

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP677/2015

CATCHWORDS

Reinstatement application—application dismissed—accord and satisfaction of the claim made in the proceeding—relief sought in the application for reinstatement substantially different from relief sought in the proceeding

APPLICANT	Belaryn Pty Ltd
FIRST RESPONDENT	Mr Lloyd Alfred Deane
SECOND RESPONDENT	Mrs Marian Martina Deane
WHERE HELD	Melbourne
BEFORE	Member A. Kincaid
HEARING TYPE	Reinstatement application
DATE OF HEARING	2 March 2016
DATE OF ORDER	2 March 2016
DATE OF REASONS	11 May 2016
CITATION	Belaryn Pty Ltd v Deane (Building and Property) [2016] VCAT 738

ORDERS

1. The application for reinstatement of the proceeding is dismissed.
2. Having considered the contents of a letter sent by the solicitors for the respondents to the applicant dated 23 February 2016, and because it is fair to do so having regard to section 109(3)(a), (c) and (e) of the *Victorian Civil and Administrative Tribunal Act 1998*, the applicant must pay to the respondents their reasonable costs of and incidental to this application, fixed in the sum of \$1,815.

MEMBER A. KINCAID

APPEARANCES:

For the Applicant

Mrs H Schofield and Dr A Schofield

For the Respondents

Mr K Hickie of Counsel

REASONS

- 1 By application dated 7 January 2016, the Applicant (“**Belaryn**”) sought reinstatement of VCAT proceeding number BP 677/2015 (the “**Proceeding**”). The Proceeding was struck out on 2 September 2015, terms of settlement having then been reached.
- 2 Belaryn claimed the Respondents (the “**Deanes**”) had breached terms of settlement dated 2 September 2015.
- 3 Belaryn also sought orders setting aside a rental determination of Mr John Castran dated 23 October 2015 (the “**Determination**”).
- 4 The Deanes opposed the application for reinstatement of the Proceeding, and they opposed Belaryn seeking orders setting aside the Determination in this Proceeding.
- 5 The Deanes relied upon the affidavit of Lloyd Alfred Deane sworn 29 February 2016.
- 6 On 2 March 2016, I dismissed the application made by the Applicant for reinstatement of the Proceeding.
- 7 The Applicant has since asked for written reasons.
- 8 The reasons that I gave for dismissing the application were those contained in Submissions relied on by Counsel for the Respondents. I shall now restate them.

Background

- 9 Belaryn is the retail tenant of property located at 2 Trafalgar Street, Wodonga (the “**Property**”) pursuant to a three (3) year renewal of lease that commenced on 18 March 2014. The Property is owned and leased by the Deans. Belaryn operates the ‘Belvoir Village Motel’ on the Property.
- 10 The Proceeding was commenced by Belaryn on 22 May 2015.¹ In the Proceeding, Belaryn sought a mandatory injunction requiring the Deanes to engage and appoint Mr Shannon Waters, a valuer, to conduct a market rental valuation to determine the commencing annual rent for the renewed lease on 18 March 2014.
- 11 The application was listed for hearing on 2 September 2015.²
- 12 At the hearing of the application, the Proceeding was compromised by way of terms of settlement dated 2 September 2015 (the “**Terms of Settlement**”), signed by both parties.³
- 13 The Terms of Settlement relevantly provided as follows:⁴

¹ Affidavit of Lloyd Alfred Deane (**Deane Affidavit**), Ex LD-1 (Application).

² Deane Affidavit, para 8.

³ Deane Affidavit, para 8, Ex LD-3 (Terms of Settlement).

⁴ Deane Affidavit, Ex LD-3 (Terms of Settlement).

- (a) the parties agreed to appoint Mr John Castran of John H. Castran Pty Ltd to conduct a market rental valuation of the Property to determine the commencing annual rent for the renewed lease on 18 March 2014, and to provide a copy of the terms of engagement to Mr Mark Schramm of the Office of the Victorian Small Business Commissioner (clauses 21 and 2);
 - (b) the Deanes were required to sign the terms of engagement of Mr John Castran of John H. Castran Pty Ltd dated 28 August 2015 (the “**Terms of Engagement**”) by 2 September 2015 (clause 2);
 - (c) the parties agree to strike out the proceeding with a right of reinstatement with no order as to costs (clause 7);
 - (d) in the event the Terms of Engagement are not executed by the Deanes by 2 September 2015, Belaryn may reinstate the Proceeding and obtain a default determination in the Proceeding (i.e. obtain the mandatory injunction) (clause 6); and
 - (e) in consideration for the parties entering into the Terms of Settlement and subject to performance, each party mutually releases and discharges each other from, among other things, the Proceeding (clause 8).
- 14 On 2 September 2015, in performance of the obligations contained in the Terms of Settlement, the Deanes:
- (a) signed the Terms of Engagement;
 - (b) provided a copy of the Terms of Engagement to Mr Mark Schramm of the Office of the Victorian Small Business Commissioner (the “**SBC**”); and
 - (c) wrote a cheque in the amount of \$4,000 payable to Mr Castran, being one half of the fee for the determination.
- 15 Following the execution of the Terms of Engagement, the Deanes have actively participated in and assisted the market valuation by providing submissions and attending an inspection of the Property (as contemplated by clause 4 of the Terms of Settlement).⁵
- 16 Mr Castran’s rental determination was completed and issued to the parties on or about 23 October 2015.

Proceeding compromised and not capable of being reinstated

- 17 I find that the terms of settlement compromised the Proceeding, and amounted to an existing and enforceable agreement between the parties. The Terms of Settlement contained a release subject to execution and performance of the Terms of Settlement.

⁵ Deane Affidavit, para 13.

- 18 I find that the Deanes complied with and have performed all of the obligations required of them in the Terms of Settlement and, that at no stage have they breached the Terms of Settlement. There has therefore been accord and satisfaction of the proceeding following performance by the Deanes.⁶
- 19 On the basis of my finding that the Deanes have performed and not breached their obligations in Terms of Settlement, and Belaryn has released and discharged the Deanes from the Proceeding upon the performance of their obligations, the proceeding is not capable of being reinstated.
- 20 The appropriate course for Belaryn is to commence a new proceeding seeking the relief claimed in its application, and for the matter to be mediated by the SBC.
- 21 Further, the relief sought by Belaryn in the application for reinstatement (orders setting aside the rental determination of Mr Castran and the appointment of a new valuer) is substantially different from the relief sought in the Proceeding (a mandatory injunction compelling the Deanes to appoint a market valuer).
- 22 Belaryn should not be permitted to use the Proceeding as the vehicle in which to seek relief that differs from the relief sought in the Proceeding.
- 23 The application for reinstatement is dismissed, and I will hear the parties on the question of costs.

MEMBER A. KINCAID

⁶ *Osborn v McDermott* [1998] 3 VR 1, cited in *Cantalano v Royal & Sun Alliance Insurance Limited* [2005] VCAT 1899.