VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP855/2016

CATCHWORDS

ss 75, 77 *Victorian Civil and Administrative Act* 1998, ss 81, 87, 89 *Retail Leases Act* 2003, retail tenancy dispute, Victorian Small Business Commission, jurisdiction of the Tribunal to hear Landlord's application, whether terms of settlement immediately discharged original cause of action, earlier proceeding in Magistrates' Court, waiver, estoppel.

APPLICANT	Brimbank Lifestyle Properties Pty Ltd (ACN:125 255 078)
FIRST RESPONDENT	Ready Retail Holdings Pty Ltd (ACN 159 319 767)
SECOND RESPONDENT	Mr David Rofaeil
HEARING TYPE	Hearing
DATE OF HEARING	13 December 2016
DATE OF ORDER	13 December 2016
DATE OF WRITTEN REASONS	16 December 2016
CITATION	Brimbank Lifestyle Properties v Ready Retail Holdings Pty Ltd (Building and Property) [2016] VCAT 2148

OTHER MATTERS:

1. On 29 June 2016 the applicant applied to the Tribunal seeking orders for damages, interest and costs against a tenant, the first respondent, and their guarantor, the second respondent.
2. On 1 September 2016 the respondents applied to the Tribunal to dismiss the proceeding under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998.
3. A further application under section 77 of the *Victorian Civil and Administrative Act* 1998 was made by the respondents on 19 September 2016 to strike out the proceeding on the ground that the subject matter would be more appropriately dealt with by the Magistrates' Court at Melbourne.
4. On 13 December 2016 the respondents' applications under sections 75 and 77 of the *Victorian Civil and Administrative Act* 1998 were dismissed for the reasons stated in the course of the hearing and summarised in writing (to follow).

ORDERS

1. The respondents' application under sections 75 and 77 of the *Victorian Civil and Administrative Tribunal Act* 1998 are dismissed.
2. By 4.00 pm, 28 December 2016 the respondents pay the applicant's costs of the application under sections 75 and 77 of the *Victorian Civil and Administrative Tribunal Act* 1998 fixed at $10,000.00.
3. The applicant file and serve Points of Claim amended by deletion of paragraph 19 and the words "*and the terms of settlement"* in paragraph 20.
4. By 4.00 pm, 20 January 2017 the applicant file and serve Points of Defence specifying the material facts relied upon. Any set-off claimed must be fully set out.
5. By 4.00 pm, 27 January 2017 the applicant must file and serve any Reply.
6. By 4.00 pm, 10 February 2017 the parties must each:
    a) serve a list of all documents in their possession or control, or in the possession or control of an agent, relevant to the proceedings; and
    b) make such documents available for inspection and photocopying upon 24 hours written notice; and
    c) **confirm in writing to the principal registrar that the list of documents has been served.**
7. By 4.00pm 24 February 2017 the parties must serve witness statements and confirm in writing to the principal registrar that the witness statements have been served. Each statement must consist of a narrative of the evidence to be given by each lay witness and must be relevant to the issues in the proceeding.
8. By 4.00pm 10 March 2017 the parties must serve any witness statements in reply (<u>if any).</u>
9. A party will not be allowed to present any evidence at the hearing which is not contained in a witness statement without justifying the need to do so to the Tribunal. A party wanting to call such additional evidence may be ordered to pay costs if the hearing is delayed.
10. Unless otherwise advised all witnesses must attend the hearing for cross-examination. If a party does not wish to cross-examine another party's witness, written notice must be given to the party concerned at least seven (7) days before the hearing date.
11. By 4.00 pm 24 March 2017 the applicant must file 2 copies of and serve on the other parties a Tribunal Book (indexed and paginated) of common documents, prepared in consultation with the other parties and in accordance with paragraphs s 22 and 23 of PNBP1 and must include all documents which have been served but not filed in accordance with the Tribunal's orders.
12. **This proceeding is listed for hearing on 28 March 2016 commencing at 10.00 am at 55 King Street, Melbourne with an estimated hearing time of 3 days. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions.**

13. The parties may each be represented by professional advocates at the hearing.
14. Liberty to apply.

JUDGE MILLANE
Vice President

APPEARANCES:

For Applicant:	Mr S. Palmer, of Counsel.
First Respondent:	Mr A. Richardson, of Counsel.
Second Respondent:	Mr A. Richardson, of Counsel.

REASONS

INTRODUCTION

1 On 29 June 2016, the applicant landlord, Brimbank Lifestyle Properties Pty Ltd (BLP) applied to the Victorian Civil and Administrative Tribunal (the Tribunal) seeking orders for damages, interest and costs against former tenant, Ready Retail Holdings Pty Ltd (RRH) and David Rofaeil (the respondents). The second respondent is the sole director of RRH. Extracts from ASIC's records produced to the Tribunal by BLP's solicitors, show that, whilst RRH is a registered company, as at 5 July 2016, a strike off action for the company was in progress. The second respondent is the guarantor of the obligations of RRH under a retail lease of premises situate at Unit 12, 1 Elgar Road, Derrimut Victoria, entered into between BLP and RRH and commencing from 5 August 2012 (the lease).

2 Sections 81 and 81A the *Retail Leases Act* 2003 (the RL Act) relevantly define a retail tenancy dispute as a dispute between a landlord and a tenant to which the RL Act applies, and includes a dispute between a landlord and a guarantor of a tenant's obligations under a lease, arising under or in relation to a retail premises lease to which the RL Act applies.

3 Section 89 confers jurisdiction on the Tribunal to hear and determine an application by a landlord or tenant under a retail tenancy lease or a guarantor of a tenant's obligations under a retail tenancy lease seeking resolution of a retail tenancy dispute.

4 Section 87(1) of the RL Act relevantly states that a retail tenancy dispute may only be the subject of proceedings before the Tribunal if the Small Business Commissioner has certified in writing that mediation under Part 10 of the RL Act has failed, or is unlikely to resolve it. The section, however, expressly states that it does not affect the validity of any decision made by the Tribunal.

5 Pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT Act), the Tribunal may summarily dismiss or strike out all or any part of a proceeding either on the basis that it is frivolous, vexatious, misconceived or lacking in substance; or is otherwise an abuse of process. On 1 September 2016, the respondents applied to the Tribunal to dismiss BLP's proceeding under section 75. The application was supported by an affidavit sworn by the second respondent on 31 August 2016.

6 On 2 September 2016, the respondents' application to dismiss was listed for hearing on 21 October 2016, with directions for a timetable in which to file written submissions.

7 Among other things, an undated written submission filed for the second respondent on 19 September 2016 notified a further application under section 77 of the VCAT Act to strike out the proceeding on the ground that the subject-matter of the proceeding would be more appropriately dealt with by the Magistrates' Court at Melbourne.

8 Section 77 empowers a judicial member of the Tribunal to strike out this proceeding if satisfied the proceeding would be more appropriately dealt with in a forum other than the Tribunal and, if appropriate, in this case to refer the proceeding to the Magistrates' Court.

9 In the meantime, on 7 October 2016, BLP submitted an application to the Victorian Small Business Commissioner for referral of the dispute the subject of the proceeding before the Tribunal for mediation.

10 Written submissions in reply and dated 7 October 2016 were filed on 19 October 2016 on behalf of BLP. A further undated, written submission in response was filed on 19 October 2016 on behalf of the second respondent.

11 It appears from the attachments to an affidavit sworn on 21 October 2016 by a solicitor acting for BLP, Jodie Leanne Potts, that on 13 October 2016 the Office of the Victorian Small Business Commissioner wrote to the solicitor acting for the respondents requesting that he contact the writer to discuss "*this matter and advise whether participation in mediation is agreed*." The email correspondence, among other things, notified the solicitor that, in the absence of agreement to mediate, the Small Business Commissioner may issue a certificate under section 87(1) of the RL Act certifying that mediation or another appropriate form of alternative dispute resolution is unlikely to resolve the dispute.

12 Having received a copy of this correspondence on 20 October 2016, Ms Potts wrote to the solicitor acting for the respondents recommending an adjournment for a period of 14 days to allow the respondents to respond to the Office of the Victorian Small Business Commissioner.

13 On the return date, on 21 October 2016, an amended application, which added an application for an order striking out the proceeding under section 77 of the VCAT Act, was filed. Among other things, Senior Member Lothian adjourned the hearing of the respondents' applications. As recorded in the Orders made that day by the Senior Member, BLP's application for an adjournment was granted because the respondents' application to dismiss relied in part upon the absence of a certificate from the Victorian Small Business Commissioner and the respondents had not yet responded to the email correspondence from the Office of the Victorian Small Business Commissioner.

14 On 25 October 2016 the respondents' applications under sections 75 and 77 of the VCAT Act were re-fixed for hearing before me on 8 December 2016. The hearing was adjourned by consent to 13 December 2016 because the solicitors for BLP had not notified counsel of the new hearing date.

15 On 2 December 2016 the Victorian Small Business Commissioner certified that mediation of another appropriate form of alternative dispute resolution under Part 10 of the RL Act was unlikely to resolve the dispute, thereby removing one potential obstacle to BLP's application proceeding before the Tribunal.

16 Following extensive argument, on 13 December 2016, I dismissed the respondent's applications and further ordered that, on or before 4pm on 28 December 2016, the respondents pay BLP's cost of the applications agreed and

fixed at $10,000. I also gave a series of directions to facilitate the hearing of the proceeding before the Tribunal.

My reasons for dismissing the respondents' applications were articulated during the course of the hearing and are summarised in the paragraphs that follow.

BACKGROUND

17 It was common ground that the retail tenancy under the lease ended in circumstances where BLP claimed rent and other amounts were outstanding (the retail tenancy dispute).

18 In accordance with the requirements of the RL Act, the retail tenancy dispute between BLP and RRH went to mediation before a mediator appointed by the Office of the Victorian Small Business Commissioner. This dispute was settled at mediation on 4 June 2015. The mediation was attended by solicitors acting for BLP and a director of BLP and by the second respondent. Terms of Settlement between BLP and RRH were executed. The second respondent was not a party to the Terms of Settlement and says he executed this agreement on behalf of RRH in his capacity as director of RRH.

19 Clause 5 of the Terms of Settlement relevantly states: "*This Settlement Agreement shall be absolute, final and binding on all the parties and shall be relied upon as a binding contract in any future proceedings in any court or tribunal by the parties and both parties agree to RELEASE each other from any further proceedings in this dispute upon fulfilment of the terms of this agreement.*"

20 It was common ground that RRH did not fulfil the Terms of the Settlement by making any payment in accordance with clause 16, pursuant to which BLP and RRH had agreed "*to settle and resolve all disputes against each other referred to in clause 15…, on a without admission of liability basis but on a full and final basis as follows..*". Clauses 16a, b, c and d provided a timetable for payment of sums of money by RRH to BLP by instalments commencing on 24 June 2015 and concluding on 24 February 2017.

21 Clause 16e provided that if RRH "*does not make the payments, as agreed in clauses 16a-d, (BLP) reserves the right to enter judgement for the full amount owing and any further damages, interest and costs owing*". Clauses 16f-g transferred to BLP property in (but not any liabilities that attach to) and the right to dispose of chattels located at the retail premises. Clause 16h, recorded agreement by BLP and RRH "*that the conditions contained in clause 16 of these Terms of Settlement shall be the full and final resolution of this Dispute and* (BLP and RRH) *also agree that no further action will be taken against the other in relation to this Dispute*."

22 Clause 7 further provided:

> This Agreement shall be governed by and construed in accordance with the laws for the time being in force in the State of Victoria and the Commonwealth of Australia. The parties agree that should any dispute arise between them that requires the determination or order of a Court then such action shall only be issued out of and heard by either;
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> i. the Courts of the State of Victoria sitting in Melbourne; or

ii. a Federal Court sitting in Melbourne

23 On 22 September 2015 BLP filed complaint against each of the respondents in the Magistrates' Court seeking to enforce the Terms of Settlement. By a defence dated 30 October 2015, among other things, the respondents either did not admit or denied allegations relating to the requirements of clause 16 of the Terms of Settlement; denied allegations that no payments had been made notwithstanding demands for same; and alleged further that, if RRH entered into the Terms of Settlement, the Terms of Settlement were void and unenforceable:

"by virtue of the fact that:

i. (RRH) entered into the Terms of Settlement without obtaining legal advice;

ii. the (second respondent) is not a party to the Terms of Settlement;

iii. the (second respondent), in his capacity as Director of (RRH), was placed under duress and/or undue pressure to execute the Terms of Settlement on behalf of (RRH);

iv. the (second respondent) was not legally represented at the mediation did not obtain legal advice before signing the Terms of Settlement (sic); and

v. the conduct of (BLP), namely:

A. entering into the Terms of Settlement with (RRH) under the circumstances alleged herein; and

B. seeking to enforce the Terms of Settlement against (RRH);

constitutes unconscionable conduct and a breach of Section 77 of the *Retail Leases Act 2003 (Vic)*."

24 On 15 April 2016 orders were made in the Magistrates' Court providing a timetable for both BLP and the respondents to file and serve amended pleadings and affidavits of discovery.

25 By letter, incorrectly dated 7 June 2015 (because its content reveals it was likely written on 7 June 2016), among other things, the solicitors acting for BLP notified the respondents that BLP had accepted RRH's and/or the second respondent's breach or repudiation of the Terms of Settlement and purported to rescind the Terms of Settlement. The conduct said to amount to repudiation of the Terms of Settlement involved RRH's breach of the Terms of Settlement in failing to pay the settlement sum and subsequent conduct, which was said to be indicative of an unwillingness on the part of RRH to be bound by the Terms of Settlement.

26 BLP's application and points of claim, the latter reciting much of the history of the failed settlement summarised above, were filed with the Tribunal on 29 June 2016. Whilst this was not also contained in the prayer for relief, by paragraph 19 of the points of claim, BLP sought a declaration from the Tribunal that BLP had "*validly rescinded the Terms of Settlement*." Paragraph 20 then alleged and provided particulars of loss and damage stating that "*by reason of (RRH's) breaches and wrongful repudiation of the lease and the Terms of Settlement (BLP) has suffered loss and damage.*"

27 It appears that Mr Palmer drew BLP's points of claim. At hearing, he conceded that the issue of whether the conduct of one or both respondents gave rise to a

right to rescind the Terms of Settlement related to whether the Terms of Settlement operated to preclude the Tribunal's jurisdiction to hear the substantive application. Counsel further confirmed that the reference to the Terms of Settlement in paragraph 20 was made in error.

28 I was satisfied from the submissions made and my analysis of the material as a whole that BLP had not intended to enforce the Terms of Settlement before the Tribunal. In short, to the extent that it could be said that the dispute articulated by the points of claim is a retail tenancy dispute (as defined by section 81 of the RL Act) BLP's application to the Tribunal is an application by a landlord under a retail premises lease. These were the circumstances in which leave was given to BLP to delete paragraph 19 and the words "*and the Terms of Settlement*" in paragraph 20 of the points of claim.

29 By letter dated 19 July 2016 the solicitors acting for BLP sought and, on 5 August 2016, obtained the respondents' written consent to strike out the proceeding before the Magistrates' Court.

30 The proceeding before the Magistrates' Court was subsequently struck out, with no order as to costs and without deciding the merits of the complaint. It was common ground that BLP's right to seek reinstatement of the proceeding to enforce the Terms of Settlement was not precluded by the orders made, although BLP would need to make out a case for reinstatement should BLP pursue this course in the future.

31 Notably, points of defence were not filed before the respondents' application under sections 75 of the VCAT Act was filed on 1 September 2016. As a result, apart from the matters raised in support of their application to dismiss the proceeding, the respondents' defence (if any) to the proceeding before the Tribunal is yet to be articulated.

32 At hearing, Mr Richardson appearing for the respondents withdrew the second respondent's submissions (paragraphs 16 to 22 inclusive) which relied on the principle of res judicata and also further alleged that BLP's proceeding was an abuse of process.

33 The respondents' applications were confined to submissions that: the Tribunal lacked jurisdiction to determine the validity of the Terms of Settlement; alternatively, the Terms of Settlement were a bar to BLP proceeding before the Tribunal; and, lastly, the Magistrates Court not the Tribunal was the appropriate forum within which to hear the dispute.

SUMMARY DISMISSAL UNDER SECTION 75 OF THE VCAT ACT

34 The respondents invoked the power of the Tribunal under section 75 to order summary dismissal or strike out all or any part of this proceeding in the circumstances described by the provision.

35 It is well-established in law that, unless otherwise provided for, an order striking out a proceeding without determination of the merits of the claim does not disentitle a party from making an application to reinstate a proceeding, whereas an

order for summary dismissal would, if made, bring the proceeding before the Tribunal to an end without any possibility of reinstatement.

36 Accordingly, summary dismissal of BLP's proceeding at an interlocutory stage would have deprived BLP of an opportunity to have the substantive dispute heard and determined by the Tribunal under the RL Act.

37 It has been said on many occasions that a proceeding must be obviously hopeless or unsustainable in fact or in law to justify summary dismissal or striking out and, further, that it must be clear there is no real question for determination.[1] Essentially, it fell to the respondents to satisfy the Tribunal that BLP's proceeding before the Tribunal was hopeless, unsustainable or bound to fail. As the orders made show, I was not so satisfied.

38 As mentioned, the application to summarily dismiss the proceeding before the Tribunal was supported by an affidavit sworn by the second respondent on 31 August 2016. Among other things, the second respondent deposed that, as advised by his solicitors, BLP's "*only true avenue of relief*" was to bring a claim against RRH for default judgment for its failure to make payment under the Terms of Settlement where, the Terms of Settlement "*were made in full and final resolution of the dispute regarding the lease*."

39 In written submissions the second respondent submitted: firstly, that the Tribunal lacked jurisdiction to determine the "*dispute over the validity of*" the Terms of Settlement; and, secondly, that the Terms of Settlement "*prohibit*" BLP from raising claims against the respondents in relation to the original dispute.

40 As my summary of the pleadings in the Magistrates' Court shows, the respondents previously defended BLP's proceedings to enforce the Terms of Settlement on the basis that that agreement was void and unenforceable. The respondents' challenge to the validity of the Terms of Settlement did not, however, also involve filing a counterclaim or initiating any independent cause of action seeking declaratory relief in respect to the Terms of Settlement,

41 In response to a query raised by me, Mr Richardson informed the Tribunal that, notwithstanding the defence pleaded in the Magistrates' Court, his instructions were that the Terms of Settlement were not void but were enforceable.

42 To this end it was submitted that, properly construed, the Terms of Settlement operated as a bar to the Tribunal exercising the jurisdiction otherwise conferred by the RL Act:

a) by creating an immediate and enforceable agreement in satisfaction of the existing claim against the respondents; and

b) by giving exclusive jurisdiction to Courts of the State of Victoria or the Federal Court sitting in Melbourne to determine any dispute between the parties to the Terms of Settlement that required determination or order of a Court.

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1 *Fancourt v Mercantile* [1983] HCA 25; (1983) 154 CLR 87 (8 August 1983) at 99.

43 Whilst BLP agreed that the Terms of Settlement were not void ab initio, BLP nonetheless relied on the earlier described repudiatory conduct, which it says entitled BLP, as it did, to rescind an agreement it says did not discharge the obligations arising under the lease until fulfilment of the terms of the agreement.

44 I formed the view that the submissions advanced by the respondents were based on a misunderstanding of the power of the Tribunal when faced with an objection by the respondents, to determine its jurisdiction to proceed, including:

a) hearing evidence on and determining the effect of the agreement entered into between only BLP and RRH; and

b) hearing evidence on and determining whether the agreement was in fact rescinded.

Construction of section 89 of the RL Act

45 The respondents submitted that the jurisdiction conferred by section 89 of the RL Act to hear and determine an application by a landlord or tenant under a retail premises lease seeking resolution of a retail tenancy dispute, does not encompass determination of a dispute about the validity of an agreement to compromise the retail premises lease.

46 In response, in its written submission, BLP noted the "*very broad*" definition of a retail tenancy dispute. BLP submitted that the dispute was "*clearly a dispute arising both under and in relation to a retail premises lease*" and further that the issue of whether the respondents can rely on the Terms of Settlement was "*clearly a matter which has arisen in relation to the retail tenancy dispute*."

47 At hearing, Mr Richardson relied on a decision of the Court of Appeal in *Director of Housing v Sudi* where the Court found that the Tribunal had no power to decide the lawfulness of the Director's decision to apply for an order for possession of a public housing property.[2] That is to say, the Tribunal was not empowered by the VCAT legislation or by the statutory scheme for obtaining possession of premises to also entertain a collateral attack on the validity of an administrative decision. The Tribunal was, it said, confined to reviewing the merits of the decision itself.

48 I do not propose in this summary of my reasons to undertake a lengthy analysis of the history of dispute resolution after the enactment of the *Retail Tenancies Act* 1986, which extensively reformed the law relating to retail tenancies. Suffice to say that, under the *Retail Tenancies Act* any dispute between a landlord and a tenant "*arising under a retail premises lease*" was determined through an arbitration process without resort to a court or tribunal.

49 In *Klewert Pty Ltd v Lansdown*[3] His Honour, Justice Ormiston relevantly explained that section 3 of that Act, which expanded the meaning of the expression "*a dispute arising under*" to include "*a reference to a dispute arising in relation to that lease under a provision*" of the Act, did not mean that a court was obliged to refer a dispute to arbitration before knowing and deciding whether

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2 [2011] VSCA 266.
3 [1989] VR 969.

it truly raised any issue of that kind. Indeed, Justice Ormiston rejected an interpretation of Part 3 of the *Retail Tenancies Act*, which would have meant that the court in that case could not determine its own jurisdiction but would have been required to refer the matter to arbitration upon objection being made.

50 Sections 33 and 34 of the *Retail Tenancies Reform Act* 1998 (the RTR Act) subsequently applied the dispute resolution process under Part 3 of that Act to any dispute "*between a landlord and a tenant arising under or in relation to a retail premises lease*" and, for the first time (subject to one exception), section 35 conferred exclusive jurisdiction on the Tribunal "*to hear and determine an application"* under Part 3 "*seeking resolution of a dispute*" to which the Part applied.

51 Section 1 of the RL Act states that the main purpose of the RL Act is to replace the RTR Act with a new scheme to enhance - the certainty and fairness of retail leasing arrangements between landlords and tenants and the mechanisms available to resolve disputes concerning leases of retail premises. Under this new scheme the dispute resolution provisions contained in Part 3 of the RTR Act were replaced by Part 10 of the RL Act.

52 Notably, section 81(1)(a) of the RL Act, continues to define a retail tenancy dispute as a dispute "*arising under or in relation to a retail premises lease*." As is plain from the language used in defining a "*retail tenancy dispute*", a dispute may arise under or in relation to a retail premises lease.

53 The phrase "*arising under*", alternatively the relational phrase "*in relation to*", clearly have work to do in establishing a retail tenancy dispute in the context of section 81(1)(a) and Part 10 of the RL Act as a whole. The meaning and application of the phrase "*arising under*" in this case was not in contention. Indeed, after some discussion, Mr Richardson conceded that the substantive application, that is BLP's application to the Tribunal, relied on the terms of the lease and in that sense arose under the lease.

54 In the circumstances described, Mr Palmer withdrew BLP's submission to the extent that it also relied on construction of the relational phrase in the context of section 81(1)(a)

55 It follows from the concessions made that:

a) The validity of the Terms of Settlement was not contested and the Tribunal was not being asked to enforce an agreement BLP alleged had been rescinded;

b) the Tribunal's jurisdiction to hear the substantive application was not contested and the Tribunal was not also being asked to determine whether the substantive application arose in relation to a retail premises lease to which the RL Act applied; and

c) it was not contested that BLP's entitlement to the relief sought was a real question for determination on the evidence.

56 What was in contention by reason of the applications made under sections 75 and 77 of the VCAT Act, was whether the Terms of Settlement currently justified summary dismissal or striking out of the substantive application without further determination of the objection on the evidence and, further, whether the proceeding would be more appropriately dealt with in the Magistrates' Court.

Construction of the Terms of Settlement

57 The respondents submitted that the Terms of Settlement properly construed constituted accord and satisfaction and created an immediate and enforceable agreement in satisfaction of BLP's right to litigate the retail lease dispute in the Tribunal under the RL Act.

58 In its written submissions BLP submitted that the compromise was executory as, under clause 5, any release of RRH would only operate upon fulfilment of the terms of the agreement. At hearing, Mr Palmer, nonetheless, submitted that the Terms should be characterised as accord and satisfaction conditional upon fulfilment of the terms of the agreement.

59 The respondents cited the decision of the Victorian Court of Appeal in *Osborn v McDermott* and in particular, Phillips J. A.'s analysis of the law as it relates to the characterisation of an agreement to compromise a cause of action.[4]

60 The issue in *Osborn* was whether an agreement to settle two County Court proceedings was an accord and satisfaction arrived at by the parties in February 1993 and, on that account, enforceable at the instance of the defendant notwithstanding non-performance in the meantime.

61 In short compass, *Osborn's* case demonstrates that authorities have recognised three alternative ways in which to characterise an agreement to compromise a cause of action. The first is a compromise by way of mere accord executory, which does not operate to discharge existing rights and duties unless and until the accord is performed; the second is a compromise by way of accord and satisfaction which operates as a discharge immediately the accord (or agreement) is achieved; and the third is a compromise by way of accord and satisfaction where, by its terms, the agreement defers the satisfaction (or discharge) of the existing obligations until performance, thereby rendering discharge conditional.

62 Accord executory is the compromise of an existing cause of action if and when something is done, more often than not to the advantage of the plaintiff; as for example when, in return for abandoning his cause of action, the plaintiff accepts an act. Accord executory does not constitute a contract and does not give rise to new rights and obligations pending performance. It has been said that the plaintiff is free to sue on the original cause of action at any time before acceptance of performance, which discharges the plaintiff's existing cause of action.[5]

63 By way of contrast, accord and satisfaction is the compromise of an existing cause of action in return for the promise that something be done; as for example when, in return for abandoning his cause of action the plaintiff accepts a promise.

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4 [1998] 3 VR 1, at 7-11

5 *Scott v English* [1947] V.L.R. 445, per Fullagar J. at 453

Accord and satisfaction represents an immediate and enforceable agreement once the compromise is agreed upon, the parties agreeing that the plaintiff takes in satisfaction of his existing claim against the defendant the new promise by the defendant in substitution for any existing obligation.

64 Lastly, accord and satisfaction where discharge is conditional contemplates an agreement whereby the parties do not make an immediately binding agreement for compromise. Satisfaction (or discharge) of existing obligations is deferred, thereby suspending the original cause of action, so that if it is not performed by the defendant according to its tenor, the plaintiff may still maintain that original cause of action.

65 In *Osborne* the terms of settlement required simultaneous payment of a sum of money by the owner and delivery up of the vehicle by the repairer. The repairer failed to deliver the vehicle on the appointed date. The Court of Appeal, allowing the appeal by the owner, found that the settlement had not amounted to an accord and satisfaction or an enforceable accord plus conditional satisfaction. It was, the Court found, a mere accord executory, which wanting performance under it, did not discharge existing obligations and had not given rise to a new contract that could be enforced.

Waiver/Estoppel

66 If, in due course the Tribunal construes the Terms of Settlement as constituting accord with immediate satisfaction, BLP will have lost the right to pursue an action under the RL Act. However, if satisfaction is found to be conditional, one of the matters that the Tribunal will need to determine on the evidence is whether, as claimed, BLP was entitled to and did rescind the Terms of Settlement earlier this year.

67 Doing the best I could to interpret the first of the written submissions and the further oral submissions made on behalf of the respondents in this regard, it was submitted that, having had the opportunity to amend its complaint in the Magistrates' Court, BLP had elected to have that proceeding struck out. BLP's claim to have rescinded the Terms of Settlement was, so the submissions went, inconsistent with its earlier pleading in the Magistrates' Court (presumably because BLP sought to enforce the Terms of Settlement) and, having by virtue of this conduct waived its right to raise a claim in waiver, BLP could not now raise a claim of rescission.

68 In response BLP submitted, firstly, that with the striking out of the proceeding by consent, it was free to commence proceedings before the Tribunal, which has exclusive jurisdiction as to the retail tenancy part of the dispute; secondly, that it was entitled to rely on RRH's conduct to rescind the Terms of Settlement and, thirdly, that the respondents are estopped from acting so as to reprobate and then approbate the Terms of Settlement.

69 In a further response in writing the second respondent joined issue on the estoppel argument citing authority, which states that reliance on an assumption created by

another party must be reasonable and on further authority to the effect that the party creating the assumption knew or intended the other party to so rely.

70 It was submitted that the doctrine of estoppel was not engaged because the respondents' pleadings of themselves did not constitute representations or assumptions for all purposes beyond the Magistrates' Court proceeding and, further, that the respondents had not known or intended that BLP rely on these pleadings beyond that proceeding.

71 As noted by me at hearing, I found the last mentioned submission surprising. The defence filed on behalf of the respondents in the Magistrates' Court proceeding was signed by the respondents' current solicitors. Among other things, the *Civil Procedure Act* 2010 required the respondents' legal practitioner to file a proper basis certificate certifying that the defence, on the factual and legal material available to the legal practitioner at the time of responding to the claim, had a proper basis. Had the respondents successfully defended the Magistrates' Court proceeding on the basis that the Terms of Settlement were void and unenforceable this would have delayed but not extinguished BLP's right to have the retail tenancy dispute determined by the Tribunal under the RL Act.

72 The point to be made at this juncture is that the disputes outlined involve real questions for determination by the Tribunal on the hearing of all of the evidence.

73 The respondents did not satisfy me that the Tribunal did not have jurisdiction to determine its own jurisdiction and, in so doing determine the disputes relating to interpretation of the Terms of Settlement and BLP's entitlement to rescind this agreement including any disputes based on waiver or estoppel. Accordingly, the application made under section 75 was dismissed.

RESPONDENTS' APPLICATION UNDER SECTION 77

74 An order striking out BLP's application pursuant to section 77 of the VCAT Act on the basis that the proceeding would be more appropriately dealt with by the Magistrates' Court at Melbourne was sought. The latter action required the Tribunal to be satisfied that the proceeding should be transferred to the Magistrates' Court.

75 I was not so satisfied. The Tribunal has exclusive jurisdiction to hear a retail tenancy dispute arising under a retail premises lease. The Magistrates' Court does not have this jurisdiction. The submission that clause 7 of the Terms of Settlement conferred exclusive jurisdiction on Victorian or Federal Courts sitting in Melbourne to hear disputes that require the determination or order of a Court, requires interpretation of the Terms of Settlement. As noted at hearing, it was by no means a foregone conclusion that clause 7, referring as it does to "a Court", ousts the jurisdiction of the Tribunal.

76 As it turned out, this conclusion was reinforced by an authority on which Mr Richardson otherwise relied, namely the decision of the Court of Appeal in *Subway Systems Pty Ltd v Ireland*, [6] where the Court was required to determine

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6 [2014] VSCA 142.

whether the Tribunal was, for the purposes of the *Commercial Arbitration Act 2011* (Vic), a court. In *Subway Systems* the Court split 2:1 when it found as a matter of construction that, in the context of that Act, the definition of court included the Tribunal.[7] The point to be made at this juncture is, that the question of whether or not for the purposes of Terms of Settlement the reference to a court included the Tribunal, requires determination by the Tribunal on the evidence.

77 The respondents did not satisfy me that the proceeding should be struck out under this provision or, that the subject matter of the proceeding would be more appropriately dealt with by the Magistrates' Court. Accordingly, the application made under Section 77 was also dismissed.

Judge Millane
Vice President

[7] See also *Amalia Koskinas v Qantas Airways Limited* (Civil Claims) [2016] VCAT 2024