VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D145/2004**

CATCHWORDS

Settlement offer under Sections 113 and 112 of the Victorian Civil and Administrative Tribunal Act 1998, Insurer's rights of subrogation against other Respondents, priority of payment in recovery

APPLICANT	Suzanna Baines
FIRST RESPONDENT	Terrace Designs Pty Ltd (ACN 004 984 025)
SECOND RESPONDENT	Geoffrey Joseph Graham
THIRD RESPONDENT	Arthur John Gunston t/as A J Gunston
FOURTH RESPONDENT	Vero Insurance Limited (ACN 005 297 807)
FIFTH RESPONDENT	Civil and Soil Pty Ltd (ACN 076 191 056)
SIXTH RESPONDENT	Alvisio Casagrande
SEVENTH RESPONDENT	Robert Brotchie and Associates Pty Ltd (ACN 007 122 018)
WHERE HELD	Melbourne
BEFORE	Member M Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	29 April 2005
DATE OF ORDER	9 May 2005

ORDER

Subject to the Fourth Respondent's right to promptly make a submission that these proceedings should not be treated the same as proceeding D144/2004:

1. The Fourth Respondent must remain a party to enable the Tribunal to properly govern these proceedings and in particular to rule on matters of costs and interest.

2. On the condition that it is bound by the outcome of these proceedings and except as provided hereunder, the Fourth Respondent has leave not to participate further in the proceedings, but the fact of failure to participate may be taken into account when costs are determined, particularly if the Fourth Respondent has insisted that its permission must be obtained and then failed to give permission to the Applicant to settle with any or all of the First, Second or Third Respondents.

3. The Tribunal may still require the Fourth Respondent to attend any future compulsory conference.

MEMBER M LOTHIAN

APPEARANCES:

For Applicant	Mr K Oliver of Counsel
For 1st and 2nd Respondents	Mr G Graham, In person
For 3rd Respondent:	Mr E Riegler of Counsel
For 4th Respondent:	Mr B Powell of Counsel
For 5th Respondent:	Mr Bolwell, Sole Director
For 6th Respondent:	Ms S Kirton of Counsel
For 7th Respondent:	Mr J M Forrest of Counsel

REASONS

1. By application of 27 April 2005 the Fourth Respondent warranty insurer ("Vero") sought leave under Section 74(2) to withdraw its claim against the Fifth and Sixth Respondents. Leave was granted at the Directions Hearing on 29 April 2005.

2. Vero also sought to be released as a party from the proceeding (or excused from further participation) subject to resolution regarding the Applicant's entitlement to interest and costs.

3. The question of leave to withdraw was reserved.

4. In parallel proceedings between Ceri Wyn Lawley and the Respondents, the following reasons were given:

"Vero's application was supported by an affidavit of Peter Dobeli of its solicitors. Mr Dobeli deposed that on 7 April 2005 with prejudice settlement offers were served upon the Applicant to the effect that:

- Vero would pay the Applicant $100,000 within 30 days of acceptance of the offer.
- Vero would pay the Applicant's reasonable legal costs and expenses associated with successful enforcement of her claim. Failing agreement between the parties costs would be assessed by the Tribunal.
- Vero would pay the Applicant interest on the sum of $100,000 within 30 days of acceptance of the offer. If the sum of interest were not agreed, it would be determined by the Tribunal.

"It is noted that the offer was expressed to be in accordance with Sections 113 and 114 of the *Victorian Civil and Administrative Tribunal Act* 1998, and open for fourteen days.

"By letter of 20 April 2005 the Applicant accepted the offer.

"Mr Oliver for the Applicant opposed the application to withdraw, agreeing that interest and costs are yet to be determined – in particular, the issue of when interest should be calculated from is a live issue. He added that there are issues of subrogation between Vero and the Applicant, and referred to the affidavit of Jeldee Ann Robertson of 28 April 2005. Ms Robertson annexed a number of letters to her affidavit.

"By a letter of 15 March 2005, Vero's solicitor wrote to the Applicant's solicitor to say that Vero had reassessed the quantum of the Applicant's claim and decided to pay her $100,000 plus reasonable legal costs and expenses. The letter continued:

> *"I also draw your client's attention to clause 20 of the policy of insurance, which states:*
>
> > *'If we pay a claim, we are subrogated to your rights against any other party in relation to the claim.*
> >
> > *You must not reduce or limit your rights against any such party.*
> >
> > *If you do, we will not pay a claim to the extent we can no longer recover from the other party because those rights are affected.'*
>
> *I understand that it is your client's intention to pursue her claims against other Respondents … If your client wishes to pursue any settlement negotiations with another party or indeed settle her claim … my client should be informed … and my client's consent should be obtained regarding any proposed settlement.*
>
> *My client puts your client on notice that if a settlement is reached with another party that prejudices my client's rights of recovery against that party, my client will exercise its rights under clause 20 ….*
>
> *My client also puts your client on notice that it asserts an equitable lien over any monies recovered by your client against any third party wrongdoer in relation to the claim, pursuant to its subrogated rights arising from clause 20 of the policy. Accordingly, your client should account to my client for any such recovered monies."*

"On 18 March 2005 the Applicant's solicitor wrote to Vero's solicitor, seeking clarification of the offer. The letter asked what interest Vero would pay as "It has taken the insurer nearly 3 years to accept liability and to agree to pay the claim … It would appear to us that our client is entitled to nearly 3 years of interest."

"It also enquired of the scale of costs and asserted the Supreme Court Scale on an indemnity basis would be appropriate.

"The letter joined issue on the question of subrogation. It asserted that the Applicant would be entitled to recover from the other Respondents she has joined to the proceedings (the First, Second and Third Respondents) the remaining part of her claim for which she has not been compensated out of the insurance provided by Vero. In particular:

> *"We recognise that your client has a right of subrogation and that our client is not entitled to be doubly compensated. That is not a position which will arise, however until the full amount of our client's loss has first been paid, and to the extent that our client makes a recovery which leaves an entitlement possibly greater than our client's loss (taking into … account the payment made by the insurer) she would need to reimburse your client. Please confirm that this is also your understanding of the subrogation principles in question."*

"The letter also sought Vero's confirmation that the Applicant could not settle with the other Respondents joined by her unless with Vero's consent, and raised the possibility that Vero would not consent unless it were to be first reimbursed by those other Respondents, despite the fact that the Applicant might not be fully compensated for her loss.

"The writer continued:

> *"Is it your client's position that our client is not in a position to now settle any other part of these proceedings with [the First, Second and Third Respondents] without your client's consent?*
>
> …
>
> *If we have correctly understood your client's position … then it seems to us that it is not possible for your client to avoid further involvement in this litigation on the basis of the offer made."*

"Annexed to the letter was a discussion of *Napier v Hunter* (1993) AC 713. The conclusion drawn by the author is that where an insured successfully sues a party against whom the insurer has rights of subrogation, the priority of distribution is first, the insured keeps an amount to compensate them for any loss over the limit of

insurance, then the insurer is refunded amounts paid out, then the insured is entitled to the excess, or self-insured portion. The Applicant's solicitors asked Vero's solicitors to inform them if their view was different.

"The Applicant's solicitors sent a further letter on 23 March 2005 noting that a response to the letter of 18 March had not been received and adding that although Vero was trying to exert a right of subrogation, it did not intend to take over the conduct of the proceeding if it settled with the Applicant. The author wrote:

> *"In cases such as this one, where the loss suffered is far greater than the sum insured:*
>
> - *An insurer is not able to exercise a right of subrogation until … the insured is fully indemnified for all of the loss it has suffered;*
> - *If the insurer does exercise a right of subrogation, it is required to act in a manner which does not prejudice the insured's uninsured component; and*
> - *If the insurer does not exercise a right of subrogation it will be liable to pay not only the costs of enforcing the claim against the insurer but also the insured's costs incurred in prosecuting its rights against third parties.*
>
> *How your client intends to proceed in the event that it settles our client's claims against it remains unclear. Accordingly, it continues to be our view that your offer is not capable of any meaningful acceptance until such time as the matters we have raised in this and our previous letter are clarified."*

"In a letter from the Applicant's solicitors to Vero's solicitor of 24 March 2005, there was reference to a letter of the same date from Vero's solicitor, a copy of which has not been annexed to Ms Robertson's affidavit, but it is clear that the issue of subrogation had not been resolved. As the author said:

> *"…our client cannot release your client subject to the issue of interest, costs and subrogation at this stage and it seems to us that your client and our client will continue to have an active interest in the VCAT proceeding. Your client is effectively tying our client's hands."*

"The issue was brought to a head by Vero's offer of compromise. It was accepted on the second last day that it was open. Although uncertainty about the interpretation of the provision in the offer relating to interest could mean that the offer was not in accordance with Sections 113 and 114, it is acknowledged that this is not a risk that a prudent party in the Applicant's position would take."

5. At the conclusion of argument by Mr Oliver for Ms Lawley, Mr Whitelaw for the Applicant said that the Applicant made the same submission in these proceedings. It is noted that no objection was made by Vero to this submission. I do not have material before me to indicate that there was similar correspondence between the Applicant and Vero, but it is logical that similar orders should be made in both proceedings. Nevertheless, I reserve the right to Vero to make a submission that these proceedings should not be treated the same as proceeding D144/2004.

6. Vero must remain a party to enable the Tribunal to properly govern these proceedings and in particular to rule on matters of costs and interest.

7. On the condition that it is bound by the outcome of these proceedings and except as provided hereunder, Vero has leave not to participate further in the proceedings, but the fact of failure to participate may be taken into account when costs are determined, particularly if Vero has insisted that its permission must be obtained and then failed to give permission to the Applicant to settle with any or all of the First, Second or Third Respondents.

8. The Tribunal may still require Vero to attend any future compulsory conference.

MEMBER M LOTHIAN