

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D424/2006

CATCHWORDS

Application for reinstatement of proceedings - terms of settlement – application for enforcement – s.93(1) Victorian Civil and Administrative Tribunal Act 1998 – order must have the effect of enforcing the terms

APPLICANTS	Glenys Dolphin, Philip Dolphin
RESPONDENT	Hart Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Reinstatement
DATE OF HEARING	8 March 2007
DATE OF REASONS	23 March 2007
CITATION	Dolphin v Hart Constructions (Domestic Building) [2007] VCAT 426

ORDER

1. The application to reinstate the proceedings is dismissed.
2. The application for an order under s. 93(1) of the Victorian Civil and Administrative Tribunal Act 1998 is also dismissed.
3. Order the Respondent to pay the Applicant's costs of this application, fixed at \$1,029.00.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A. Beck-Godoy of Counsel
For the Respondent	Mr D. Oldham, Solicitor

REASONS

Background

1. On 31 October last year the parties settled this proceeding following a Compulsory Conference at the Tribunal.
2. They prepared and signed Terms of Settlement (the Terms”) setting out what had been agreed. Clause 6 of the Terms reads:

“The parties agree not to disclose these terms of settlement to anyone other than their legal advisers and the tribunal or otherwise in accordance with law.”
3. Well before the Compulsory Conference was held the Applicants made a complaint to the Building Control Commission (“the Commission”) concerning the conduct of the Respondent. After the Terms were signed, the Commission contacted the Respondent in relation to the complaint for the apparent purpose of investigating it.
4. Following this contact, the Respondent sought the permission of the Applicants to disclose the contents of the Terms to the Commission. The Applicants refused to consent and the Respondent then applied to the Tribunal seeking an order permitting it to disclose the Terms to the Commission.
5. The application came before me on 8 March 2007 and, after reading the affidavits filed by the parties and hearing submissions, I refused to make the order sought for reasons I gave orally at the time. The Respondent has now requested written reasons.

Grounds of the application

6. The order is sought pursuant to s.93(1) of the Victorian Civil and Administrative Tribunal Act 1998, which states as follows:

“93. Settlement of proceeding

(1) If the parties agree to settle a proceeding at any time, the Tribunal may make any orders necessary to give effect to the settlement.”
7. The proceeding has been determined and the Tribunal is functus officio except insofar as an application might be made to reinstate it. This application has been treated as being such an application.

Reinstatement

8. Generally where proceedings have been struck out because a matter has been settled in accordance with terms of settlement, they can only be reinstated if the agreement contained in those terms of settlement has not been complied with. Where this is alleged the Tribunal must first determine whether there has been a non-compliance. If so, the aggrieved party will have its remedies, either to enforce the terms of settlement (whether in the proceeding itself or by separate action) or to treat the terms of settlement as having been repudiated, accept the repudiation and treat the agreement as

being an end, reinstate the proceedings and then prosecute the original cause of action. In either case, in order to reinstate the proceeding, it has to be demonstrated that there has been a breach of the settlement agreement.

The present case

9. In this instance, what has happened is that the Applicants have made a complaint to the Building Control Commission and, some considerable time afterwards, the parties signed the Terms resolving the litigation between them. The Terms incorporate a release. It is a mutual release from all “claims, demands, suits and costs of whatsoever nature, howsoever arising out of or connected with the subject matter the dispute and the proceedings”.
10. If I give such a release, it can only have the effect of releasing somebody from something that I or those claiming under or through me might do, or from claims that I or they might have. In this instance the Commission is a separate entity from the Applicants.
11. Whether or not, on the basis of the earlier complaint that it received, it decides to take any action in regard to the Respondent is a matter for the Commission. I cannot see that any practical purpose would be served by showing it a copy of the Terms because they do not purport to release the Respondent from anything the Commission might do, nor could they have done.
12. It may be that if someone were simply to inform the Commission that the matter had been settled it would not pursue the matter further but that would be entirely up to the Commission.
13. What is sought here is that I make an order that the Terms can be produced to the Commission. The problem with that is that clause 6 says that the parties agree not to disclose the Terms to anyone other than their legal advisors and the Tribunal or otherwise in accordance with the law. I think the phrase “otherwise in accordance with the law” means “otherwise as required by law”. If someone were to serve a subpoena on the Registry or on one of the parties to produce them for the purpose of some legal proceedings then no doubt they would have to be produced if the subpoena were not set aside. But I cannot make an order that paragraph 6 of the Terms no longer applies simply because one of the parties asks me to do so.
14. It is suggested that I can make the order under s.93(1) but all that sub section authorises me to do is to make any orders necessary to give effect to the settlement. Where the Terms, which set out the agreed terms of the settlement, say that they are not to be disclosed, an order requiring their disclosure would not be giving effect to them but would be contrary to them. Accordingly, I do not think that s.93(1) could justify the order sought.
15. There is no breach of the terms by the Applicants alleged which would enable me to reinstate this proceeding or even give directions for an application to be reinstate. What the Respondent wants is permission to

show something to a third party after having agreed in the Terms that it would not be shown.

Decision

16. I cannot make an order under s93(1) which runs counter to the Terms. The parties agreed not to disclose them to anyone other than their legal advisors and the Tribunal or otherwise in accordance with the law. That part of the agreement stands and the parties are bound by it. The application will therefore be dismissed.

Costs

17. The Applicants apply for costs of \$1,029.00, being \$770.00 for counsel's fees and \$259 for the preparation of an affidavit. I think that is fair and reasonable. The application had no prospect of success and the Applicants should not have been put to the expense of having to oppose it. I will order the Respondent to pay the Applicant's costs of this application, fixed at \$1,029.00.

SENIOR MEMBER R. WALKER