

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D306/2006

CATCHWORDS

Accord and satisfaction – whether accord executory – whether satisfaction deferred until due performance
– offer ad acceptance – construction of offer of settlement

APPLICANT	T & B Chugg Pty Ltd (ACN 005 991 211)
RESPONDENTS	John Johnston , Michele Johnston
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Determination of preliminary question
DATE OF HEARING	15 February 2007
DATE OF ORDER	8 March 2007
CITATION	Chugg v Johnston (Domestic Building) [2007] VCAT 662

ORDER

1. The answer to the question set aside for preliminary hearing is: “Yes”.
2. Costs are reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr K. Oliver of Counsel
For the Respondents	In person

REASONS

The question

- 1 In this matter I have before me the following question for preliminary determination namely:

“Whether the proceeding has been compromised by the Applicant Builder’s alleged acceptance of the Respondent-Owner’s offer of 19 October 2006”.
- 2 Affidavit material and statements of facts and contentions have been filed by both sides.
- 3 The matter came before me for preliminary hearing on 15 February 2007. Mr Oliver of Counsel appeared on behalf of the Applicant and the Respondents appeared on their own behalf.
- 4 The point to be decided relates to 2 letters, the first being a letter from the Respondents’ solicitors enclosing an offer of compromise and the second being a response from the Applicant’s solicitors purporting to accept the offer. It is desirable to set out both the offer of compromise and the letter of acceptance in full.

The offer

- 5 The settlement offer was in the following terms:

“SETTLEMENT OFFER

The owners hereby offer to compromise both these proceedings inclusive of interest and costs. In full and final satisfaction of both these proceedings inclusive of Claim, Counterclaim, interest and costs the Owners offer to pay to the builder the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00). This offer is made on the following basis:

1. it is made and served in accordance with Part 4 of Division 8 of the VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998 (“the Act”) and Sections 112, 113 and 114 of that Act;
2. it is made without prejudice within the meaning of Section 113(1)(b) of the Act;
3. further or alternatively it is made without prejudice under reservation of the Owners rights to rely on this offer on question of costs;
4. further or alternatively it is made in accordance with the principles contained in *Calderbank v. Calderbank* (1995) 3 ALL ER 333 and *Cutts v. Head* (1984) 1 ALL ER 597;
5. this offer is open for acceptance until the expiration of period of FOURTEEN (14) days from the date of service of this Offer on the builder’s solicitors;

6. this Offer may only be accepted in writing;
7. if this Offer is accepted the Builder must deliver to the Owners within thirty (30) days after acceptance of this Offer;
 - (a) Plumbing Compliance Certificate for all plumbing works completed by the Builder and/or the Builder's sub-contractors;
 - (b) Electrical Compliance Certificate for all electrical works completed by the Builder and/or the Builder's sub-contractors;
 - (c) Termite Protection Certificate for all termite protection works completed by the Builder and/or the Builder's sub-contractors

in exchange for and as a pre-condition to payment by the Owners of the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00);
8. otherwise, each of the parties shall bear their own costs.
9. if accepted, payment of the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) will be made within seven (7) days after receipt at the offices of Guymmer Naidoo, Lawyers, Office 1, Level 1, 7-9 Bakewell Street, Cranbourne 3977 – DX 37706 Cranbourne of the Certificates referred to in paragraph 7(a)-(c) hereof and not earlier than thirty (30) days after date of acceptance of this Offer is received, whichever event later occurs. Payment of that sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) will be made at the offices of Rigby Cooke, lawyers, level 13, 469 LaTrobe Street, Melbourne 3000 – DX 191 Melbourne.

Dated and signed this 19th day of October 2006.

.....
 GUYMER NAIDOO
 Solicitors for the Applicant/Owners

The acceptance

6 The letter accepting the offer reads (omitting formal parts) as follows:

“We refer to previous correspondence and in particular your letter of 19 October 2006 under cover of which you enclosed on behalf of the owners a settlement offer.

Our client hereby accepts the offer dated 19 October 2006.

Our client is now attending to the collation of the various certificates pursuant to Clause 7(a)-(c). Upon provision of the same we will expect payment in the sum of \$25,000.00 in accordance with paragraph 9.

Upon payment, we will forward to you correspondence enclosing Minutes of Consent orders requesting that the Tribunal make Orders for the proceeding to be struck out with no order as to costs.

We would ask that you acknowledge receipt of our client's acceptance of your clients' Offer".

Subsequent events

- 7 Following this correspondence, the Builder's solicitor sent to the Owner's solicitor, first copies of some certificates, and then later, original certificates. The Owner's solicitors complained first about having received only copies instead of original documents and subsequently there was a complaint that the certificates were not properly prepared or were invalid. The Owners still maintain that the plumbing certificate is inadequate because they say that:
- (a) the plumber was not a licensed roof plumber at the time that he constructed the roof;
 - (b) the stormwater drains were not inspected;
 - (c) the position of the sewer pipe was changed and the altered works were not inspected.
- 8 These allegations are not admitted by the Builder and I have insufficient evidence to enable me to decide whether these certificates are valid or not. Accordingly, I make no determination as to the validity of the certificates that the Builder has now given to the Owners, although I do find that they were given outside the 30 day period specified in the offer.

The argument

- 9 The Builder maintains that the two proceedings have been compromised and that, subject only to their providing the required certificates which they claim to have done, they are entitled to payment of the settlement sum.
- 10 The owners argue that the proceedings have not been compromised because of the failure of the Builder to provide the agreed certificates within the agreed time or, they say, at all. Alternatively, they say that, if the proceedings were compromised the compromise was not to amount to an accord and satisfaction of the two proceedings unless and until the Builder complied with the conditions, which included the provision of the certificates within the relevant time. Since the certificates were not provided within the relevant timeframe (and this does not seem to be disputed) the proceedings are not compromised.
- 11 The Owners wish to continue with their Counterclaim and say that the builder's claim should be "dropped" because "it would be unfair to let him continue also with his claim of such an amount when we believed he had agreed to settle with us for a much smaller sum". (sic.)

Analysis

- 12 The notion that the Counterclaim can continue and that the Tribunal can somehow "drop" the Builder's claim is curious and is not maintainable in law. The settlement offer related to both the claim and counterclaim and either both have been compromised or neither have. If the Owners maintain

that their counterclaim has not been compromised then it must follow that the Builder's claim has not been compromised either and may likewise continue.

- 13 I do not accept the owner's submission that the settlement offer was not accepted because of the failure of the Builder to provide the required certificates within the stated period. Accordingly to paragraph 7 of the offer, the Builder's obligation to deliver the certificates to the Owners only arises after the offer has been accepted. The provision of the certificates is therefore clearly not intended to be part of the act of acceptance. It must therefore follow that there was a settlement agreement to compromise both proceedings.

An accord and satisfaction?

- 14 The remaining question then is, does the failure of the Builder to provide the relevant certificates within the specified time mean there is no accord and satisfaction? The nature of an accord and satisfaction was dealt with by the Court of Appeal in *Osborn v McDermott* [1998] 3 VR 1. In that case, Phillips J A said, in essence, that there were three types of accord that parties might enter into to settle a proceeding. The first is an accord and satisfaction, where the parties give up their respective rights in the litigation immediately in exchange for the benefits of the settlement agreement. Such an accord operates as an immediate discharge of the proceeding. The second is an accord executory, which does not operate to discharge existing rights and duties unless and until the accord is performed. The third is where the parties make an immediately binding agreement for compromise but defer the discharge of existing obligations until the obligations under the agreement are performed, thereby rendering the discharge conditional upon performance. The agreement is enforceable but the action continues until such time as the obligations under the agreement have been performed. Once that happens, the satisfaction is complete and the other party, having performed his obligations, is discharged.
- 15 In the present case, as I have stated, it is quite clear that there has been an agreement entered into between the parties. The question is simply whether on its true construction the agreement was an accord and satisfaction or an agreement that was to amount to an accord and satisfaction only when the Builder performed all of his obligations.
- 16 I think the second and third lines of the settlement offer are fairly clearly in favour of the former view. It is the Owner's offer to pay the sum of \$25,000.00 that is said to be "in full and final satisfaction" of both these proceedings inclusive of claim, counterclaim, interest and costs. It is not the provision by the Builder of the certificates nor is it the payment of the money itself.
- 17 Although the Builder is required to deliver the relevant certificates within 30 days after acceptance of the offer, there is nothing in the agreement to the effect that the settlement of the two sets of proceedings is to be deferred

until after that has occurred. The handing over of the certificates is simply stated to be “in exchange for and as a pre-condition to payment by the owners” of the settlement sum. It is not said to be a precondition to the settlement of the two sets of proceedings.

- 18 I think that on its proper construction the settlement offer was accepted by the builder’s solicitors and that upon such acceptance there was an accord and satisfaction and both sets of proceedings have therefore been compromised.

Conclusion

- 19 The answer to the question set aside for preliminary hearing is therefore:
“Yes”
- 20 As to the enforcement of their respective rights under the settlement agreement the parties will not doubt seek appropriate advice. Since both proceedings have been compromised there is nothing further for the Tribunal to do in regard to either matter unless orders are sought for enforcement of the terms in this proceeding rather than by separate action. I make no comment as to whether or not that would be appropriate.
- 21 Costs will be reserved.

SENIOR MEMBER R. WALKER