg is entitled to pursue his claim in damages for the breach of the Contact of Sale. However, this tribunal does not have power to entertain an action in damages for breach of a contract for the sale of land and so that claim must be brought elsewhere. All this Tribunal can entertain is the claim for damages for defective workmanship and, except in regard to the insured part of that claim, it has been compromised and is no longer available to Mr Eckberg.

The claims in proceeding D275/2007

54. In proceeding D275/2007, Vero seeks a declaration to the effect that, by entering into the Terms, Mr Eckberg has breached clause 20 of the policy of insurance and that, by the operation of that Clause, Vero is entitled to refuse to pay the claim to the extent that it has been prejudiced. It also seeks a declaration that the extent of its prejudice is $99,000.

55. Mr Eckberg makes no claim directly against Mr Wharington but has counterclaimed against Vero seeking a declaration that Vero is entitled to exercise its rights under the policy by reason of proceeding D48/2006 being reinstated. Any such declaration would affect Mr Wharington because of Vero's expressed intention to pursue him for anything that it has to pay to Mr Eckberg. It was therefore appropriate for Mr Wharington to be a party to this proceeding.

56. Mr Eckberg's claim against Hassell & Byrne is in damages for negligent advice in case I should find that Vero is not required to pay him the $99,000. By way of defence, Hassal & Byrne assert that Vero is required to make the payment and their advice was not negligent. In addition, they rely upon the fact that counsel who represented Mr Eckberg at the Compulsory Conference advised him upon the settlement and the Terms and that it was not negligent for them to accept Counsel's advice.

57. The starting point is the wording of the Terms.

The Terms

58. Paragraphs 1, 2 and 5 provided that Mr Eckberg and Mr Wharington would enter into a contract of sale for the sale by Mr Eckberg to Mr Wharington of the subject land for a price of $550,000.00 in accordance with certain specified terms.

59. Paragraphs 3, 4, 6 and 7 are as follows:

> "3. The Applicant and the First Respondent, upon the execution of these terms release and discharge each other from all claims that either has or had upon the other but for this Release.
>
> 4. It is further agreed that:
>
> (a) The applicant is entitled to and shall retain the benefit of the claim made on, and the decision of, Vero Insurance Ltd, with respect to the subject property, that is to say, the decision of Vero Insurance to determine quantum in the amount of $100,000.00.
>
> (b) The First Respondent shall not appeal the said decision of Vero Insurance or otherwise act to interfere with that decision.
>
> ……
>
> 6. The Applicant hereby grants the First Respondent a licence to enter upon the property and to undertake rectification works on the property, on the following conditions:

- Entry is limited to 8.00 a.m. to 6.00 p.m. weekdays and Saturday 9.00 a.m. to 6.00 p.m.
- Rectification works shall be undertaken as in a proper and workmanlike manner and subject to the conditions and warranties set out/provided by the *Domestic Building Contracts Act* 1995.
- The licence is revocable in the event that the First Respondent breaches the term of the licence.

7. Proceeding to be struck out with the right of reinstatement."

How should the terms be construed?

60. Mr Masel submitted that, on a proper construction or alternatively, as a matter of law, Clause 13 of the Terms only concerns that part of the liability that is not the subject of the $99,000.00 to be paid by Vero. He submitted that it only related to the uninsured liabilities that is, Mr Eckberg's claim other than that portion of it represented by the $99,000.000 that Vero was to pay to him.

61. There are two limbs to this argument. The first is that, as a matter of construction, Clause 3 should be read in this way. The second is that, as a matter of law, an insured and a third party cannot by means of an agreement between them secure the release by the insured of the third party so as to defeat an insurer's right of subrogation where those rights are known to exist by the insured and the third party. In support of these two submissions Mr Masel referred me to a number of authorities.

62. In *Morganite Ceramic Fibres Pty Ltd v Sola Basic Australia Ltd* [1987] NSW LR 189, the defendant ("Sola") sold a defective machine to the plaintiff. The faults in the machine caused substantial losses to the plaintiff in production and sales which it claimed from its insurer. The plaintiff's insurer had paid a substantial sum of money to the plaintiff under two policies for material damage and consequential loss. The defendant was aware of that claim.

63. The plaintiff also claimed from the defendant for the value of the machine. It was subsequently agreed between the plaintiff and the defendant that the plaintiff would return the machine to the defendant in exchange for a refund of the price. After the disposal of the machine pursuant to the agreement between the plaintiff and the defendant the insurer, in the name of the plaintiff and exercising a right of subrogation, sued the defendant for the losses that it had paid to the plaintiff and was met with a plea of accord and satisfaction.

64. Smart J had to consider whether the settlement achieved directly between the plaintiff and the defendant also included the further damage with respect to which the plaintiff had been indemnified by its insurer. His Honour said (at p.192):

> "There is no direct Australian authority and no English authority of consequence on the alleged principle that if the wrongdoer settles with the insured without the consent of the insurer and with knowledge of the insurer's payments and right of subrogation, such right is not defeated by any settlement or release. The defendant asserted that it did not exist. The alleged principle is supported by leading English and Australian text books …".

The learned judge then referred to a number of texts and continued (at p.193):

> "In *Haigh v Lawford*, summarised at (1964) 114 NL JLJ 208 Judge Bulger of the Salisbury County Court, *indicta*, accepted the principle, considering that, apart from authority, it seemed:
>
> > "… right in principle that, once the insurer's right of subrogation had crystallised, the wrong doer with knowledge of the payment to the insured should not be able to prejudice that right by release or compromise with the insured."

65. The learned judge also referred to the following passage from Derham, "subrogation in insurance law" (1985) at p.92:

> "The correct rule would seem to be that a release granted by the insured to the third party will not be effective as against the subrogated insurer if that release indicates *mala fides* by the insured and the third party in respect of the insurer. Of course, the fact that the third party has knowledge of the insurer's payment invariably will lead to a presumption of *mala fides*, but this would not be so if the insured was entitled to be *dominus litis*".

66. The learned judge referred to a number of American and Canadian authorities which supported the principle and observed that the doctrine of subrogation is a creature of equity and derives its operative features from the general indemnity nature of the contract. After making those observations, his Honour continued (at p.197):

> "I turn to relatively recent cases which, while not dealing with the point here in issue, contain important statements of principle. The defendant relied heavily upon this passage from the judgement of Mason J A in *Sydney Turf Club v Crowley* [1971] 1 NSW LR 724 at 734:
>
> > "Where an insurer is subrogated to the rights of the insured against the third party, the insurer does not acquire an independent cause of action in his own right. He succeeds to the insured's course of action against the third party, in this case the right of action on the policy issued by the jockey club. That right of action remains in all respects unaltered; it is brought in the name of the insured and it is subject to all the defences which would be available if the action had been brought by the insured for his own benefit …"

67. His Honour then referred to the comments of Barwick CJ in *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228 at 240-241, where the learned Chief Justice said:

> "… It is settled law that an insurer who has paid the amount of the loss under a policy of indemnity is entitled to the benefit of all the rights of the insured in the subject matter of the loss and by subrogation may enforce them. This right of subrogation is inherent in the contact of indemnity …… It is also settled law that an insured may not release, diminish, compromise or divert the benefit of any right to which the insurer is or will be entitled to succeed and enjoy under his right of subrogation. On occasions an attempt by the insured to do so will be ineffective against the insurer because of the knowledge of the circumstances which the person under obligation to the insured may have. On other occasions when the insured's act has become effective as against the insurer, the insured will be liable to the insurer in damages, or possibly, on some occasions for money had and received. But such conduct on the part of the insured will not in general avoid the insurer's liability to indemnity, though in some circumstances the insurer may be entitled to set off the amount of the damages against the amount otherwise payable under the indemnity". [my emphasis]

68. Smart J concluded on p.198 as follows:

> "On the whole of the material I am of the opinion that it is open for the plaintiff to contend that the case does fall within the qualification propounded by Barwick CJ. I am also of the opinion on the materials, that it is open to the plaintiff to rely on one approach suggested in *Ocean* by analogy, namely, that in a practical sense the insurer's rights and the matters they covered had become separated from the return of the unit and the refund of the monies, even though originally part of the one cause of action. It is open for the plaintiff to contend that they were being dealt with separately and that the release did not apply to the claims paid by its insurer."

69. The decision in *Morganite* went on appeal with the majority (Priestley JA and Hope JA) determining that, on its true construction, the release did not apply to the insured part of the claim. They did not find it necessary to consider whether there was such a legal principle as found by Smart J. The dissenting judge on appeal, Meagher JA, found that no such principle existed, saying that the argument was misconceived.

70. When the *Morganite* case finally came on for hearing, Smart J determined it by finding that, on its true construction, the agreement did not effect the release of the defendant. However he went on to say that, if he were wrong on the construction point then there was such a principle as that he had described previously; that is, that a release given to the third party by the insured was ineffective to defeat the insurer's right of subrogation.

71. In *Baltic Shipping Co v Merchant "Mikhail Lermontov"* (1994) 36 NSW LR 361 Handley JA, with whom the other two members of the Court of Appeal agreed, referred with approval to *Morganite* as authority for the proposition that, since the third party was on notice of the insurer's rights, general releases given by the insured passengers in that case were not effective to preclude those rights of the insurer. (See p.370)

72. In *Le v Williams* [2004] NSW SC 645 the point was raised but Campbell J did not need to consider it because the case before him was decided as a matter of construction.

73. Mr Waldren sought to distinguish *Morganite* on the basis that the insurer in that case appears to have paid out the claim before the release was signed and so the right of subrogation had therefore crystallised. He said that the same applied to the various authorities Smart J referred to. In this case the Terms were entered into before there was any payment and so before any right of subrogation had crystallised. However in *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* (*supra*) the learned Chief Justice did not confine his comments to cases where the right of subrogation had crystallised. He said at p.240 after referring to the rights of subrogation and between the two passages set out above:

> "It has been put that it exists as a contingent right from the inception of the insurance. For my part, with respect, I do not find the description "contingent right" appropriate and satisfying. A right of subrogation it seems to me does not depend for its existence as a right upon the occurrence of a loss under the policy. Its exercise is of course dependent upon the payment of the loss and it is a right that exists from the moment of a making of a contract of indemnity. There is therefore no reason why a breach or a threatened breach with a right could not be restrained by the insurer before the loss has occurred, although an occasion for such a course would probably be rare."

74. Mr Masel pointed out that, at the time the Terms were entered into, both Mr Eckberg and Mr Wharington were aware that Vero had accepted the claim and that as a result, Mr Eckberg was to be paid $99,000.00. Mr Wharington was also aware that Vero was intending to seek to recover that from him and that is why he sought to be made a party to the proceeding. I accept that that is the case.

75. In these circumstances, and on the basis of the authorities cited, in particular, the passages from the judgment for Barwick CJ in *State Government Insurance Office v. Brisbane Stevedoring Pty Ltd* (infra) I think it was not open to Mr Eckberg and Mr Wharington to shut out the rights of Vero to pursue Mr Wharington in the exercise of its right of subrogation. Hence the general release given cannot as a matter of law extend to release Mr Wharington from that liability which Mr Masel described as "the insured part of the claim". In case I am wrong I also need to consider the construction argument.

76. Mr Masel said that Clause 3 could not be read in isolation from what follows in the Terms. Although Clause 3 is a general release Clause 4 says that the applicant is entitled to the benefit of the insurer's decision. The benefit of the claim was the amount that Vero had agreed to pay. Further, Mr Wharington had agreed that he would not appeal the decision nor act to interfere with it. It is therefore not logical, he said, to read the release as

dealing with that part of the claim. The agreement should therefore be read down to exclude Clause 4.

77. Consequently, he submitted that, as a matter of construction, the effect of the whole of the agreement was that Mr Eckberg would enjoy the benefit of the $99,000.00 as part of the bargain and that Mr Wharington was otherwise to be released.

78. Mr Masel relied upon *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 as to the interpretation of a general release. The majority of the court (Dixon CJ, Fullagar, Kitto and Taylor JJ) said at p.129:

> "From the authorities which have already been cited it would be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releaser".

79. It is quite clear that it was the intention of the parties that Mr Eckberg would enjoy the benefit of the $99,000.00 and that Mr Wharington would not in any way interfere with the payment of that sum to him. It was also clear that Mr Wharington knew that Vero would seek to recover that sum from him and that, since he agreed in the Terms not to appeal, he would be unable to resist such a claim. He also knew that the only avenues for recovery that would be available to Vero would be either the exercise of its right of subrogation or by means of an assignment of Mr Eckberg's rights in regard to the insured part of the claim. It would therefore be quite inequitable for Mr Wharington to be allowed to set up the general release found in the Terms so as to defeat any claim taken against him in the name of Mr Eckberg to recover this amount of $99,000.00 in that it would have the effect of defeating the very purpose of the transaction namely, that Mr Eckberg would enjoy the benefit of the claim.

80. Mr Waldren suggested that paragraphs 3 and 4 could sit together and so, there being no apparent ambiguity in the text of the document, it is not permissible to go beyond the document in order to interpret it. However that submission is inconsistent with the judgement in *Grant* which says that the true purpose of the transaction is to be:

> "….ascertained from the nature of the instrument and the surrounding circumstances including the state of the knowledge of the respective parties concerning the existence, character extent of the liability in question and the actual intention of the releaser".

81. Mr Waldren submitted that by entering into the Terms containing the release Mr Eckberg left his claim against Mr Wharington in a mess. He suggested that, whereas before entering into the Terms and giving the release, Vero would have had a clear claim against Mr Wharington for

defective workmanship, it now has to cope with the effect of the Terms and the release that they contain. I do not think that follows. For the reasons given it is clear that, to the extent of the $99,000.00, the claim remains unaffected. Indeed, it does not appear that Mr Wharington took any point in regard to the defence of any claim for $99,000.00 until Vero refused to pay and raised the argument which he now seeks to rely upon. Mr Waldren's submission that Vero's rights have been affected by Mr Eckberg entering into the Terms is only good if Mr Wharington in fact is released and I find that he has not been.

82. In *Qantas Airways v Governs* (1992) 28 NSW LR 26 at p.26, the majority of the court (Gleeson CJ and Handley JA) said at p.43:

> "… No attention was given by the parties … to the well established principle of equity that the general words of a release are limited always to such matters as was specially in the contemplation of the parties at the time when the release was given".

83. Mr Masel also argued that, upon the acceptance of the claim by Vero and the agreement to strike out the proceedings, there was a contract between Mr Eckberg and Vero and that Vero was obliged by that contract to pay the claim. I do not accept that argument. All that Vero did was change its decision. It did not agree to pay Mr Eckberg $99,000 in consideration of him withdrawing his appeal. Had it done so, the obligation to pay the $99,000 would have arisen immediately and Vero would have been bound to pay it, even if Mr Wharington had successfully appealed the decision. That cannot have been intended.

84. Mr Masel's next argument was that Mr Wharington cannot rely upon the release to defeat his co-promise that Mr Eckberg may retain the $99,000.00. That agreement, he submitted, is spelled out in paragraph 4 of the Terms. To now plead that he is released from that obligation would, Mr Masel says, amount to a breach of contract which would sound in damages. However damages would only be suffered if the plea were successful that is, if Mr Wharington was able to rely upon the release and I have found that he is not.

85. However if I am wrong and he is entitled to rely upon the release, I find it difficult to see how reliance upon one part of a contract can amount to a breach of another part. I think the better analysis is that the parties did not intend the release to frustrate their clear expressed intention that Mr Eckberg should receive the proceeds of the insurance claim. That way the clauses can sit together.

86. Mr Masel's next submission was that Vero had failed to prove that clause 20 was in the policy. The primary evidence as to the policy and its terms and conditions was set out in the exhibits to Mr Rodriguez's two affidavits. There was some confusion in regard to this to start with when Mr Rodriguez was cross examined but it is now clear that the relevant form of policy is not the 1997 form annexed to Mr Rodriguez's affidavit but the

1996 policy that has since been produced. That also contains a Clause 20 in the same terms so I am satisfied that the clause formed part of the policy.

87. Mr Masel pointed out an obvious difficulty with the policy, namely, that it is expressed to be in the name of the "owner" and it is clear on the evidence that Mr Wharington, who is named as the owner in the certificate of insurance, was never in fact the owner of the subject land. However it was the clear intention of both the insurer and the owner of the land, which is a company of which Mr Wharington is both shareholder and director, that the policy would cover the owner for the time being of the land to the extent of the indemnity provided by its provisions. There has never been an issue that, as the present owner, Mr Eckberg is not insured under the policy and his claim has been accepted and he and Vero have agreed that he will be paid $99,000.00 in satisfaction of it. The claim having been based upon this policy and the claim having been made and accepted pursuant to it, Mr Eckberg cannot be heard to say that the cover conferred is not subject to the provisions of the very policy under which he now claims. Further, in his Points of Defence he has admitted the policy and the relevant Clauses 20 and 26.

88. Mr Masel's next point and one upon which Mr Eckberg relies in his defence is that the policy is not in accordance with the relevant Ministerial Order. There does not appear to have been any substantial disagreement between counsel as to the structure and effect of the Ministerial Order. It is made pursuant to s135 of the *Building Act* 1993.

89. By clause 11.3 any policy issued pursuant to it is to be read down so that it complies with the Ministerial Order. Clause 2 of the Order imposes upon the builder the requirement to procure a policy of the nature described. The extent of the cover to be provided by the policy is as set in that clause. Clause 3 describes the persons to whom the policy must provide cover and Clause 4 provides the period for which the cover must be provided. Clause 5 bears the heading "Permissible policy limitations under Part A". Clause 5.1 allows a certain limitation for claims for liquidated damages and Clause 5.2 deals with overpayments to the builder. There are no other limitations permitted.

90. The next relevant clause of the Ministerial Order is clause 10 which provides that the policy may include certain provisions which are listed. These are:

    (a) provision for payment of an excess by the insured in certain circumstances;

    (b) a limit of the aggregate liability of the insurer to not less than $100,000.00 and limit the liability of the insurer for legal costs of the claimant;

    (c) provision that the insurer may refuse to accept claims after the expiration of 6 years and 6 months from the completion date;

(d) an exclusion of certain external works from cover of the policy;

(e) restriction or exclusion of loss or damage due to fair wear and tear;

(f) a requirement that the insured make reasonable efforts to assist and inform the insurer or its agent, provide reasonable access to the site for inspection, rectification and completion of the building works and permit access to a builder nominated or approved by the insurer.

(g) A limitation in certain respects of liability with respect to common property of a multi unit building.

91. Clause 11 of the Ministerial Order sets out certain provisions that the policy must contain. One of these, clause 11.3, provides that if the policy is inconsistent with the order then it should be read and be enforced as if it complied with it. The most significant parts of clause 11 are as follows:

"11.4 An insurer is not entitled to either refuse to pay a claim under a policy or to cancel a policy on the ground that the policy was obtained by misrepresentation or non disclosure by the builder or that the policy premium was not paid providing, in the latter case, that a certificate evidencing insurance has issued or the insurer has otherwise accepted cover; and

11.5 The insurer acknowledges that s.54 of the *Insurance Contracts Act* 1984 (an insurer may not refuse to pay claims in certain circumstances) shall apply or be deemed to apply to all policies issued pursuant to this order PROVIDED HOWEVER that where the person who is making a claim against the insurer has notified either the builder, either orally or in writing, … within 180 days of the date of when the claimant first became aware, or might reasonably be expected to have become aware, of such fact or circumstance which may give rise to the claim, then the insurer shall not rely upon s54 of the *Insurance Contracts Act* 1984 to reduce its liability under the policy or to reduce any amount otherwise payable in respect of the claim made by reason only of any delay in a claim being notified to the insurer".

92. Mr Masel submitted that a limitation on cover of a risk that the order requires to be covered that goes beyond those limitations set out in the order is not permissible. I think that is right. He pointed out that the order does not permit the policy to contain a limitation on cover by reference to loss of, or compromise of, a right of subrogation. By way of contrast, he referred me to the Ministerial Orders in Government Gazettes S82/2002 and S98/2003 which do permit such a limitation. He said that clause 20 was therefore inconsistent with the Ministerial Order and, by clause 11.3 of the order, the policy is to be read down as if it complied. The clear intent of the Ministerial Order was, he said, that the policy would only contain the limitations on cover that were permitted by the order.

93. Mr Waldren submitted that clause 20 was simply a restatement of the ordinary legal principle of subrogation. He said that the "permissible limitations" in the Ministerial Order referred to limitations able to be

imposed upon the scope of liability of the insured under the policy. He said that there was nothing in the order or in the language of these permissible limitations or the mandatory requirements that excluded the ordinary legal principle of subrogation or the duties owed by the insured to the insurer that pays a claim. He said that for such rights to be abrogated would require clear and unambiguous language and there are no such words in the Order.

94. I think that Mr Waldren is right in regard to the permissible policy limitations under clause 5 but the position under clause 10 is not as clear. Unlike clause 5, the minimum requirements in clause 10 are not related to the extent of cover. Rather, they impose conditions and limitations in regard to the making of a claim under the policy. The requirements as to the payment of an excess and the limitation of the amount of the liability in clauses 10.1.1 and 10.1.2 might arguably be said to cut down the cover and thus limit it in a real sense, but 10.1.3 permits a limitation on when the insured may claim and clause 10.1.6 permits the imposition of obligations on the insured to assist the insurer. The fact that the Minister has expressly permitted this would suggest that the imposition of duties upon the insured is not otherwise permitted.

95. I think that, insofar as clause 20 of the policy purports to impose any positive obligation upon the insured that is not expressed in the Ministerial Order, it is inconsistent with the Order and invalid. Insofar as it purports to limit the liability of the insurer by reason of anything done or not done by the insured it is similarly inconsistent with the Order and invalid. Insofar as it merely restates the fact that, if it pays a claim it is entitled to be subrogated to the right of the insured, that is inherent in the insurance contract and so is not inconsistent with the Ministerial Order. To that extent, I accept Mr Masel's submission that clause 20 cannot limit the liability of Vero under the policy and also Mr Waldren's submission that, at least in part, it simply restates the normal legal position that, upon payment of the claim the insurer is entitled to be subrogated to the rights of the insured against the third party. Accordingly, I agree with Mr Masel that Clause 20 cannot remove the cover that the Minsterial Order requires to be provided.

96. Mr Masel's next argument was that clause 20 was void by reason of the operation of s.68 of the *Insurance Contracts Act* 1984 (Commonwealth). That section provides as follows:

> "Contracts effecting rights of subrogation.
>
> (1) Where a contract of general insurance includes a provision that has the effect of excluding or limiting the insurer's liability in respect of a loss by reason that the insured is a party to an agreement that excludes or limits the right of the insured to recover damages from a person other than the insurer in respect of the loss, the insurer may not rely on the provision unless the insurer clearly informs the

insured in writing before the contract of insurance was entered into, of the effect of the provision".

97. Mr Masel submitted that the policy in question is a contract of general insurance and, by reference to the definitions in the Act, he is correct. He also submits that clause 20 of the policy is a provision that has the effect of excluding or limiting the insurer's liability in the manner described in the section. I accept that submission. By operation of the section Vero may therefore not rely upon the provision unless it clearly informed the insured in writing before the contract of insurance was entered into of the effect of that provision.

98. Mr Waldren said that the word "is" in the third line of sub-section (1) should be read as if it said "is at the time of the loss". The agreement that excluded or limited Mr Eckberg's rights to recover damages from Mr Wharington was not entered into until after the loss and after Vero had agreed to pay the claim. Because the agreement was entered into after the loss the section did not apply.

99. Mr Waldren said that the section was directed at existing arrangements between the insured and the third party either at the time the contract of insurance was entered into or at any time prior to the loss. It is not directed, he argued, at how the insured deals with the third party when a claimable loss has arisen.

100. He said that s.68 arose as a consequence of concerns expressed by the Australian Law Reform Commission in its report *"Insurance Contracts"* (Canberra: AGPS 1982) at paragraphs 307 to 308. In the passage cited the learned authors of the report referred to a difference between an insured prejudicing an insurer's right of subrogation to existing rights as distinct from its right of subrogation to potential rights. The distinction seems to be between limitations that occur before the insurer has acquired any rights by way of subrogation as distinct from limitations of rights of subrogation after those rights have accrued.

101. I do not think that distinction is of any assistance in the present case. It is made clear in the passages referred to in *Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (supra) that the insurer has prospective rights even before the loss has occurred. Further, the intention of the section was to require the insurer to put the insured on notice at the time of the inception of the policy so that he knows, not only that he must not prejudice the insurer's right of subrogation to existing rights but also must not prejudice its right of subrogation to potential rights. The section does not say that it only applies for a loss that has arisen that is claimable under the policy. The words of the section are clear and I can see no reason for reading anything into them.

102. Mr Masel referred me to *"Sutton Insurance Law in Australia"* 3rd edition, paragraph 1647. In that passage the learned author, after discussing the sections, adds:

> "The reference to a provision that has the effect of excluding the insurer's liability "by reason that the insured is party to an agreement" with a third party, is no doubt wide enough to include an agreement entered into with the third party during the currency of the policy, but much will depend on the exact wording of the expressed provision in the policy".

I cannot see any valid reason for reading down the section as Mr Waldren urges.

103. Mr Waldren pointed to the unusual nature of the insurance scheme contemplated by the Act and the Ministerial Order and said that it would be impossible for the insurer to forewarn every person who became the insured under the policy each time there was a change of ownership of the insured building works. I agree that it would be but I think the answer to that lies in the fact that, although there may be a succession of people entitled to the benefit of the policy from time to time, there is only one policy. The Act requires the warning to be given before the policy is entered into. The intention of parliament must therefore be that it is to be given to the contemplated "insured" at that time, that is, immediately before the policy was issued. Such person or persons will be identifiable and in this case, that would have been Mr Wharington's company which was the owner of the land at the relevant time. If the notice had been given to that company, the section would have been complied with but it is clear from the evidence that no such notice was given. It therefore follows that s.20 may be not relied upon by Vero.

Estoppel

104. Mr Masel submitted that, by not attending the compulsory conference when it knew that the purpose of the conference was to endeavour to settle the claim between Mr Wharington and Mr Eckberg Vero is estopped from relying on the release. He said that it must have foreseen that settlement may occur and that as part of that settlement a release would be given by Mr Eckberg to Mr Wharington. It is a universal practice to provide such a release in terms of settlement. He said that Vero was content for Mr Eckberg and Mr Wharington to settle the dispute and allowed them to do so. It had the right to assume control of the proceedings and elected not to do so. He said that Vero knew that Mr Eckberg would be negotiating with Mr Wharington with the knowledge that it had agreed to pay him $99,000.00. Its conduct amounted to a representation by inaction and so it is estopped from relying on the release.

105. Mr Waldren pointed out that clause 33 of the policy did not require Vero to take over the conduct of the proceeding and suggested that, until payment, it had no right to do so.

106. I do not believe that the mere inaction of Vero gives rise to any estoppel. It had simply made a decision to pay a sum of money to Mr Eckberg and in doing so it made no representation beyond the terms of that decision as communicated to the parties. It was a decision against which Mr

Wharington might have appealed, the time for appeal not having expired. Vero was not required to assume control of the proceedings.

107. Similarly I do not think that it is established that it would be unfair or unconscionable in the circumstances for Vero to refuse to pay him the $99,000.00 if it was otherwise lawfully entitled do so.

Conclusion

108. For the reasons given I find that the release in the Terms is not effective to prevent Vero from recovering from Mr Wharington the $99,000 that it has decided to pay to Mr Eckberg. This is both because, on its proper construction, the general release in the Terms does not extend to that part of Mr Eckberg's claim and also because, since both Mr Eckberg and Mr Wharington knew and agreed that Vero was to pay the $99,000 to Mr Eckberg and were also aware that Vero was intending to seek recovery of that sum from Mr Wharington, it was not competent for them to agree to shut out that right of Vero.

109. I find that the general release in the Terms is otherwise effective to shut out any other claims Mr Eckberg had against Mr Wharington as at the date of the Terms and that the claim that he seeks to make arising from the alleged breach of the Contract of Sale of land by Mr Wharington is not justiciable in this Tribunal.

110. The decision to pay the said sum to Mr Eckberg having been made and the only basis upon which Vero refused to pay the money not having been established, Mr Eckberg is entitled to an order in the sum of $99,000.00 against Vero. Consequently, the claim by Mr Eckberg against the Second Respondent must fail. It is unnecessary to consider the other defences taken by the Second Respondent.

Orders

111. The following orders will be made in proceeding D275/2007:

    1. The Applicant's claim is dismissed.

    2. Declare that the Applicant is not prevented by reason of the terms of settlement entered into between the First Respondent and the Third Respondent from recovering by way of subrogation or assignment the sum of $99,000.00 paid by it to the First Respondent.

    3. The First Respondent's claim against the Second Respondent is dismissed.

    4. Costs reserved.

112. With respect to Proceeding D48/2006,

    1. Declare that as to the sum of $99,000, the claim by the Applicant for damages against the Respondent has not been heard or determined as it can only be brought against the Respondent by Vero Insurance Limited, whether by way of subrogation or assignment.

2. Declare that the claim by the Applicant for damages is otherwise compromised by the terms of settlement entered into between the parties and dated 4 April 2007.
3. Declare that this Tribunal has no power to hear and determine the First Respondent's claim against the Third Respondent for alleged breach of a contract for the sale of the land at 21 Scarborough Drive Patterson Lakes.
4. Liberty to any party to apply for any further orders or directions as may be appropriate to give effect to the accompanying reasons for decision.
5. Costs reserved.

SENIOR MEMBER R. WALKER