

**CATCHWORDS**

DOMESTIC BUILDING DISPUTE -. Application for reinstatement – Whether terms of settlement constitute an accord and satisfaction, accord and conditional satisfaction or accord executory – Appointment of expert pursuant to terms of settlement - whether parties bound by expert’s final assessment..

<b>APPLICANT</b>	Mrs Beverley Fulton
<b>RESPONDENT</b>	Infantino Constructions Pty Ltd (ACN 004 689 481)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member E. Riegler
<b>HEARING TYPE</b>	Preliminary Hearing
<b>DATE OF HEARING</b>	7 November 2014
<b>DATE OF ORDER</b>	20 November 2014
<b>CITATION</b>	Fulton v Infantino Constructions Pty Ltd (Building and Property) [2014] VCAT 1454

**ORDER**

1. The proceeding is reinstated *nunc pro tunc*.
2. I find and declare that the terms of settlement dated 11 December 2013 entered into between the parties constitute an accord and satisfaction of the claim and counterclaim comprising this proceeding.
3. I find and declare that the expert determination of Mr R Lorich is binding on the parties.
4. **The proceeding is listed for a further directions hearing before Senior Member E Riegler at 9.30 am on 5 December 2014 at 55 King Street, Melbourne, at which time the Tribunal will hear any submission as to the costs of and associated with this preliminary hearing and make further orders as to the future conduct of the proceeding.**

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicants

Mr D Cole of counsel

For the Respondent

Mr L Connolly of counsel

# REASONS

## BACKGROUND

1. The Applicant (**‘the Owner’**) is the owner of a property located in Lyndhurst (**‘the Property’**). On 1 February 2010, she entered into a domestic building contract (**‘the Contract’**) with the Respondent (**‘the Builder’**) for the construction of new home on the Property. A dispute arose between the Owner and the Builder in relation to the building work performed by the Builder and monies said to be owed under the Contract.
2. On 23 August 2013, the Owner lodged an application in the Tribunal to determine the issues comprising the dispute. On 25 November 2013, the Builder lodged its counterclaim in the proceeding. Both the claim and counterclaim were the subject of a compulsory conference ordered by the Tribunal. At the conclusion of that compulsory conference, the parties had reached an in-principle agreement, which was subsequently formalised into written terms of settlement dated 11 December 2013, and executed by the parties on 12 December 2013 (**‘the Terms’**).
3. Broadly, the Terms contemplated that an independent building consultant; namely, Mr R Lorich (**‘the Expert’**) would be jointly appointed by the parties to inspect a specified list of items of alleged incomplete, defective and damaged work, in order to confirm in writing whether those works had been completed, rectified or replaced. The Terms also provided that the Builder would pay a sum of money to the Owner on or before 3 January 2014 and supply a number of certificates and other documents upon completion of the remedial works contemplated by the Terms.
4. The Owner contends that the Builder has failed to wholly perform the Terms and as a consequence, the release given under the Terms is of no effect. Consequently, the Owner submits that she is free to prosecute her original claim. By contrast, the Builder contends that the Terms constitute an accord and satisfaction of the original claim and counterclaim, such that the Owner and the Builder are no longer able to prosecute their original claims.<sup>1</sup>
5. Naturally, if the Terms are held to be of no effect, then the Expert’s determination would not be binding on the parties. Conversely, if the Terms are found to be binding, the Builder contends that the opinion expressed by the Expert is also binding on the parties. However, the Owner further argues that even if the Terms are held to be valid and enforceable, the determination of the Expert would not be binding on the parties, because he failed to comply with the terms of his retainer.

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<sup>1</sup> It is common ground that the release provided under the Terms does not extend to release the Builder from a breach of the warranties given under s 8 of the *Domestic Building Contracts Act 1995* in respect of any item of defective work that was not known or ought reasonably to have been known to the Owner at the time the Terms were entered into.

6. Therefore, the issues raised in this preliminary hearing can be summarised as follows:
- (a) Do the Terms constitute a compromise by way of accord and satisfaction, which operates to discharge existing rights and duties upon execution of the Terms?
  - (b) Is the Expert's determination under the Terms binding on the parties?

#### **HAVE THE TERMS DISCHARGED EXISTING RIGHTS AND DUTIES?**

7. The Terms comprise a number of essential clauses, which can be summarised as follows:
- (a) There was to be a compilation of an agreed list of alleged defects, incomplete works and/or damaged works, which were to be set out in *Annexure 1* attached to the Terms (**'the List'**). This was completed without controversy.
  - (b) The Expert was to be appointed. Again, this was done without controversy.
  - (c) The Expert was to inspect the items on the List and to prepare a preliminary assessment as to whether any of the items on the List were incomplete works, defective works and/or damaged works.
  - (d) The Owner was required to give access to the Builder to make good any of the items on the List which the Expert determined were incomplete works, defective works and/or damaged works.
  - (e) The Expert was to re-inspect the remedial works undertaken by the Builder to determine whether the Builder had made good the items on the List which the Expert had previously determined to be incomplete works, defective works and/or damaged works.
  - (f) The remedial works were to be completed by 28 February 2014, with provision for an extension of time in certain circumstances.
  - (g) Upon completion of the remedial work, the Builder was to provide the Owner with a Certificate of Occupancy, Certificate of Home Owners Warranty Insurance, approved plans and specifications and any relevant permits and certificates for the building works.
  - (h) By 3 January 2014, the Builder was to pay the Owner \$16,500 *towards settlement of the dispute* between them.
  - (i) The parties would bear their own costs of and incidental to the proceeding.
  - (j) In the event that the terms were not complied with, the Owner was entitled to reinstate the proceeding and obtain a determination for any amount outstanding or the full cost of completing and/or

rectifying the incomplete, damaged and/or defective works, based on quotations obtained by the Owner and approved by the Expert.

- (k) In consideration of the parties entering into the Terms, they each released and discharged each other from further claims.
8. The Terms have been substantially performed by the Builder, notwithstanding the Owner's allegation that the Builder has breached its terms. It is common ground that the Builder has not provided the Owner with all certificates and other documents required by the Terms. It is further alleged that there remains a very small number of items of work, which the Expert has not accepted as having been repaired or replaced satisfactorily.
9. Mr Cole, counsel for the Owner, submitted that the Builder's failure to wholly perform its obligations under the Terms results in the release not operating because it is conditional upon performance. He referred me to the judgment of Phillips JA in *Osborn v McDermott*,<sup>2</sup> where his Honour stated:
- Thus, there are three possibilities, not two. First, there is the mere accord executory which, on the authority, 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 when a 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.<sup>3</sup>
10. His Honour went on to state:
- ... Where there is accord and conditional satisfaction, the plaintiff is bound to await performance and accept it if tendered, but if there be no performance, then the plaintiff may proceed according to general principles called into play when any agreement is repudiated: the plaintiff may either treat the agreement (the accord) as at an end and proceed on his original cause of action; or he may, at his option, sue on the compromise agreement, in place of the original cause of action.<sup>4</sup>
11. Mr Cole submitted that the Terms constitute an *accord and conditional satisfaction*. He argued that as the Builder has not wholly performed the Terms, the Owner is at liberty to treat the Terms as having been repudiated

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<sup>2</sup> [1998] 3 VR 1.

<sup>3</sup> Ibid at page 10.

<sup>4</sup> Ibid at pages 10-11.

and elect to determine the Terms, thus allowing her to prosecute her original cause of action.

12. Mr Connolly, counsel for the Builder, submitted that the Terms constituted an accord and satisfaction. He argued that the release provided under the Terms was not conditional upon performance but rather, immediate upon execution of the Terms.

13. The release given under the Terms was expressed as follows:

In consideration of the Parties entering into these terms of settlement, the Parties mutually release and discharge each other from all further claims, demands, suits and costs of whatsoever nature, however arising out of or connected with the subject matter of the Dispute and the proceedings, whether at law, in equity or under statute. 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.

14. In my view, the release given under the Terms was immediate upon execution. There is nothing expressed in the release to suggest that it was conditional or subject to performance. Moreover, the terms expressly state that the release is given in consideration of the parties entering into the Terms. In that respect, the release differs in its expression from the release considered in *Osborn v McDermott*. In that case, the release stated:

... be settled on terms that:

...

(e) there be mutual releases between the parties to the first proceeding and the second proceeding in respect to the subject matter of those proceedings.

15. In *Osborn v McDermott*, it is unclear whether the words used in the release - *there be mutual releases*, were expressed to be prospective. That lack of clarity does not arise in the present case because the release given under the Terms expressly states that it operates in consideration of the parties entering into the Terms. In other words, the consideration given is the entering into of the Terms, rather than the performance of its obligations. It is not expressed prospectively.

16. Other factors fortify this view. In particular, the Terms contain a comprehensive default mechanism, which I consider to be a dispositive remedial code for breach by the Builder. Construing the release as being executory would result in those default mechanisms having no utility at all. In my view, it is unlikely that the parties would have intended that to be the case.

17. Therefore, I find that the Terms provided an immediate release upon their execution. It is no longer open for either party to sue on the original cause

of action. That cause of action has been compromised in return for the rights and obligations set out in and under the Terms.

## **IS THE EXPERT'S DETERMINATION BINDING?**

18. Pursuant to the Terms, solicitors for the Builder wrote to the Expert by letter dated 16 December 2013, setting out the terms of his engagement:

...

A dispute has arisen between Infantino and Ms Fulton in relation to a number of alleged incomplete, defective and/or damaged items. The parties have entered into Terms of Settlement ("**Terms**") a copy of which are attached. Pursuant to the Terms, you have been appointed by the parties as the independent expert to provide your opinion on the matters set out in the Terms, which are summarised below.

### **Questions for expression of opinion**

Pursuant to the Terms, the parties prepared a detailed list of alleged incomplete, defective and/or damaged works which is set out in Annexure 1 of this letter ("**the List**").

Infantino and Ms Fulton request that you attend the Property and inspect only the items on the List and following your inspection and on the information available to you and contained in your brief confirm in writing whether or not:

1. each of the alleged items of incomplete work are complete;
2. each of the alleged items of defective work constituted defect; and/or
3. each of the alleged items of damaged work constituted damage.

The parties request that you confirm the above matters in writing by no later than 6 January 2014.

Infantino will then attend to the items on the List which you determine are incomplete, damaged and/or defective ("**the Works**").

Upon receiving notification that Infantino has completed the Works, the parties request that you attend the Property and inspect only the Works. Further, following your inspection, to confirm in writing whether or not the Works have been completed, rectified and/or replaced to your satisfaction.

Infantino is required to complete the Works by 28 February 2013 [sic] ("**Completion Date**"). Infantino is entitled to an extension of time to be Completion Date or any of the following delays:

...

If Infantino does not complete the Works to your satisfaction by the Completion Date, you may be requested by Ms Fulton to provide a costing to complete the remaining Works.

19. Mr Cole submitted that further to the express terms of the Expert's engagement, as set out in the extract of the above letter, it was implicit that

he would carry out his functions *professionally*. Mr Cole submitted that it was in this respect that the Expert departed from the terms of his engagement. In particular, Mr Cole argued that many of the items assessed by the Expert could not, on any reasonable view, constitute either completed or rectified work and as such, it could not be said that the Expert carried out his functions professionally.

20. In addition, Mr Cole submitted that the process adopted by the Expert was not of the standard that one would expect of an expert carrying out his functions professionally. Therefore, Mr Cole argued that the Expert had failed to carry out his functions in accordance with the terms of his retainer and as a result, neither party was bound by his opinion or determination.
21. Mr Cole referred to and relied upon an expert report prepared by Mr Wilson, the building consultant engaged by the Owner. That report critiqued the opinions and conclusions reached by the Expert and concluded that of the 77 items of work comprising the List, there were 22 items, where Mr Wilson's opinion or observation differed from that of the Expert. According to Mr Cole, some of those items related to work where it was patently obvious that the item remained defective. For example, Item 13 in the Expert's final report states:

<b>Item No.</b>	<b>Description of Alleged Incomplete Works</b>	<b>Expert Opinion Is the Item Complete? (Yes or No)</b>	<b>Complete or Incomplete</b>	<b>Comment</b>
13	The owners states the Zip tap is to be installed to the kitchen/pantry	Yes	Now Complete	Zip Tap to be sourced from cabinet maker. (owner supplied) Photos Provided by builder on 21/3/14 show it now installed.

22. The second column of the Expert's final report cites, verbatim, the item of work to be investigated as it was described in the List. The remaining three columns are the Expert's opinion or determination. In Mr Wilson's report, he states, in relation to Item 13:

The zip tap appears to have been installed, however, at the time of inspection I was unable to operate the tap.

23. Therefore, Mr Cole submits that although the Expert correctly observed that the Zip tap had been installed, he failed to investigate whether it actually worked.



24. Consequently, Mr Cole argued that the process adopted by the Expert was both flawed and unprofessional.
25. The majority of the remaining items where there was disagreement between the conclusions reached by the Expert and Mr Wilson relate largely to matters of opinion between them. This was acknowledged by Mr Wilson during his oral evidence.
26. In addition, the Owner also gave evidence as to the inspection process undertaken by the Expert. In summary, she said that the Expert was late to the first inspection, did not have a ladder with him, was unprepared and conducted his inspections hastily.
27. The Expert was summoned to give evidence. In response to the matters raised by Mr Wilson, he said that he assessed the items of work comprising the List in accordance with applicable standards and formed his opinion based on his expertise and by reference to those standards. To a large extent, he disagreed with the opinion expressed by Mr Wilson and explained why this was the case. In answer to the Owner's evidence, he conceded that he was 10 minutes late for the first inspection but said that otherwise, he attended all inspections prior to the allotted time.
28. He said that he attended the first inspection armed with the List but arrived to what he considered to be a *toxic environment*, as the Owner and the Builder were arguing. He recounted the process he adopted was to first familiarise himself with the site and the items on the List by listening to each of the parties. He then inspected each and every item on the List and made notes. According to the Expert, that took approximately 2 hours. He then left the site and prepared a Scott Schedule, setting out his comments which he subsequently sent to the parties. He said that at the time of the first inspection, he did not need any other documents apart from the List. He disputed that he did not have sufficient tools or equipment and said that he had all necessary equipment with him, including a fold-up ladder, which was in his vehicle.
29. The Expert further said that he conducted all subsequent inspections in similar fashion.

### **Was the inspection process conducted professionally?**

30. In my view, the inspection process conducted by the Expert was comprehensive and diligent. I do not accept, what is largely an opinion expressed by the Owner, that the process was flawed. During cross-examination, the Expert described precisely what he did in respect of each of the *contested* items on the List. In each case, he explained the process he adopted to arrive at his opinion. There was only one item where the Expert conceded that he may have overlooked two small paint marks left on a wall. Apart from that, his evidence as to the remaining *contested* items indicates

that the disagreement between the Expert and Mr Wilson focuses on differing opinions.

31. Further, I do not accept Mr Coles' submission that the presence of installed fixtures that did not work was evidence of a flawed inspection process. In particular, the complaint made in the List in respect of the Zip tap was that it had not been installed. In my view, the Expert's retainer required him to report as to whether the particular item had been installed or not, which he did. The item was not described in the List as defective or damaged and there was no obligation on the Expert to look into that aspect. Obviously, if the fixture does not work, the Owner's rights against the Builder are unaffected by the release given by the Terms, because the item was not installed at the time the Terms were executed and therefore any defect could not reasonably have been known at that time.

### **Difference of opinion between the Expert and Mr Wilson**

32. In my view, it is of no consequence that there is a difference of technical opinion between the Expert and Mr Wilson. I remain of that view even if it were curially determined that Mr Wilson's opinion was to be preferred. I accept the submissions made by Mr Connolly that as the parties agreed to be bound by the opinion of the Expert, it was not open for either party to impugn that opinion. Mr Connolly referred me to a recent decision of the Victorian Court of Appeal in the case of *Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*,<sup>5</sup> Maxwell P, JA observed:

It is commonplace in commercial contracts for provision to be made for the determination - whether by an independent expert or by one of the parties - of a particular cost, value or quantity. As a consequence, intermediate appellate courts have frequently had to consider whether, and to what extent, a determination of this kind can be reviewed by a court (or, where the contract so provides, by an arbitrator). As will appear, the applicable principles have been clearly enunciated, and consistently applied, by the appellate courts of several States.

The question, first and last, is one of contract. What did the parties bargain for? If the determination given does not satisfy the terms of the contract, then it is of no effect and, at the option of the parties, must be done again. If, on the other hand, determination complies with the contract, the parties are bound by it.

The starting point is the judgment of Lord Denning MR in *Campbell v Edwards*, where his Lordship said:

“It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or

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<sup>5</sup> [2012] VSCA 99.

collusion, of course, it would be very different. Fraud or collusion unravels everything.”<sup>6</sup>

33. In the present case, Mr Cole contended that the Expert did not comply with his retainer, because he failed to exercise his functions in a professional manner. As indicated above, there are two limbs to that argument.
34. First, Mr Cole submitted that the inspection process was flawed. I have already found that not to be the case.
35. Second, Mr Cole submitted, in essence, that the Expert got it wrong (in a technical sense) in respect of a number of the items on the List. I reject that submission. In particular, I do not accept that a difference of opinion between the two consultants equates to the Expert being wrong. Moreover and importantly, even if the Expert’s opinion was ultimately found to be incorrect, that is of no consequence. As the extract of the judgment above illustrates, the parties are bound by the opinion expressed by the Expert even if he has made an honest mistake. I do not accept that a mistake in the formulation of an opinion as to a technical matter means that the Expert has not acted professionally. More would need to be shown before such a finding could be made. As I have already indicated, the evidence presented in this case does not come close to making such a finding.

## CONCLUSION

36. Having regard to my findings set out above, I have no hesitation in declaring that that the Terms are binding on the parties and further, that the parties are bound by the expert opinion expressed by the Expert, pursuant to those Terms.
37. Having said that, I note that the Owner’s *Amended Points of Claim* go further than simply alleging that the Terms or the opinion of the Expert are not binding on the parties. In particular, the Owner alleges that the Terms have been breached by the Builder. For example, none of the certificates required to be supplied by the Builder to the Owner have been supplied. Further, there are some items which the Expert has determined remain incomplete or defective. For that reason, the proceeding has been reinstated in order to determine those issues.
38. In addition, the Owner alleges that there are a number of other defects which have arisen and which were not obvious at the time when the Terms were entered into. As such, the Owner contends that she is entitled to claim in respect of those items.
39. Strictly speaking, those additional items should form part of a fresh application lodged in the Tribunal. However, given that the matter is to be reinstated to deal with alleged breaches of the Terms, it is appropriate that those additional claims are considered within the reinstated proceeding.

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<sup>6</sup> Ibid at paragraph [14].

40. Finally, I note that the Builder urged the Tribunal to rule on those other defects in the course of this interlocutory proceeding. At the conclusion of this hearing I indicated that there was insufficient time to consider that aspect of the Builder's application and in any event, it was really a matter for the Builder to raise in its defence. Therefore, I do not propose to consider those items in the context of this interlocutory proceeding. Accordingly, those additional allegations of defective work are to be left for trial, as expert opinion will, no doubt, be called upon by each of the parties.

**SENIOR MEMBER E. RIEGLER**