

GRAHAM LEGAL

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IS A NEW CERTIFICATE OF BUILDER'S WARRANTY INSURANCE REQUIRED WHEN RECTIFICATION WORKS ARE REQUIRED?

On 3 December 2013 Deputy President Aird made orders in *Munafo v. Enterprise Constructions (Aust) Pty Ltd* [2013] VCAT 2040.

This had been a dispute between owners and a builder regarding the interpretation of Terms of Settlement entered into by them following an earlier dispute arising out of a domestic Building Contract.

Under the Terms of Settlement the builder had agreed to perform various works which, for the most part, could best be described as works to rectify defects in the drainage works originally performed by the builder itself.

However, to carry out these rectification works, it was going to be necessary for the builder to remove paving and land-

scaping works that, under the original Building Contract, were works that had been performed by the owners themselves.

In her decision, Deputy President Aird answered two important questions of general application.

1. Was it going to be necessary for the builder to obtain new insurance covering these rectification works?
2. In the event of a claim against the builder's warranty insurer, would that insurer be liable for reinstatement of the owners' paving and landscaping works given that the warranty policy ordinarily excludes liability for that kind of work?



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CERTIFICATE OF BUILDER'S WARRANTY INSURANCE

After deciding that the builder did not need to obtain new insurance (because she found that the original policy covered "loss or damage resulting from defective work", at paragraph 24 of her reasons for decision Deputy President Aird went on to determine:

If an insurer becomes liable to indemnify an owner for defective building works, and the rectification of the defective works necessarily involves the removal of works carried out by the owners to access and rectify the defect, the rectifications for which the insurer must provide indemnity will, in my view, include the removal and reinstatement of the owners' works.

In this case, it is irrelevant whether the existing policy covered the original paving and landscape works. To rectify the defects in the stormwater drainage works it is necessary to remove and replace (the owners' works).

There are two important lessons here.

1. If Terms of Settlement require a builder to undertake rectification works it is not necessary for the builder to obtain a new policy of warranty insurance and apparently whether or not the original Building Contract had been terminated.
2. All rectification works carried out by a builder will be covered under the original warranty insurance policy whether or not in the course of carrying out those works the builder is required to undo and rebuild works that were originally the responsibility of the owners themselves.

DELAY DAMAGES

On 8 March 2013 Riegler dismissed an owner's claim for unliquidated damages predominately comprising damages for delay. See *Charterarm Investments Pty Ltd v Roberts* [2013] VCAT 260.

After noting that "damages are generally assessed so as to put the injured party in the same position, so far as money can do it, as if no breach had occurred" the Senior Member stated:

It is clear that the parties to an agreement may, as part of their agreement, fix an amount that is to be payable by way of damages in the event of a breach of the agreement.

Provided the amount so fixed is a genuine pre-estimate of the damage that would arise from the breach, and not so out of all proportion as to be by way of a penalty, that amount is recoverable without proof of the actual loss caused by the breach.

It is immaterial that the amount of the actual loss turns out to be less than the amount specified.

Equally, if the actual loss turns out to be greater than the amount of the liquidated damages, the claimant cannot ignore the liquidated damages clause and sue for an liquidated damages.

There are two important lessons here.

1. If a building contract provides that liquidated damages are payable in the event of delay, then unliquidated damages for delay may not be claimed as an additional item.
2. Whereas an unreasonably high liquidated damages amount will be dismissed on the ground that it is a penalty, an unreasonably low liquidated damages amount will be upheld. As a consequence, the calculation of the liquidated damages amount should be very carefully undertaken.



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The **Graham Legal** team is devoted to the task of providing an ever improving standard of care and service.

We use sophisticated computer software.

SimplyLaw is a document production and file management system designed by Phillip Graham. It is extraordinarily powerful.

SimplyLaw incorporates more than 1900 precedents that have been meticulously drafted, formatted and encoded.

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GL will only be accepting work in areas of law in which we have established and recognised expertise.

Our company policy is to work on all client files as a team.

We delegate individual tasks to the person who will best get the client's work done having regard to the nature of the task to be performed, the skills of our respective team members and to maximise cost efficiency for our client.



Milestones

- ◇ On 14 January 2014 Rose Maina celebrated the first anniversary of her debut at *GL*.
- ◇ On 1 February 2014 *GL* celebrated its 24th anniversary at 1059 Mt Alexander Road, Essendon.
- ◇ On 1 March 2014 Phillip Graham celebrated 38 Years since his admission to practice as a lawyer.
- ◇ On 1 April 2014 Phillip Graham celebrated 38 years since first being admitted to partnership in law.
- ◇ On 17 May 2014 Val Jakovac will celebrate 17.5 years at *GL*.
- ◇ On 5 September 2014 Phillip and Julie Graham will celebrate their 34th wedding anniversary.

Areas of Practice

- ◇ Building & Construction Law
- ◇ Commercial & Civil Litigation
- ◇ Commercial Leasing
- ◇ Conveyancing & Property Law
- ◇ Debt Recovery & General Litigation
- ◇ Family Law
- ◇ Guardianship
- ◇ Probate & Administration
- ◇ Wills & Powers of Attorney

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