

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D512/2003

**CATCHWORDS**

Domestic Building, breached terms of settlement, forgone payment by another party.

<b>APPLICANT</b>	Grant Wharington
<b>FIRST RESPONDENT</b>	Vero Insurance Limited (ABN 48005297807) (previously known as Royal & Sun Alliance Insurance Australia Ltd)
<b>SECOND RESPONDENTS</b>	Steven and Athina Deriboklou
<b>THIRD RESPONDENT</b>	Boral Window Systems Pty Ltd
<b>FOURTH RESPONDENT</b>	The Truss Works (Vic) Pty Ltd
<b>FIFTH RESPONDENT</b>	Eliza Designs Pty Ltd (ACN 006 888 777)
<b>SIXTH RESPONDENT</b>	Nepean Building Permits and Consultants (A Firm)
<b>SEVENTH RESPONDENT</b>	James Sheedy
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	25-29 September 2006
<b>DATE OF ORDER</b>	23 October 2006
<b>CITATION</b>	Wharington v Vero Insurance (Domestic Building) [2006] VCAT 2142

**ORDER**

- 1 The Applicant must pay the Second Respondents \$74,415.64. forthwith.
- 2 I certify for Mr Hester, expert called on behalf of the Second Respondents, for the costs of an incidental to preparing his report and attending the Tribunal for one day and two half days.

- 3 I certify for Mr Dangerfield, expert called on behalf of the First Respondent, for the costs of an incidental to preparing his report and attending the Tribunal for one day and a half.
- 4 There is leave to apply for costs.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicant                      Mr D. Pumpa of Counsel

For the Second Respondents        Mr S. Smith of Counsel

## REASONS

- 1 These proceedings concern Terms of Settlement (“ToS”) entered by Mr Wharington and Mr and Mrs Deriboklou, among others, dated 15 December 2005.

### History

- 2 Mr Wharington was the registered builder of a development at Marina Palms, Patterson Lakes, of which number 3 is Mr and Mrs Deriboklou’s home. They are the second owners, and have claimed on the warranty insurance for alleged defects. The warranty insurer decided to accept a number of their claims, and in 2003 Mr Wharington appealed a decision of 24 July 2003 which is this proceeding. His second appeal in 2005 concerned a decision notified to him by letter of 4 March 2005, which is proceeding D175/2005 which is also disposed of by these orders and considered in these Reasons.
- 3 The ToS settled all matters between all the parties to them, and required Mr Wharington to pay \$8,000.00 which he did, albeit late, and to arrange for a registered domestic builder to undertake the works described in the Scope of Works attached to the ToS, at his expense. Clause 2 of the ToS required the rectification work:
  - i to commence between 15 and 31 January 2006,
  - ii to be completed within 30 days of commencement plus reasonable time where not due to the fault of Mr Wharington,
  - iii to include obtaining all permits and approvals and any plans and incidentals associated with the works and
  - iv to be covered by new domestic building warranty insurance.

Clause 3 obliged Mr and Mrs Deriboklou and Mr Wharington to enter a major domestic building contract with a builder nominated by Mr Wharington to undertake the works and Mr Wharington was to be solely liable to pay the new builder. It is not disputed that Mr Wharington failed to arrange for a new builder who was ready to start work by 31 January 2006.

### The breach and the Terms of Settlement

- 4 Clause 13 of the ToS provides:

Save as provided in paragraph 13 [sic – 12] hereof, in the event of a default in compliance with these terms of settlement in [sic] the innocent party shall give the defaulting party/s a written notice of default giving the defaulting party 7 working days to remedy the default, if the default is not remedied within the 7 working days of receipt of the notice of default, the innocent party shall be at liberty to reinstate the proceeding and seek monetary or other relief.

- 5 Mr Wharington gave unconvincing evidence that he made repeated attempts to arrange for a builder to do the work under the ToS, but was unsuccessful until Mr Dangerfield signed a standard-form HIA contract with additional clauses on 6 September 2006. Mrs Deriboklou's evidence is accepted that a number of unsuccessful attempts were made to encourage Mr Wharington to comply with the ToS and arrange for a builder to undertake the works. Mr and Mrs Deriboklou received a letter from an employee of Mr Wharington's company "Timelink Pacific Pty Ltd" dated 18 January 2006, stating in part that:

At current time Grant [Mr Wharington] is competing in the Volvo Round the World Ocean Race and was due back in port at Melbourne pm 17<sup>th</sup> January, 2006. Unfortunately with the intrepid [sic] weather conditions and equipment failure on board the yacht he is now not expected to Docklands until approximately 25<sup>th</sup> January if nothing else goes wrong.

The relevance of this to you is that Grant was due to sign contracts with the new builder on 20<sup>th</sup> January, 2006 to enable rectification works on your property to commence.

I have spoken to the builder and he is not willing to commence without proper paperwork signed by Grant and himself.

Currently I am unable to contact Grant for further instruction and would greatly appreciate it if you would be patient until he returns to Melbourne to settle the above at his earliest possible convenience.

- 6 At paragraphs 13 and 14 of his witness statement of 17 August 2006, Mr Wharington stated that Mr Hester, the expert witness for Mr and Mrs Deriboklou was the builder mentioned in the letter from his office of 18 January and that:

During January 2006 Mr Hester, with whom I had ongoing discussions in an attempt to engage him to carry out TOS works indicated that he would not be able to commence the works for at least 3 months. Additionally, Mr Hester told me that he had an ongoing problem in obtaining enough staff. At this stage I volunteered to Mr Hester that I could make my employees available to him for them to carry out the works under his supervision.

- 7 I asked Mr Wharington if Mr Hester ever said that he was willing to enter a contract with Mr Wharington. His answer was "He said he'd consider it".

- 8 At paragraph 10 of her witness statement of 14 July 2006, Mrs Deriboklou said that when she finally met with Mr Wharington on 31 January 2006 he advised her that he was unable to get a builder who was willing to rectify all defects and she concluded the letter of 18 January 2006 appeared to be untrue. Her conclusion appears justified. No evidence has been called from Ms Claire Taylor-Reed, the author of the letter of 18 January 2006 about the builder who was 'due to sign' and neither party asked Mr Hester if he was ever 'due to sign' with Mr Wharington. The approach of Mr

Wharington, or Ms Taylor-Reed on his behalf, to Mr and Mrs Deriboklou appears to have been, at best, cavalier.

- 9 On 6 February 2006 JW & NI Hester sent a facsimile to Timelink Developments which stated, omitting the formal parts:

**Re: Best & Deriboklou Repairs etc**

We are writing in reference to your request to Warranty and oversee the Repairs to the above Properties.

We have considered the overall details from our Records, along with the Responsibilities to be borne in the matter and also our extremely heavy work load for the coming months, and have no alternative than to opt out of the situation completely. It is not good promising, then not being able to carry out to total satisfaction.

We apologize that we are unable to assist at this time.

- 10 Mrs Deriboklou's evidence is accepted that, despite the existence of the ToS, Mr Wharington attempted to negotiate a cash settlement at meetings on 8 and 13 February 2006. At paragraph 17 of her witness statement of 14 July she said:

It was then left to me to find the [new] builder, get him to re quote and see when he can rectify all defects.

There is no indication that Mrs Deriboklou was invited to do so by Mr Wharington. Mrs Deriboklou obtained a quotation from Mr Bill Jubb of JR Property Group of \$91,316.60.

- 11 A copy of this quotation was sent to Mr Wharington, his solicitors and solicitors for Vero Insurance Ltd ("Vero") by letter dated 25 February 2006. The letter was clearly written by Mr and Mrs Deriboklou and not by their lawyers. The letter is not in strict accordance with the ToS but speaks loudly of the authors' frustration and disappointment, and of their perception that Mr Wharington had breached the ToS.
- 12 It appears that Mr and Mrs Deriboklou returned to their solicitors who drafted the letter dated 2 May 2006 which was sent to Mr Wharington with a copy to his solicitors. It gave notice under section 13 of the ToS that he had seven days to remedy the breach. The breach was not remedied and the proceeding was reinstated on 16 May.
- 13 The point was made for Mr Wharington that there was no provision in the ToS that time was of the essence, however by 31 January 2006 Mr Wharington was clearly in breach of his obligation to Mr and Mrs Deriboklou. It is possible that his capacity to nominate a builder ended earlier, however it is found that by 16 May 2006 at latest, Mr Wharington had, by his inaction, lost the right to nominate a builder under the ToS.

## **Effect of the contract signed by Mr Wharington and Mr Dangerfield of 6 September 2006**

- 14 Mr Smith of Counsel for Mr and Mrs Deriboklou asserted from the bar table that the first his clients knew of the purported contract was when solicitors for Mr Wharington sent their solicitors a facsimile on 22 September 2006, containing part of the contract document. It is noted that on the same day the proceeding by Mr and Mrs Deriboklou against Vero had been struck out by consent of Mr and Mrs Deriboklou and Vero, and on the basis that Mr Wharington neither objected nor consented. The letter from Mr Wharington's solicitors to Vero's solicitors was dated 21 September 2006. Under cross-examination Mr Wharington acknowledged that he had received the default notice of 2 May 2006, that the seven days allowed by the notice had expired and that the proceeding had been reinstated before the contract was signed.
- 15 As found above, the date by which Mr Wharington lost the right to nominate a builder was, at latest, 16 May 2006. The conditional contract signed by Mr Wharington and Mr Dangerfield of 6 September 2006 was therefore potentially of some relevance to determining the value of work to be done, but none with respect to the rights of Mr and Mrs Deriboklou as against Vero, which is discussed further below.

### **Alleged release of Mr Wharington by obtaining warranty insurance**

- 16 On the second day of the hearing Mr Pumpa of Counsel for Mr Wharington tendered the contract bearing the date 6 September 2006 and a facsimile copy of a certificate in respect of insurance issued by Lumley General issued on 8 September 2006. Mr Pumpa submitted that the effect of issue of the certificate was to release his client in accordance with clause 19 of the ToS which provides in part:

Save as specified by Section 10 of the *Domestic Building Contracts Act 1995* upon payment of the \$8,000.00 by the builder referred to in paragraph 6 above and the issuance of a valid and binding policy of domestic building warranty insurance for the rectification works, the owners release and forever discharge the builder...

Assuming that the certificate is "a valid and binding policy of domestic building warranty insurance" as I have had no evidence or argument to the contrary, it is too late. The policy provided was not relevant to "the rectification works" because Mr Wharington had failed to take the opportunity to nominate the builder while he still could. It was no more than a certificate of insurance relevant to an offer which Mr and Mrs Deriboklou chose, prudently, not to accept.

### **Value of work under the Terms of Settlement**

- 17 The Tribunal is grateful for the assistance of the experts called by both parties, being Mr Hester, and Mr Dangerfield who was called on behalf of Mr Wharington. On the second day of the hearing, after a morning of

evidence in an experts' conclave, they had discussions and came to the view that all outstanding work under the ToS could be completed for \$68,453.00 which includes \$6,000.00 for contingency and \$6,479.00 for the driveway under item 19. Both experts said under oath that they were willing to do the work under contract with Mr and Mrs Deriboklou and would leave the price open for acceptance for 60 days, that is, until Friday 24 November, 2006. Mr Hester said he could do the work in 25 business days, and Mr Dangerfield in 45.

- 18 It is noted that Boral Window Systems Ltd, a previous party to these proceedings and a party to the ToS, has undertaken to provide the windows for the rectification and remains bound by that obligation. The value of the windows is not taken into account in determining the amount payable by Mr Wharington to Mr and Mrs Deriboklou.

#### Item 19

- 19 In the Scope of Works, item 19 is headed: "The jointing and/or reinforcement in the front paved driveway is not adequate" and the body of the item is "Builder to pay the owners \$700.00 and supply drain, Ableflex expansion foam for future paving by owners." The parties agree that no such payment has been made and the materials have not been supplied. As mentioned above, the experts agreed that if the driveway were to be rectified by one of them, a fair price would be \$6,479.00.
- 20 The parties have chosen to treat this application as one to determine Mr and Mrs Deriboklou's loss for breach of the ToS. In these circumstances the loss suffered by Mr and Mrs Deriboklou under item 19 is the loss of \$700.00 and the value of the drain and foam. No direct evidence was given about the price of the drain and foam, however it is noted in item 8 of Mr Dangerfield's quotation of 19 July 2005 that the cost of "grated drains and swd [storm water drain] fittings is \$890.00. In the absence of better evidence, a further \$110.00 is allowed for the Ableflex expansion foam. \$6,479.00 is therefore deducted from the sum of \$68,453.00, and \$1,700.00 is added back in.

#### Contingency

- 21 The contingency of \$6,000.00 is a little under 10% of the sum agreed by Mr Hester and Mr Dangerfield after item 19 is adjusted. Where the exact extent of necessary work is not and cannot reasonably be known before it commences, a contingency is appropriate. I have been assisted with respect to this item in particular by the evidence of Mr Hester regarding the possibility that there could be uncosted items, such as the risk of extensive damage to the floor joists and lintels beneath the windows which are to be removed and replaced.
- 22 I note that Mr Dangerfield said in examination in chief that he had allowed \$2,500.00 for contingency, but reiterate that the sum agreed by him and Mr Hester for this item was \$6,000.00. If there is a difference of opinion

between Mr Hester and Mr Dangerfield on this item, Mr Hester's evidence is preferred.

- 23 A matter which caused some concern is that Mr Hester said under cross-examination that if not all the contingency is spent he will refund it to (or not claim it from) Mr and Mrs Deriboklou. This means that there is a possibility that Mr and Mrs Deriboklou will gain a windfall. However it is also possible that \$6,000.00 will be insufficient for the contingency items, which loss would be borne by Mr and Mrs Deriboklou. I am satisfied that a contingency is justified and that \$6,000.00 is a reasonable sum.
- 24 The total allowed for work under the ToS, taking into account the contingency and item 19, is \$63,674.00

### **Vero payments forgone**

- 25 Clause 5(c) of the ToS provided that Mr and Mrs Deriboklou were to receive \$10,000.00 from the then Second Respondent, Vero:

... within 14 days after the owners notify Vero in writing at its address above that:

- i. the builder has engaged a registered builder to carry out the rectification works; and
- ii. the said registered domestic builder has effected domestic building insurance for the rectification works, such notification to be given to Vero within 7 days upon the owners receipt of a valid and binding certificate of domestic building warranty insurance for the rectification works-

- 26 Clause 9 of the ToS provided:

Upon receipt of the sum of \$10,000 from Vero as specified in paragraph 6 [sic – 5] above, the owners shall release and forever discharge the insurer from, and will not make any claim or commence any actions against Vero in relation to:

- (a) the claims;
- (b) the proceedings;
- (c) the policy.

- 27 As discussed above, the contract form signed by Mr Wharington and Mr Dangerfield and dated 6 September 2006 was too late under the ToS and did not have the effect of giving Mr and Mrs Deriboklou an entitlement to \$10,000.00 against Vero.

- 28 The ToS were silent as to the consequences regarding this \$10,000.00 if Mr Wharington failed to fulfil his obligations. However, as Mr Smith submitted, Mr Wharington's failure deprived Mr and Mrs Deriboklou of \$10,000.00 that they would otherwise have received from Vero, and Mr Wharington cannot have been ignorant of this fact. Further, as submitted by Mr Smith, and consistently with the order of 24 August 2006 in proceeding D597/2003, Vero had not breached its obligation to Mr and Mrs



Deriboklou under the ToS. The pre-conditions for payment of the \$10,000.00 had not occurred, so there was no breach by Vero.

- 29 It was submitted by Mr Pumpa and confirmed by Mr Smith that Mr and Mrs Deriboklou still receive value from Vero, because Vero has not been released from its obligations if Mr Wharington should fail to fulfil his under this decision. Nevertheless, Mr and Mrs Deriboklou are \$10,000.00 worse off, because if Mr Wharington had obtained a builder and insurance when obliged to do so, it would not have been necessary to have Vero stand behind his obligations under this decision.
- 30 Mr and Mrs Deriboklou are entitled to be placed, as far as possible, in the position they would have occupied if the ToS had been fulfilled by Mr Wharington. It therefore follows that they are entitled to \$10,000.00 for this item.

### **Interest on \$10,000.00**

- 31 Mr Smith's submission is accepted that if Mr Wharington had fulfilled the ToS, Mr and Mrs Deriboklou would have been paid \$10,000.00 by, at latest, 21 February 2006. The arithmetic under clause 5 of the ToS is that if the new builder were to start work by 31 January 2006, the insurance would be in place by that date, Mr and Mrs Deriboklou would have notified Vero within seven days of the certificate of insurance, and Vero would have paid within a further 14 days. It follows that Mr and Mrs Deriboklou have been deprived of the use of the money from that date until this.
- 32 Under s.53(2)(b)(ii) of the *Domestic Building Contracts Act 1995* the Tribunal has power to award damages, including interest, when it is fair to do so. In the circumstances it is fair that Mr Wharington should pay interest on the sum from 22 February to today. In accordance with the *Penalty Interest Rates Act 1983*, a sum is awarded of \$741.64

### **Storage and accommodation**

- 33 Regardless of whether it is sensible for Mr and Mrs Deriboklou to move out of their home or to place some or all of their goods in storage during the works, the ToS are silent regarding these and no sum is included specifically for these purposes. It is therefore reasonable to assume that as between Mr and Mrs Deriboklou and Mr Wharington, Mr and Mrs Deriboklou had decided to bear these expenses. Mr Wharington's breach has not altered the necessity or advisability of moving out or moving their possessions, and therefore no sum is allowed for these items.

### **Damaged blind**

- 34 Mr and Mrs Deriboklou claimed \$410.00 being the cost to replace a blind they allege has been damaged by water, but they failed to prove how the blind was damaged, or even that it was damaged, and how Mr Wharington was responsible for this item. No amount is allowed for the blind.

### **JR Property Group Account**

35 Mrs Deriboklou's evidence is accepted that she and her husband incurred a bill of \$787.50 from JR Property Group when she sought another quotation to undertake the ToS works and while there might have been a discussion with Mr Wharington about obtaining the quotation, she gave no evidence that he was aware that there would be a charge for it or that he agreed to pay such a charge. No amount is allowed for this account.

### **Summary of amounts owing to Mr and Mrs Deriboklou**

Value of work	\$63,674.00
Vero payment forgone	\$10,000.00
Interest on Vero payment forgone	<u>\$741.64</u>
Mr Wharington must pay Mr and Mrs Deriboklou	\$74,415.64

**SENIOR MEMBER M. LOTHIAN**