**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST** VCAT REFERENCE NO. D818/2012

## CATCHWORDS

*Application pursuant to section 93 Victorian Civil and Administrative Tribunal Act 1998 to enforce terms of settlement-Parties unrepresented at VCAT Mediation-Document entitled "ADR Agreement-Cooling Off Period" provided to parties by Mediator-Terms of Settlement subsequently entered into-whether, having regard to the detailed terms, it was an implied term that the Cooling Off Period term no longer applied-if not, whether the owner's conduct subsequent to the entry into the Terms of Settlement was such as to create an assumption on the part of the builder that the owner would not rely on the Cooling Off Period term, thus preventing the owner from now relying on the term pursuant to the principles of equitable estoppel-whether, pursuant to the same principles, the conduct of the applicant subsequent to the respondent cooling off was such that the applicant is now prevented from bringing the application.*

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|---|---|
| **APPLICANT** | Cavalier Homes Albury Wodonga Pty Ltd (ACN: 117 293 053) |
| **RESPONDENT** | Mr Shaun Scanlon |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Member A. Kincaid |
| **HEARING TYPE** | Preliminary Application |
| **DATE OF HEARING** | 19-21 May 2014 |
| **DATE OF ORDER** | 21 May 2014 |
| **DATE OF WRITTEN REASONS** | 9 July 2014 |
| **CITATION** | Cavalier Homes Albury Wodonga Pty Ltd v Scanlon (Building and Property) [2014] VCAT 813 |

## ORDERS

1. The application made by the Applicant is dismissed.

2. Costs of the application are reserved.

**MEMBER A. KINCAID**

**APPEARANCES:**

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| For the Applicant | Mr T. Sedal of Counsel |
| For the Respondent | Mr J. Gray, Solicitor |

## REASONS

1 I heard a preliminary application by the applicant between 19-21 May 2014 and made my decision, giving reasons orally on 21 May 2014.

2 On 26 May 2014 the applicant sought written reasons, and so I publish those reasons. They are essentially a transcript of the oral reasons, with some minor corrections to syntax.

3 This hearing of this proceeding was due to start on Monday 19 May 2014. The applicant (the "**builder**") claims the outstanding balance of a progress claim under a building contract with the respondent. The respondent (the "**owner**") counterclaims in respect of allegedly defective works carried out by the builder. The claims arise out of the construction by the builder of a single storey brick veneer house on the owner's property at Bonegilla, near Wodonga, Victoria.

4 The proceeding was commenced by the builder on 16 August 2012, some six months after the owner occupied the premises.

5 At the start of the hearing on 19 May 2014, Mr Sedal of Counsel, for the builder, made an application under section 93(1) of the *Victorian Civil and Administrative Tribunal Act 1998* to give effect to Terms of Settlement between the parties dated 28 November 2012. He submitted that the respondent had complied with the Terms of Settlement, and that therefore neither the claim nor the counterclaim is competent.

6 Mr Gray, solicitor, appeared for the owner. It was not possible for Mr Sedal to give extended notice of the application to Mr Gray, but Mr Sedal informed me that he was able to send some material concerning the proposed application to Mr Gray by facsimile last Friday evening.

### Background

7 The Terms of Settlement were entered into following a mediation conducted by Mr John Anderson on 28 November 2012.

8 Neither party was legally represented at the mediation.

9 This had the consequence that, at the start of the mediation, Mr Anderson provided to each party a document entitled "ADR Agreement: Cooling Off Period". This document serves as a reminder to the parties of the procedure contained in the Tribunal's Practice Note PNVCAT4, the terms of which are applicable when a party or parties are not represented at a mediation. The provision of this document is confirmed by Mr Anderson's ADR Report on the Tribunal's file.

10 The relevant parts of this document are as follows:

> ADR Agreement: Cooling Off Period
>
> In the circumstances when a party, or parties, are not legally represented and agreement is reached at a mediation, **the agreement**

**is subject to a mandatory cooling off period of two business days**.

Business days are between the hours of 9.00am and 4.30pm Monday to Friday. For example, if a mediation is held on Friday:

| | |
|---|---|
| Friday: | Mediation |
| Saturday | |
| Sunday | |
| Monday | First Business Day |
| Tuesday | Second Business Day |
| Wednesday | Tribunal Finalises Proceedings |

No steps will be taken by the Tribunal to implement the finalisation of this proceeding during the mandatory cooling off period.

If any party, upon reflection, wishes to withdraw from the settlement they should notify the Tribunal by phone on (03) 9628 9762 during the two business days following mediation (**emphasis added**).

11 The document goes on to provide details how a party may exercise its right under the cooling off arrangement.

12 I have concluded that the Cooling Off Period term contained in the first paragraph of the document, certainly at the time it was provided to the parties, and their agreement to it, operated as a proposed express oral term of any mediation agreement that may be subsequently entered into by the parties.

13 It is common ground that on Friday 30 November 2012 the owner purported to withdraw from the Terms of Settlement within the required 2 business days. I am also satisfied from my review of the Tribunal's file, that this was so. I provided the parties' representatives with the opportunity of reviewing the Tribunal's file in regard to this course of events.

14 On 3 December 2012 the Tribunal wrote to the builder in the following terms (with sentences in bold also shown):

> I refer to the above matter and wish to confirm my conversation with you on Friday.
>
> As discussed, the other party in this matter exercised their right to the post mediation cooling off period.
>
> **The agreement reached at the mediation 28 November 2012 has therefore been cancelled.**
>
> This matter will be referred to the Head of List to consider the further listing of this matter. Notice of the next listing will be mailed to all parties at the earliest opportunity.

**To confirm the above, any agreement reached at mediation of 28 November has been cancelled and is therefore no longer in place.**

15 On 3 December 2012 the Tribunal wrote to the owner in the following terms (with sentences in bold also shown):

> I refer to the above matter and wish to confirm your advice to the Tribunal on Friday that you wished to revoke the settlement agreement reached at the mediation on 28 November 2012.
>
> The Tribunal contacted [the Applicant] and notified them that you had exercised your right to cancel the agreement reached at the mediation on 28 November 2012.
>
> We confirm therefore the agreement reached at the mediation on 28 November 2012 has been cancelled.
>
> As discussed, this proceeding will be referred to the Head of List to consider the further listing of this matter. Notice of the next listing will then be mailed to all parties at the earliest opportunity.
>
> **To confirm the above, any agreement reached at mediation of 28 November has been cancelled and is therefore no longer in place. The [Applicant] has been advised that the settlement has been cancelled.**

16 It is also noteworthy that by letter dated 12 December 2012 Mr Derek Norquay, solicitor acting for the builder, wrote to the Tribunal as follows:

> **Cavalier Homes Albury Wodonga Pty Ltd v Shaun Scanlon**
> **Shaun Scanlon v Cavalier Homes Albury Wodonga Pty Ltd**
> **File No. D818/2012**
>
> I advise that I now act for Cavalier Homes Albury Wodonga Pty Ltd ("**Cavalier Homes**") in both the Claim and Counterclaim.
>
> Following the recent withdrawal of Mr Scanlon from the agreement struck at mediation during the "cooling off" period, I confirm the request made by Cavalier Homes that this matter be listed for a Directions Hearing as soon as possible.

17 Mr Sedal, on behalf of the builder, now submits that the express terms of the settlement agreement were such that the Cooling Off Period term, which I have found was orally agreed at the start of the mediation as applying to any agreement that subsequently may have come out of it, must be taken to have been subsequently discarded by the parties.

18 Alternatively, Mr Sedal submits, the owner so conducted himself during the period immediately after the mediation that he encouraged an assumption on the part of the builder that the Cooling Off Period term would not apply, causing the builder to act to its detriment to the knowledge of the owner and in regard to which it would now be unconscionable for the owner to resile

from the implied promise that the owner no longer would rely on the Cooling Off Period term[1].

19 After these general submissions were made, I decided to hear the application. I subsequently adjourned the matter before lunch on 19 May 2014 in order to allow Mr Gray to take some further instructions from the owner about the matter. The hearing of the builder's application resumed at 10:00 a.m. on Tuesday 20 May 2014.

## Other Matters

20 Mr Sedal submits that should I find that the Cooling Off Period term did not apply, then the words of the Terms of Settlement are unambiguous, that is to say, in exchange for the undertaking by the builder to conduct certain work by 30 November 2012 the owner would release the builder:

> "from all further claims, demands, suits and costs of whatsoever nature, howsoever arising out of or connected with the subject matter of the dispute and the proceedings."[2]

21 Mr Sedal submitted that if I find the words to be ambiguous, then I may fairly have recourse to what was said by the parties during the mediation as comprising part of the factual matrix. Yesterday, I made my own views clear-that even if I find the terms to be ambiguous, I would not be permitted to rely on what was said or done at the mediation, not only because section 92 of the *Victorian Civil and Administrative Tribunal Act 1998* prevents it in the absence of agreement by both parties, but because it is not open to me to receive evidence of negotiations when construing the words of a written contract.

22 I should add that just prior to the lunch adjournment yesterday I received a witness statement made by the owner. It purported to provide details of what was done or said during the course of the mediation in some respects. It also related alleged facts and circumstances that may lead to a submission on behalf of the owner that the Terms of Settlement were executed under duress. After the lunch adjournment Mr Gray informed me that he no longer wished to make any such submission, and so I struck out those paragraphs.

23 Later in the day, I asked Mr Gray whether his information to me was based upon a provisional view that I had expressed upon earlier in the day that section 92 of the *Victorian Civil and Administrative Act 1998* may prevent him from leading any evidence about what took place at the mediation, if only to advance a duress argument. I informed him that, upon reflection, this may not be the case. In any event, he has now reserved his right to make such a claim if the builder's application before me is successful. I should also add that I have expressly reserved the rights of the parties to

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[1] The builder relies on the principles of equitable estoppel, as discussed in *Waltons Stores (Interstate)Ltd v Maher* [1988] HCA 7 and particularly at [34]-[38].

[2] See clause 5 of the Terms of Settlement.

make submissions on the meaning and effect of the Terms of Settlement - again, only if I grant the builder's application.

24 In regard to the third sentence of paragraph 11 and paragraph 12 of the owner's statement, I struck them out on the basis of their being in breach of section 92 of the *Victorian Civil and Administrative Tribunal Act 1998*.

## Analysis

25 Mr Gray, on behalf of the owner, submits that the Cooling Off Period term survived the Terms of Settlement, and that the owner duly cooled off on 30 September 2012. He also says that even if it did not (and putting aside questions of duress and other matters that I have discussed) the Terms of Settlement are not enforceable against the owner in any event, because the builder failed to perform its side of the bargain, that is to say, it failed to carry out certain works which are referred to in the Terms of Settlement.

26 Did the Cooling Off Period term continue to apply, notwithstanding the detailed conditions of the Terms of Settlement? For that purpose, it is necessary to set out relevant parts of the Terms of Settlement, as follows:

> **TERMS OF SETTLEMENT** dated 28 November 2012
>
> **WHEREAS**
>
> I The [owner] and the [builder] entered into a building contract dated 15 June 20111 ("the contract") for the performance of works at 44 Hillandale Court, Bonegilla in the State of Victoria ("**the works**").
>
> II A dispute arose between the [owner] and the [builder] in relation to the works performed and/or monies owed under the contract ("**the dispute**").
>
> III The [owner] and the [builder] have lodged an Application in VCAT to determine the issued comprised in the dispute.
>
> In the interests of avoiding further costs and expense, the parties have agreed to a settlement of the proceeding and the dispute in the following terms:
>
> 1. The [owner] will pay the [builder] the sum of $19,000 ("**the settlement sum**")…
>
>  2.1 Payment of the settlement sum is to be made by 2pm 7 December 2012…
>
> 5. In consideration of the parties entering these terms of settlement and subject to their performance, the parties mutually release and discharge each other from all further claims, demands, suits and costs of whatsoever nature, arising out of or connected with the subject matter of the dispute and the proceedings. Where the Owner is a party, this release does not apply to a breach other than a breach that was known, or ought reasonably to have been known, to the Owner to exist at the time these Terms of Settlement were executed.

6. The [builder] undertakes to rectify the leakage in the shower, the cracks and sap leakage from the front and rear posts, acid stains to paint front weatherboards and laundry door and repairs to any consequential damage/s (the "**rectification works**").

7 The rectification works are to be completed by [the builder] by Friday 30 November 2012 on the basis that access is made available to [the [builder] from 8:30 a.m. on Thursday 29 November.

## Cooling Off Term Not Discharged by Implication

27 I have concluded that the Cooling Off Period term was an express oral term of the proposed Terms of Settlement, agreed at the start of the mediation, that survived any other terms that were subsequently agreed to between the parties. The term is described in the cooling off period document to which I have referred, which expressly states that "[any settlement] agreement …is subject to a mandatory cooling off period of two business days", with full details following as to how a party may withdraw during the period. Put another way, there is nothing in the Terms of Settlement that, in my view, negates the continued existence of the express oral Cooling Off Period term.

28 Mr Sedal argued that the fact that the builder under the Terms of Settlement agreed to carry out work during the period of the 2 day cooling off period, by necessary implication the express oral term was no longer applicable. I am of the view that the express purpose of the 2 day cooling off period is to provide comfort to a party without legal representation that he or she can withdraw from the Terms of Settlement, whatever those terms may be. An essential feature of the ADR process, as practised by the Tribunal, is that unrepresented parties should have a safety net where they choose to participate in a mediation of a dispute without legal representation. The arrangement is also fully set out in Practice Note PNVCAT4 available on the VCAT website, details of which the parties may also be assumed to have knowledge. The only exceptions to the application of the cooling off period are spelt out in clause 63 of the Practice Note, and none is applicable here.

29 In these circumstances I find myself unable to reach the conclusion that the circumstances warrant the implication of a further term (having regard to the *BP Refinery* test[3]) to the effect that the Cooling Off Period term agreed to by the parties at the outset of the mediation would, because of the particular terms subsequently agreed, no longer apply.

30 Mr Sedal also relies on Professor Carter's essay on *Termination*[4] (approved by French J, as he then was in paragraph [159] of *Martec International Pty Ltd v Energy World Corporation Limited*[5]), which describes two situations

[3] See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266
[4] *Law of Contract*, 2nd edition, Butterworth's Common Law Series (2003) at [1320]-[1321].
[5] [2006] FCA 1004 (3 August 2006)

where consensual discharge of a term may occur by implication (and to adopt his Honour's paraphrasing):

> (a) Where the parties to a contract enter into a second contract which is inconsistent with an intention that the contract by which the parties were originally bound should remain in force; and
>
> (b) when the conduct of the parties to an agreement is such that an agreement to terminate the former contract may be inferred or where their conduct creates an estoppel.

31 I do not agree that the first proposition is applicable in this case. A particular feature here, and not, it seems, being the circumstance addressed by Professor Carter's first proposition, is my finding that, at the outset of the mediation, the parties agreed that whatever may be subsequently agreed as an outcome of the proposed mediation, the Cooling Off Period term would be a term of any such future agreement.

32 This does of course lead to the proposition that any agreement by an unrepresented party, say Party A, to do work or pay money during the two day cooling off period, may be to no avail, because the beneficiary of the work or the payment, Party B, may subsequently decide to cool off. The risk that it may not be possible for the parties then to be restored to their original positions following the carrying out of work or the payment of money by Party A, is a risk that I consider has been assumed, in this example, by Party A.

### Owner Not Estopped from Relying on Cooling Off Term

33 It is then submitted by Mr Sedal, on behalf of the builder, that the conduct of the owner has been such as to reasonably lead to the assumption on the part of the builder that a certain state of affairs existed that is to say that the 2 day cooling off period will not apply, causing the builder to act to its detriment to the knowledge of the owner, and from which conduct it would now be unconscionable to allow the owner to resile.

34 I have concluded that the express oral term of the Terms of Settlement (that is to say, that they were subject to a 2 business days cooling off period, which survives any agreement between the parties by which one party is to carry out work or confer benefit on the other party within 2 business days) is a matter against which the subsequent conduct of the owner should be assessed. There was nothing in my view, in the subsequent conduct of the owner, effectively standing by while work is being undertaken by the builder pursuant to the Terms of Settlement, which could reasonably lead to an assumption on the part of the builder that the owner would not seek to cool off during the 2 day cooling off period. That was a risk undertaken by the builder when it agreed to do the work during the 2 day period.

35 In the end, even if there was such conduct, causing an assumption to be made by the builder of the type I have described, I am not persuaded that in

any event there was such a change of position on the part of the builder, given the nature of the works undertaken by the builder, as to make it unconscionable for the owner to resile from conduct that led to any such assumption.

### Builder's Delay in Making Application

36 The owner submits, in effect, that in any event, this proceeding is not the right vehicle to make such an application. This is because it has just been brought too late. I will say something of the history of the matter subsequent to Mr Norquay's letter dated 12 December 2012, to which I have already referred.

37 The builder filed this proceeding on 16 August 2012 seeking the balance of monies owing under a building contract 9 June 2011. The amount sought was $28,410.

38 On 4 October 2012 the owner filed a counterclaim for $49,559. On analysis, what the owner was seeking was $22,834 being the amount conceded as owing to the builder of $26,725 less the claimed cost of rectification of $47,237, plus fees and of $2,322. The defective works the subject of the counterclaim was defective brickwork. At the time of filing the counterclaim, the owner was in possession of an expert report from Mr Bill Vost of John O'Connell and Associates of 27 September 2012. Mr Vost also provided a supplementary report of 8 May 2013.

39 Some five months after the mediation conducted by Mr Anderson on 28 November 2012, Mr Tim Gibney of Tim Gibney and Associates Pty Ltd provided a report dated 3 May 2013 to the owner, identifying defects to the subfloor framing, the brickwork, high moisture levels caused by excavation in the rear *al fresco* area. The report also identified edge heave along the eastern side of the house, which had allegedly resulted from lifted portions of the strip footing, with the resultant movement of the dwelling. This report plainly raised issues which were not the subject of complaint in the counterclaim. Mr Gibney's report was referred to in the owner's Defence and Counterclaim filed on 5 December 2013, almost a year after the mediation. The Counterclaim claimed $88,000 as particularised in the report of Mr L.R. White, Builder, dated 20 May 2013.

40 The builder filed points of defence to the counterclaim dated 20 January 2014 without any reference to the matters the subject of the current application. It was signed by the builder's solicitor, Mr Norquay. Subsequent experts reports were obtained by the parties and filed as follows:

(a) The builder obtained a report of Mr John Hay including costings, dated 28 June 2013 and a Mr Carl Hutchison dated 7 August 2013, both in response to the two Voss reports and the Gibney report to which I have referred;

(b) the owner then obtained further rectification costings from Mr Laurence Hargrave dated 27 January 2014, in the amount of $144,000; and

(c) the builder obtained a further report from Mr Casamento dated 26 April 2014. He was required to investigate structural and other defects, and to assess the performance of footings, brick piers, bearer and joist spans, stumps and the structural integrity of the brickwork and articulation joints.

41 Following the mediation, and the owner's cooling off, a directions hearing was held on 7 March 2013 when the builder was represented by Mr Norquay, solicitor, by telephone. Mr Norquay continues to act for the builder.

42 A directions hearing was held on 30 April 2013 when time for service of experts reports was extended and the parties agreed to a compulsory conference on site on 23 August 2013. It appears that an agreement had been reached between the parties, disposing of the matter, but subject to the owner obtaining legal advice and/or signed terms. These conditions were apparently not met.

43 An administrative mention was held on 6 September 2013 which in turn was adjourned to 7 October 2013 to allow further negotiations to take place between the parties.

44 A directions hearing was held on 24 October 2013, again which Mr Norquay attended by telephone, and further orders were made for provision of witness statements and other such matters.

45 On 20 February 2014 a further directions hearing took place when the builder was represented by Mr Twigg of Counsel.

46 On 3 March 2014 the orders made at the earlier directions hearing on 20 February 2014 were confirmed. Mr Twigg appeared again on behalf of the builder.

47 A further report of Mr John Hay dated 5 May 2014 was obtained by the builder, responding to Mr Hargrave's report dated 27 January 2014.

48 Following these events the matter was set down for a hearing to start on Monday 19 May 2014 with an estimated length of 5 days. Only then did Mr Sedal for the builder announce that he wished to make this application under section 93(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.

49 In all the circumstances I consider that, in fairness, it is not possible for the builder to make this application, at this late stage. The conduct of the builder, through its lawyers, ever since the cooling off by the owner has been such that it unconditionally accepted that the owner had an entitlement to cool off when he did, and that conduct has been continuing right up until

last Friday evening when, I accept, that Mr Gray received details from Mr Sedal of the proposed application.

50 The owner has incurred significant cost and expense in running this matter for a further period of time since December 2012, on the reasonable assumption that, by its conduct, the builder accepted the proposition that the owner had duly exercised his right to cool off. I think that it would therefore be unconscionable if I were now to allow the builder to make an application of the type it has now made.

51 I have concluded that the builder is estopped from making the application that it has made, for reasons I have just expressed.

### Evidence of Builder's Failure to Comply with Terms of Settlement

52 The application fails for the reasons I have expressed.

53 In addition, I have heard evidence of two contractors called by the builder, Mr Holt and Mr Ray, concerning the work undertaken by them at the house during the 2 business days following the entry of the Terms of Settlement. The evidence was to the effect that all required works were duly attended to. The owner has given evidence that workers engaged by the builder attended the house to rectify defects, but the shower recess leak was not rectified, and nor was the sap leakage to the cracks to the front and rear verandah posts. I have reviewed photographs of those posts, and also the shower. The owner gave evidence that he found out that the shower was still leaking when he had a shower some little time after he withdrew from the Terms of Settlement. He says that he did not subsequently complain about these matters, believing that he had duly revoked the Terms of Settlement.

54 On balance, in regard to that last point in particular, I accept the evidence of the owner, particularly in respect of those matters outstanding following the attendance by the contractors at the house. I am not persuaded, on the balance of probabilities, that there was satisfactory compliance by the builder with the Terms of Settlement.

55 The application is dismissed. I will hear argument on costs.

**MEMBER A. KINCAID**