VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D384/2001

CATCHWORDS

Building dispute – terms of settlement - accord and conditional satisfaction – proceeding struck out – terms of settlement frustrated- work not done - no continuing release of Insurer where contract frustrated – proceeding reinstated

[2005] VCAT 1899

APPLICANT	Antony Catalano
RESPONDENT	Royal & Sun Alliance Insurance Limited
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	15 July 2005
DATE OF ORDER	25 July 2005

ORDER

1. The proceeding is reinstated.
2. Direct that this proceeding be listed for directions together with proceeding D314/2004 as soon as practicable.
3. For so long as proceeding D314/2004 remains undetermined, unless there is a direction to the contrary, this proceeding must only be listed for hearing or directions together with that proceeding.
4. Costs reserved.

SENIOR MEMBER R WALKER

APPEARANCES:

For Applicant	Mr Riegler of Counsel
For Respondent	Mr Stirling of Counsel

REASONS FOR DECISION

Background

1. This proceeding relates to the construction of a residence at 20 Paringa Road, Portsea for the Applicant ("the Owner") by one Sabroni Pty Ltd ("the Builder"). The work was done pursuant to a domestic building contract dated 3 April 2004. Domestic building insurance with respect to the project was provided by the Respondent ("the Insurer").

2. Following a dispute between the Owner and the Builder the Builder issued proceedings against the Owner, being Application D314/2001 on 2 May 2001 ("the Builder's action"). The Owner made a claim on the domestic building insurance on 29 January 2001 but the Insurer denied liability. By these proceedings, issued 24 May 2001, the Owner sought to challenge the Insurer's decision.

3. This is an application by the Owner to reinstate these proceedings which were struck out with a right of reinstatement on 2 October 2002. The ground for the application for reinstatement is that Terms of Settlement entered into between the Owner, the Respondent and the Builder were not complied with by the latter and the Owner wishes to proceed with his original application.

The terms of settlement

4. On 26 September 2002 the three parties entered into an agreement in the form of Terms of Settlement bearing that date ("the Terms"). A copy of the Terms is exhibit 4 to the affidavit of Kristy Ranaldo sworn 3 June 2005.

5. In essence, the Terms set out an agreed scope of works ("the Works") that were to be carried out by the Builder within a certain time, commencing on a particular date. When, in the Builder's opinion, the Works had been completed in accordance with Terms it was to immediately notify the Owner's expert and the Owner's solicitors in writing and within fourteen days of the date of that notice the Owner's expert was to inspect the work done. If there was any dispute as to whether the Works were completed or as to the extent and scope of the Works or whether they had been carried out in accordance with the Terms then the parties agreed that a telephone mention to

this Tribunal would be held for a Special Referee to be appointed to decide any question in dispute and the parties agreed to be bound by the decision of the Special Referee.

6. If a Special Referee were appointed and if he was of the opinion that any of the Works had not been completed in accordance with the Terms then he was to provide directions to the Builder as to what further works were required to be carried out and the Builder was then to carry out those further works within fourteen days or such other time as the Special Referee should deem appropriate. Following the expiry of that time the Special Referee was to assess whether or not the further works had been completed and if they had not he was to assess the reasonable cost of having a third party contractor complete them and was to provide a copy of that assessment in writing to the Tribunal and to the solicitors for each of the parties within fourteen days. The Builder was then to pay the assessed amount to the Owner and in default the Owner was able to obtain an order from the Tribunal against the Builder for payment of the assessed amount and if such an order were obtained the Owner was then able to demand from the Insurer payment of the sum specified in the default orders and the Insurer was obliged to make such payment within twenty-eight days of receipt of the demand.

7. If the Insurer was required to pay any such demand it was entitled to issue proceedings against the Builder and obtain judgment against it for the amount it had paid plus interest and costs.

8. The costs of any Special Referee appointed by the Tribunal were to be borne by the Builder and the Owner as determined by the Tribunal.

Performance by the Builder

9. The Owner contends that the Builder did virtually none of the required work and it is not contended by the Insurer that it did a great deal although it appears that some work was done. In any event, an application by the Owner to reinstate the Builder's action and have a special referee appointed was made to the Tribunal and was heard on the 19th and 20th of December 2002. No explanation has been offered as to why in this application it was only sought to reinstate the Builder's action and not also this proceeding. Although the solicitor for the Insurer appeared briefly, the application did

not involve the present proceeding and so the determination the Tribunal made did not bind the Insurer.

The application to reinstate the Builder's action

10. In the course of deciding the reinstatement application, the Tribunal found that the Terms had been repudiated by the conduct of the Builder which conduct had been accepted by the Respondent on or by 2 December 2002. The Builder's action was then ordered to be reinstated although the Tribunal specifically did not determine whether the present proceedings should also be reinstated.

11. The Builder's action came back before the Tribunal on 12 February 2003 when the Tribunal set aside for separate hearing the question whether the Owner was able to maintain a claim for damages for breach of the Terms. That matter was subsequently argued before his Honour Judge Bowman. In a recent judgment extending over sixteen pages, his Honour found that the Tribunal had determined that the Terms were at an end and could not be enforced, that no part of them was severable and that therefore the Builder's action was reinstated in full. The consequence of such a finding was that the Owner could not seek to enforce the Terms. His Honour found that there was a res judicata and issue estoppel binding both the Owner and the Builder.

The consequences

12. As a result of the application referred to, the Builder's action is reinstated and there is a determination binding the two parties to it, being the Owner and the Builder, that the Terms are at an end with the consequence that the whole of the subject matter of the Builder's action must be re-litigated. The Tribunal however has made no determination as to whether the present proceedings should also be reinstated and indeed, in the order of 20 December 2002 that question was specifically left open.

13. I note from the file in the Builder's action that this proceeding was not before the Tribunal at the time that order was made. In any event, since the Insurer was not a party, it cannot be bound by the determination. The findings made by the Tribunal at the hearing of 19th and 20th December 2002 and subsequently by his Honour Judge Bowman, bind only the parties to the Builder's action and only relate to the subject matter of that proceeding.

The present application

14. This application for reinstatement came before me on 15 July 2005. Mr Riegler of Counsel appeared for the Owner and Mr Stirling of Counsel appeared for the Insurer.

15. Before turning to counsel's submissions I should set out in full the final four Clauses of the Terms, which appear under the heading "Release". They are as follows:

> "*18. In consideration of entering these Terms of Settlement, and subject to the rights of the parties as set out in Clauses 14, 15 and 16 herein:*
>
> *"(a) the Owner and the Builder hereby both release and forever discharge each other from all claims, suits, actions and costs relating to or connected with the Builder's Claim the Owner's Counterclaim and the contract; and*
>
> *(b) the Owner hereby releases and forever discharges the Insurer from all claims, suits, actions and costs relating to or connected with the Insurance claim, the Insurer's decision and the Insurer Proceedings.*
>
> *19. Nothing however in this agreement shall effect the rights of the Owner pursuant to section 8 of the Domestic Building Contracts Act 1995 with regard to defects which the Owner is not aware of or could not reasonably be aware of at the date of this agreement or in relation to any defect which may arise in the Agreed Works which may become apparent subsequent to the Builder completing its obligations under this agreement.*
>
> *20. The Owner and the Insurer agree that the Insurer Proceedings shall be struck out with a right of reinstatement with no order as to costs.*
>
> *21. The Builder and Owner agree the Builder's Claim proceeding and the Owner's Counterclaim Proceeding shall be struck out with a right of reinstatement with no order as to costs*."

16. I have no evidence before me to establish that the Terms have been avoided as between the Owner and the Insurer. That question was necessarily left undetermined by the Tribunal but I find it impossible to see how the Terms, being an agreement between three parties, could be avoided as between only two of them and not as between all three of them. It is convenient to deal with this question first.

One or two agreements?

17. Mr Stirling submitted that the Terms are really two agreements in one. I do not accept that submission. Certainly, they were drawn up in order to record a settlement of two distinct applications before this Tribunal but the manner in which the resolution has

been achieved is to confer and impose rights and obligations on the parties that are so interconnected it is simply not possible to separate them out and say: "That is the agreement between the Owner and the Builder and that can stand on its own" and: "That is the agreement between the Owner and the Insurer and that can stand on its own". If the Builder does not perform his obligations to the Owner there is a liability imposed on the Insurer. To establish that liability under the agreement he has with the Insurer, the Owner must establish a breach of the agreement he has with the Builder. If there were no such agreement there would be nothing upon which the agreement with the Insurer could operate. The Insurer would also be entitled to be heard as to whether there was such a breach. There is then a right of recourse by the Insurer against the Builder. If Mr Stirling's approach were right, this would seem to be a third agreement. But that could not operate in the absence of the agreement between the Insurer and the Owner. The agreement between the Owner and the Builder could not stand without the agreement between the Owner and the Insurer because the latter agreement provides the guarantee to the Owner that the Builder will perform the Works in accordance with the terms. There is only one agreement and the respective rights and obligations of the parties are not severable.

18. Mr Riegler referred me to the case of ***Brew v Whitlock*** [1967] VR 803 in regard to the question of severability where, after considering various authorities, the Full Court said (at p.807):

> "*These authorities on severability in cases concerning uncertainty in a part of the contract point to the test as being the intention of the parties as to whether the operation of the contract apart from the impugned part was to be conditional on the efficacy of that part, or whether it was to take effect notwithstanding the failure of that part. That intention is to be ascertained from the construction of the contract as a whole. The process of construction will have regard to such considerations as the independence in form of the impugned part, any interdependence of that part and formal operation with the rest, the effect that severance will have on the operation or meaning of what is left, the nature of the subject matter dealt with in the part and its relative importance in the setting of the whole bargain, whether the impugned part is one of several promises supported by different considerations or by a common consideration, or whether it is part of a single consideration supporting a promise or promises or whether it is one of several considerations and, if so, whether it is immaterial or important part of the total consideration or merely subordinate*."

19. In this case the Builder agrees to do certain work and if he does not, there is machinery to provide what will happen. Its agreement to do the work is in exchange for having the benefit of the Terms, including the agreement to release the Builder. The Insurer agrees to be responsible to pay for the consequences of the Builder's default and then seek its remedy against the Builder if it should have to do so. Its agreement to do this is in exchange for having the benefit of the Terms, including the agreement to release the Insurer. The Owner is to receive the benefit of the work to be done by the Builder and, if the Builder defaults, the benefit of the obligation of the Insurer to pay the cost of having it done by someone else. In consideration of this he agrees to release the Builder and the Insurer. The parties chose to incorporate these mutual rights and obligations in a single document for a very good reason. I cannot see that it is possible to divide it into two distinct and severable contracts. It is by no means apparent that the Owner would have been prepared to enter into a separate agreement with either the Builder or the Insurer without the other agreement also being in place. It is also by no means apparent that the Insurer would have been prepared to enter into an agreement with the Owner without the agreement by the Builder that it would have recourse against the Builder if it were called upon to pay. It is by no means apparent that the Owner would have agreed to release both the other parties without the interlocking obligations undertaken by them as set out in the Terms.

20. The Terms provide that both sets of proceedings are to be struck out with a right of reinstatement. They were both struck out on the same day with a right of reinstatement.

The operation of the finding in the Builders action

21. It is most regrettable that the application to reinstate the Builder's action was made in isolation and not together with an application to reinstate this proceeding as well. The Tribunal would then have been in a position to deal with both matters at the same time. As it is, the Tribunal was only able to deal with the reinstatement of the Builder's action. In regard to that application it could hear only from the Owner and the Builder and look at the evidence tendered by those parties. It could deal only with the rights of those two parties and its order could only bind those two parties. It could not affect the rights of the Insurer. Those were left to be determined in this application.

22. In the earlier application it was found that the Terms had been repudiated by the Builder and that the repudiation had been accepted by the Owner. As a consequence, it was found that the Terms were at an end. There is no mention in the order as to the part (if any) played by the Insurer in this process. The Tribunal's order includes the reasons given for it (see ***Victorian Civil and Administrative Tribunal Act 1998*** s.117(6)). There were no written reasons provided for the order but a transcript of the proceeding is exhibited to the affidavit of Kristy Ranaldo and insofar as that contains oral reasons I can look at it. It appears from the transcript that the Tribunal found that the Builder had done only about three days work commenced late towards the end of the period in which the work was to be done. The Learned Member found that the Builder had repudiated the Terms by evincing an intention not to be bound by them. He said that the repudiation had been accepted by the Owner by his application to reinstate the proceedings by letter of 2 December 2002. He then said:

> "*From this it also follows that I cannot act under the terms. The terms are finished. This includes Clause 11(c) to which I was referred. That provision relates only to whether the agreed works are being performed*."

23. The letter of 2 December 2002 referred to in the Tribunal's reasons is exhibit 5 to the affidavit of Kristy Ranaldo. It is addressed to the Registry and encloses a copy of the Terms. It refers to the Builder's breach and asks *"…for an urgent directions hearing as soon as possible for this matter to be dealt with."* The letter bears the heading of both sets of proceedings but it appears that in response to this letter only the Builder's application was listed for a directions hearing. Apart from this letter I do not have the benefit of any of the other evidence that was before the Tribunal when the Builder's action was reinstated. That evidence is set out in the transcript but it is only before me as evidence that was given in another proceeding. I cannot treat that as also being evidence in this proceeding and make decisions based upon it.

24. In any event it is neither necessary nor possible for me to revisit the Tribunal's decision to reinstate the Builder's action. It is sufficient to say that it has been determined in the Builder's action that the contract constituted by the Terms has been terminated. It has also been found subsequently by his Honour Judge Bowman that as a consequence of that finding, the Terms are wholly at an end including the releases contained in them. Those findings bind the parties to the Builder's action but they do not bind anyone else.

The submissions

25. The foundation of Mr Stirling's argument is that the Builder repudiated the Terms and the repudiation was accepted by the Owner. He said that by accepting the repudiation the Owner elected to treat the Terms as at an end. By doing so, the Owner no longer has the benefit of the Terms. Certainly if a party o a contract repudiates a contract and the innocent party elects to treat the contract as at an end, the effect of that election is that the contract comes to an end. It does not come back to life if the innocent party changes his mind. To restore the former contract that has been terminated would require a fresh agreement between the parties. But Mr Stirling's argument is based upon findings made in another proceeding to which the Insurer was not a party. No issue estoppel or res judicata can be relied upon by the Insurer as a result of anything decided in the Builder's action. If the Insurer wishes to make submissions based upon facts, those facts must be established by evidence that has been led in this proceeding. There is no evidence before me upon which I can make any finding that the Builder has repudiated the agreement or that, following such repudiation the Owner elected to treat the agreement as at an end and so accepted the repudiation. I do not accept Mr Stirling's submission that this point was conceded in paragraph 2.3(b) of Mr Reigler's submission. All that Mr Reigler does in that paragraph is set out what the Tribunal found in the Builder's action.

26. The affidavits relied upon in the Builder's action have not been filed in this proceeding and the witnesses that were cross-examined were not called in this proceeding. I cannot rely upon the evidence given in another proceeding in order to determine an application in this proceeding. Ultimately, the relevant fact about the application in the Builder's action is what the Tribunal decided and the reasons that it gave because it was that decision that determined the fate of the Terms as between the Owner and the Builder. The position of the Terms vis a vis the Insurer was not before the Tribunal and the question whether the present proceeding before me should be reinstated was deliberately left open.

27. No evidence has been led in the application before me that would justify a finding in this proceeding that the Builder has repudiated its obligations under the Terms. In Ms Ranaldo's affidavit she simply says that *"…disputes arose in relation to the performance by the Builder of its obligations under the second Terms of Settlement."*

The Insurer's solicitor, Mr Farrelly does not suggest any breach of the Terms by the Builder in his affidavit but does say that, to the best of his knowledge and belief, the Owner has never made any allegation or suggestion that the Insurer has breached any of its obligations under the Terms.

28. There is also no evidence upon which I could find that, even if there were any act of repudiation by the Builder, the Owner has elected to accept that repudiation and treat the contract as at an end. All that appears from the evidence before me is that the Owner's solicitor requested that the matter be re-listed urgently to be "dealt with" and a copy of the Terms of Settlement was enclosed. I cannot spell out from that letter an election on the part of the Owner to treat the Terms as being at an end.

29. I therefore find that, by reason of an order made in another proceeding, a tripartite agreement is no longer able to be enforced between two of the three parties and the rights and obligations of the respective three parties cannot be severed. What is the consequence of that?

Termination by only two of three parties

30. The notion that a tri-partite agreement can be ended by an act of repudiation by one of the three parties and the acceptance of that repudiation by only one of the others seems odd but there is authority to suggest that this it is possible (see ***Lyon White Lead Limited v Rogers*** (1918) 25 CLR 533 at p.551, per Isaacs and Rich JJ). The explanation of this case in ***Jenkins v Smyth*** [1973] VR 441 at 447 has been criticised in the recent New South Wales Supreme Court decision of ***Carringville Pty Ltd v The Gatto Group Pty Ltd*** [2003] NSWSC 123. In any event, it 2would seem from hese cases that if an innocent party elects to treat the contract as at an end, the contract is avoided as between all parties, not just the two involved in the termination.

31. In the Tribunal's decision in the Builder's action the position of the Insurer was expressly left open. As was pointed out in both the ***Lyon White Lead*** case in ***Jenkins v Smyth***, it is necessary that all parties to the agreement be parties to the action, hence the desirability of both applications having been before the Tribunal on the last occasion. It is most unsatisfactory to have to deal with the problem in two stages but the Tribunal has already found that the agreement is at an end and, although there is no res judicata

or issue estoppel involving the Insurer and the Owner as between themselves, it is now not possible for the Owner and the Builder to enforce or assert the rights and obligations under the Terms between themselves. That being so, the mechanism in the Terms of Settlement cannot work. Where then does this leave the terms when I have no evidence of any termination involving the Insurer?

Frustration

32. Mr Riegler submits that the Terms were frustrated in that there can no longer be an assessment of the "further works" and so the mechanism set out in the Terms cannot operate. He relied upon the case of ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales***(1982) 149 CLR 337. In that case the contract price for tunnelling work had been calculated on the basis that work would proceed continuously. Injunctions prevented work from proceeding except during stated hours which greatly increased the construction costs. The High Court held that this was an instance of frustration. Mason J said (at p.360):

> *"The critical issue is then whether the situation resulted from the grant of the injunction is fundamentally different from the situation contemplated by the contract on its true construction in the light of surrounding circumstances."*

Aickin J said (at p.383):

> *"In my opinion the grant of the injunction produced frustration in the true sense of that term. It had become unlawful to perform the work in a manner which would have complied with the requirement of the contract, a requirement well known to both parties."*

33. In this case, the continued performance of the contract encapsulated in the Terms has become impossible due to the finding of the Tribunal in the Builder's action and therefore upon the making of that finding the contract, *if it still existed* must have been frustrated.

The status of the releases

34. There was considerable debate been counsel as to whether or not the release in favour of the Insurer contained in paragraph 18(b) of the Terms would then survive. If it did, there would be little point in reinstating this proceeding. In the Builder's action it was

held that the releases as between the Owner and the Builder could no longer stand but I must decide the question afresh as between the Owner and the Insurer.

35. Mr Stirling submitted that the wording of the release in favour of the Insurer suggested that it was immediately effective upon the execution of the Terms and therefore remained in effect notwithstanding that the agreement contained in the Terms might subsequently fall. This would be a very strange result. The releases were intended to ensure that the burden assumed by the Insurer under the Terms was all that it would have to shoulder and that there would be no further claims. If, by reason of the untimely termination of the Terms the Insurer shouldered no burden at all, it is difficult to see why that release should survive. That certainly would not have been the intention of the parties. Suppose that Builder had repudiated the Terms and the Insurer had accepted the repudiation and brought the agreement to an end (assuming that were possible). Could the Insurer then have said to the Owner that it then had no liability because it had determined the Terms but the releases none the less remained intact? This seems an unlikely interpretation.

36. Mr Reigler referred me to the case of ***Osborn v McDermott*** [1998] 3V.R. 1 where the Court of Appeal considered the nature of an accord and satisfaction. In a judgement with which the other members of the court concurred, Phillips J.A. said (at p. 10):

> *"First there is the mere accord executory which on the authorities does not constitute a contract and which is altogether unenforceable, giving rise to no new rights and obligations pending performance and under which, when there is performance (but only when there is performance), the Plaintiff's existing cause of action is discharged. Secondly, at the other end of the scale, is the accord and satisfaction, under which there is 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. Somewhere between the two there is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance."*

37. Mr Reigler submits that the Terms fall into the third category, and that there could be no release unless and until there was performance by the other two parties. He said that performance was a condition precedent to the releases coming into effect. He referred to the case of ***Perri v Coolangatta Investments Pty Ltd (***1982) 149 C.L.R. at p. 551 where the High Court discussed the nature of contract subject to a condition precedent as being one where it creates no rights until the condition is fulfilled. As a matter of law, that is obviously so but the real question is whether this release falls into the third category described in ***Osborn v McDermott.***

38. Mr Stirling placed great reliance on the words *"…hereby releases and forever discharges…"* in clause 18(b) as showing an intention that the Insurer should be released immediately upon the execution of the Terms, regardless of whether or not there should subsequently be any performance. Certainly those words have that appearance but the opening words to Clause 18 include *"…and subject to the rights of the parties set out in clauses 14, 15 and 16 herein:"*…showing that it was the intention of the parties that the price for the release was that the parties would have those rights. Where those rights are no longer available because of a decision of this Tribunal in another proceeding the real consideration for the release disappears.

39. Mr Stirling submitted that the original causes of action merged into the Terms. In this respect he relied upon comments of Gobbo J. to that effect in the unreported case of ***Hannan v Binns*** *(Supreme Court of Victoria 15 November 1993 –unreported).* As to what happens to a cause of action that has been compromised, Halsbury uses the terms "spent and exhausted" (4th Edition Vol 37 para 391). Fosket (*Law and Practice of Compromise 5th Ed. Page 101),* also referred to by Mr Stirling, describes the situation as being "the end of the dispute. To say that there is a merger does not take the matter any further. A cause of action also merges in a judgement (Halsbury 4th Edition Vol 16 para 1536) but will revive if the judgement is subsequently set aside to enable the action to be proceeded with.

40. There can be no doubt that the Terms amount to an existing and enforceable agreement between the parties for performance according to their tenor. However I do not construe it as operating to immediately discharge the existing cause of action in both proceedings whether or not there should be any performance. By providing that there was to be a

right to reinstate both sets of proceedings the parties were contemplating that obligations under the agreement might not be performed. Mr Stirling suggested that the right of reinstatement was intended to be only for the purpose of obtaining judgement in one of the ways the Terms had spelled out earlier in the document. However the wording of clauses 20 and 21 is not so restricted.

41. Further, if the releases were intended to have immediate effect regardless of whether or not there should be any subsequent performance, both the Builder and the Insurer could, immediately after signing the Terms, wholly refused to perform their obligations and plead the release, saying to the Owner: "You will now have to proceed in the manner set out in the Terms". I do not believe that would have been the intention of the parties.

42. The procedures set up in the Terms are complicated and reliant upon the actions of a number of people. Not one of the three parties could ensure that the whole of the rights of the parties set out in Clauses 14, 15 and 16 would be satisfied because there are obligations or functions imposed upon all parties and on strangers to the agreement. There was always the possibility that something would go wrong and the parties would have to resume the two sets of the proceeding, hence the agreement that there should be a right of reinstatement in each case.

Conclusion

43. I therefore find that the Terms were an accord and conditional satisfaction, the condition being the satisfaction of the rights of the parties set out in clauses 14, 14 and 16. That condition has not been satisfied and now cannot be, because the rights and obligations as between the Owner and the Builder cannot be enforced.

44. For these reasons, the proceeding will be reinstated. I shall also order that this proceeding not be listed for hearing, whether for directions or otherwise, except together with proceeding D314/2001, for so long as that latter proceeding remains unresolved. It is most desirable to avoid problems such as those presented in this application. Costs will be reserved.

ROHAN WALKER
SENIOR MEMBER
DOMESTIC BUILDING LIST