

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT Reference: D527/2003

CATCHWORDS

Reinstatement of proceeding – Terms of Mediation Settlement not observed by Respondent – Terms observed by Respondent when reinstated application heard – Alleged benefit to Applicant from third party allegedly lost by Respondent’s failure – Monies paid into Applicant’s Solicitor’s trust account under Terms undisbursed– Directions sought re such.

APPLICANT: Patricia Doreen Houltham

FIRST RESPONDENT: J. G. King Pty Ltd. (ACN 006 627 210)

WHERE HELD: Melbourne

BEFORE: Member M. Walsh

HEARING TYPE: Hearing

DATE OF HEARING: 24 March 2005, 26 April 2005 & 5 August 2005

DATE OF ORDER: 8 September 2005

[2005] VCAT 1902

ORDERS

1. Application for remedy or relief in respect of fences and landscaping dismissed.
2. Application for directions regarding the disbursement of the monies still held in trust dismissed.
3. Costs of this reinstatement proceeding reserved with liberty to apply concerning such. Any costs application shall be listed before me.

MEMBER M. WALSH

APPEARANCES:

For the Applicant: Mr P Graham, Solicitor

For the Respondent: Mr M Champion, Solicitor on 26 April 2005 and 5 August 2005

Mr S Hardy of Counsel on 24 March 2005

REASONS FOR DECISION

1. This application was settled between the parties on terms agreed by them prior to its hearing and determination by the Tribunal. The agreement was recorded in writing in the undated 'Terms of Settlement' annexed to these Reasons and marked with the letter 'A'. Those Terms are signed by the Applicant in person and by Mr M. Champion, solicitor for the Respondent.
2. By letter dated 27 October 2004, the Applicant's solicitor wrote to the Registrar seeking "*to have this proceeding reinstated so that questions regarding the Respondent's compliance with the Terms of Settlement may be determined and directions given regarding the disbursement of the monies still held in trust*".
3. The application for reinstatement was listed before the Tribunal on 10 February 2005 when Senior Member Walker made a number of Directions and fixed the application for reinstatement for hearing at 10.00 a.m. on 24 March 2005.
4. The application was heard before me on 24 March 2005 and subsequently on 26 April 2005 and 5 August 2005.
5. As a result of the hearing on 24 March 2005, I found and determined that the Respondent had breached the Terms of Settlement by its failure to undertake all the works referred to in clause 6 of those Terms by 4.00 p.m. on 10 December 2003.
6. I further heard evidence which I accept that even as at the date of the application for reinstatement, not all of the works required to be completed pursuant to the Terms of Settlement had been completed even though they had been completed

as at the date of the first hearing before me. In fact, the last items were completed on the day prior to the hearing on 24 March 2005.

7. Accordingly, although no substantive remedy or order in respect of the non-observed Terms was available or appropriate as at the date of or on the basis of that hearing, the Applicant has been put to the expense of instituting the reinstatement proceeding because of the Respondent's breach of the Terms of Settlement. This is, in effect, an issue of costs.

8. The Applicant also alleged that she has not received the benefit from a third party (Windsor Homes Pty. Ltd.) of certain alleged entitlements relating to fencing and landscaping pursuant to some arrangements between the Respondent and Windsor Homes Pty. Ltd. Further, that she has not received such because the balance of monies due to be paid to the Respondent in fulfilment of the contract but pursuant to the Terms of Settlement have not been paid and that they have not been paid because they were to be paid only on completion of 'the works' to be attended to pursuant to the 'Terms of Settlement'. The relevant provision is clause 1 of those Terms and is as follows:

"1. The Applicant will pay the Respondent the sum of \$4,125.43 inclusive of costs and interest as follows:

1.1 Upon completion of the Works (as defined)

1.2 From the sum of \$5,625.43 held in the Applicant's solicitors trust account ("the due date")"

("the settlement sum")

9. In my view, the above provided sufficient reason to reinstate the proceeding and accordingly I ordered such. What was reinstated was that part of the original application unresolved by a hearing and determination and remaining unresolved as at the date of issue of the application by the failure in part of the Respondent to

comply with the Terms. What was before me as at the hearing of the application was the detriment in two specific guises which allegedly flowed from the Respondent's failure. To the extent that the Terms impinge on the unresolved aspects, reference may be made to them. However, this is not a proceeding on enforcement of an enforceable contract (the Terms of Settlement) as such.

10. I reserve (and this in accordance with the wishes of the parties), the whole issue of costs. As indicated, this incorporates also the aspect referred to in paragraph 7.
11. The issue primarily before me was therefore that referred to in paragraph 8. In addition, there are related and peripheral issues such as:
 - (a) The fact that the sum payable to the Respondent by the Applicant pursuant to clause 1 of the Terms of Settlement still has not been paid. (There is no application on foot by the Respondent in respect of this – the concern is that of the Applicant's solicitor who holds that amount undisbursed in his trust account). This refers to the second reason given by the Applicant for seeking reinstatement (refer paragraph 2).
 - (b) Whether the sum referred to in '(a)' above can or should be allocated to satisfy any order which may be made by the Tribunal in respect of paragraph 8 or any order for costs in favour of the Applicant should such subsequently be made.
12. In respect of the issue referred to in paragraph 8, the Applicant agreed in evidence in chief with the position put to her by her legal representative that she had certain contractual rights as part of the arrangements she had entered into.
13. Those rights were said to arise from arrangements involving a party other than the two parties to this proceeding namely a party said by the Applicant to be Windsor Homes Pty. Ltd. The Applicant gave evidence that she bought her to-be-constructed house from that company. There was apparently some arrangement between that company and the builder Respondent to this proceeding. Detailed evidence of that complete arrangement was not given to me and I remain ignorant of such.

14. However, I was made aware of and the Terms of Settlement refer to certain aspects of those arrangements. These are referred to in Special Condition 1 of the contract which is as follows:

“1. In the Event that a provision has been made in the Building Contract price for fencing it is acknowledged that the provision is for the Building Owner’s one half share only. Should construction of the fence be delayed by reason of any delay in obtaining agreement from the owners of abutting allotments to contribute their share of the erection of the common fencing the Building Owner acknowledges that such matter will not be used as an objection to Completion having been achieved by the Builder and all money due upon Completion under this Building Contract shall be paid apart from a fencing allowance which may be retained by the Building Owner until completion of the fencing. The fencing allowance for all fences included in the Building Contract is \$1,000.00”.

15. An ancilliary reference is included in a ‘Please Note’ provision of a ‘Price Reconciliation’ provided by Windsor Homes Pty. Ltd. and which I believe was annexed to the building contract as executed between the parties to this proceeding. This is as follows:

***“PLEASE NOTE:
The following items will be provided by Windsor Homes Pty. Ltd. on completion of the house and only on condition that the Builder has paid the Rebate allowance to Windsor Homes Pty. Ltd. as per the agreed Contract and other conditions apply.***

Landscaping

*Fencing Allowance of \$1000 – rebated to client at handover.
Provide landscaping to front yard to 100m2 with 10 shrubs, seeding and woodchips with edging.”*

Evidence was given which I accept that the value of the landscaping which would normally be provided is approximately \$600.00.

16. My attention was also directed to the following term of the Terms of Settlement.

“8. Upon payment of all monies due to the respondent pursuant to this agreement, the respondent will promptly assess and pay to Windsor Homes Pty Ltd the amount the respondent considers due to it and provide the applicant with written confirmation that it has done so”.

17. The nub of the issue under consideration is the precise nature of the complaint of the Applicant in respect of landscaping and fencing.
18. As referred to in paragraph 13 above, the Applicant agreed with the position put to her by her legal representative when giving evidence in chief that she had certain contractual rights as part of the arrangements she had entered into. She further gave evidence that she believed she still had such a contractual right on the occasion of the mediation giving rise to the Terms of Settlement as the Respondent's representative intimated such to her. Further, in re-examination by Mr Graham she said that she expected that the works would be completed by 10 December 2003 and that she also had an expectation that \$1,600.00 in respect of the landscaping and fences would be paid to her as soon as possible after that day. Finally, in his closing submission, Mr Graham summarised the basis of the Applicant's claim to that amount as being her 'expectation' of it and the various 'references' to it - those in the contract documents as well as the Terms of Settlement. The Applicant's alleged entitlement was not presented in any clearer, better substantiated or more precise terms than that.
19. It is not clear whether the nature of the Applicant's complaint was that she had an enforceable entitlement or right in respect of fencing and landscaping pursuant to either and which contract or the Terms of Settlement. Or whether she allegedly had an opportunity which has been lost because of the actions or inaction of the Respondent and whether if so, such should entitle her to an award of damages. Maybe she has no enforceable entitlement or right and no compensable lost opportunity.
20. A 'Chronology of Events' dated 24 March 2005 and compiled by the Applicant's solicitor was used as a base document by the Applicant when giving her evidence in chief. Paragraph 62 of that document is as follows:

“62. The Applicant alleges the following additional breaches.

62.1 *By paragraph 8 of the Terms of Settlement the Respondent is required to “promptly assess and pay to Windsor Homes Pty. Ltd. the amount the Respondent considers due to it and provide the Applicant with written confirmation that it has done so”.*

62.2 *Although the final payment to the Respondent has not yet been made, the Respondent has settled its liability to Windsor Homes Pty. Ltd. without informing the Applicant of its intention to do so.*

62.3 *Windsor Homes Pty. Ltd. is no longer trading and, as a result, the Applicant will not be able to recover from that company:*

62.3.1 *the fencing allowance of \$1,000.00; or*

62.3.2 *the front landscaping allowance of \$600.00*

62.3.3 *that the company agreed would be paid to the Applicant upon that company’s receipt of payment from the Respondent.”*

21. When giving evidence in relation to that paragraph, the Applicant said that she ‘bought’ her to-be-constructed house from Windsor Homes who then contracted out to the Respondent builder in this proceeding. She gave evidence that she signed a contract with that former party. In that same context, she also gave evidence that she had a contractual right to recover from Windsor Homes an allowance of \$1,000.00 in respect of fencing and a further allowance of \$600.00 in respect of landscaping.

22. A number of observations need to be made concerning the above.

23. Despite the evidence of the Applicant that she bought her to-be-constructed house from Windsor Homes, there was no other evidence before me about any enforceable contract she may have entered into with Windsor Homes or the content of such. The only contract involving the Applicant of which I am aware is the M.B.A. New Homes (building) Contract between herself and the Respondent and marked ‘EXHIBIT 2’. There appears to have been no privity between the Applicant and Windsor Homes.

24. In support of her contention of capacity to enforce what she contends is a beneficial entitlement from Windsor Homes. The Applicant's solicitor directed my attention to the fact of her evidence (referred to in paragraph 21) that she had a contractual right to the entitlement in issue.
25. The Tribunal finds and determines that on the evidence before it and on the balance of probabilities she has no contractual right to that entitlement arising from any privity of contract between herself and either the Respondent or Windsor Homes. Her evidence that she had a contractual right does not in itself establish that right.
26. Nevertheless, it is quite clear from the authorities that the lack of privity of contract is not necessarily conclusive of her lack of capacity to enforce a beneficial entitlement from the third party.
27. The Applicant's solicitor also referred to her 'expectation' of the beneficial entitlement in question. The observation at the conclusion of paragraph 25 is applicable to this reference also.
28. The further submission by the Applicant's solicitor was to 'the references in' the relevant documentation being the building contract, its Windsor Homes 'Price Reconciliation' annexure and the Terms of Settlement. In the context of this rather undefined submission, and in the context of consumer protection, the Applicant's solicitor submitted that consideration should also be had to Sections 97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998*.
29. It will be observed that Special Condition 1 of the contract principally commences with a condition, concerns clarification that all that is in issue is the owner's half share of the fencing cost, the consequences of delay in obtaining

agreement from the owners of abutting allotments – one being the right of the Building Owner to retain a fencing allowance of \$1,000.00 should the construction of the fences have been delayed and not constructed at the time of completion of the house.

30. In respect of the provision in the Windsor Homes ‘Price Reconciliation’ apparently annexed to the contract, a number of observations may be made. To whom is the ‘PLEASE NOTE’ (refer paragraph 15) addressed? ‘The following items will be provided’ to whom? Has the condition that ‘the Builder has paid the Rebate allowance to Windsor Homes Pty. Ltd. as per the agreed Contract and other conditions apply’ been fulfilled? What ‘Rebate allowance’? What ‘agreed Contract’? What ‘other conditions’? What does ‘Fencing allowance of \$1,000.00 – rebated to client at handover’ mean? I heard no evidence about those matters and therefore have no knowledge of them.

31. In respect of the Term 8 of the Terms of Settlement – one of the ‘references’ adverted to by the Applicant’s solicitor - the provision commences with a condition which the Applicant acknowledges has not been fulfilled. Even should it have been fulfilled, the Term requires the Respondent to make a prompt assessment and payment, not to the Applicant, but to Windsor Homes Pty. Ltd. of an amount. The amount to be so paid is the amount the Respondent considers is due to Windsor Homes – whatever that might be. When such assessed and considered amount (whatever that might be) has been paid, the Respondent undertook to provide the Applicant with written confirmation that it has done so. I heard no evidence about whether any payment by the Respondent to Windsor Homes has been made apart from that referred to in paragraph 20 above and the observation in paragraph 25 applies. The implication of what I heard was that no ‘written confirmation’ has been given to the applicant.

32. Whatever those 'references' in the Contract, Price Reconciliation and Terms of Settlement may mean, they would not appear to confer any enforceable beneficial entitlement in the Applicant against any party and particularly against the Respondent.
33. Any confirmation of her continuing 'right' on the occasion of the mediation does not confer a new right but is merely a confirmation of any existing entitlement there may be. No such entitlement seems to me to have been substantiated.
34. It would be unjust and unfair to the Respondent to find that there was a beneficial entitlement to what the Applicant is seeking simply on the basis of the expectation of the Applicant and the 'references' and considerations referred to above. This is so even having regard to the provisions of the *Victorian Civil and Administrative Tribunal Act 1998* to which Mr Graham directed my attention and in the context of consumer protection considerations. In order to find in favour of the Applicant, the Tribunal must be persuaded of some more substantial, substantiated and precise basis.
35. The only other basis upon which the Applicant would seem to have any semblance of success against the Respondent would be on the basis of an alleged 'lost opportunity' – 'lost' because a payment has not been made, such payment being the trigger for payment of a fencing and landscaping benefit to her; the allegation being that the payment was not made because the further works had not been completed.
36. In relation to that basis, the works have now been completed but the payment by the Applicant has not been made. Therefore, any payment of a fencing and landscaping benefit has not been triggered. Even if the payment by the Applicant had been made, there is nothing, as examined above, which provides a right in the Applicant, automatic or otherwise, to the alleged benefit. There was no actual

right, entitlement or opportunity which could be 'lost' irrespective of what the Respondent did or did not do.

37. Further, even if the payment by the Applicant had been made and even if there were a right in the Applicant to a fencing and landscaping benefit, why should the Tribunal hold that it was lost?
38. Certainly, any such benefit has not been received at this stage by the Applicant. It hasn't been applied for. It hasn't been refused.
39. In response to what was put to her by her legal representative, (and, in particular paragraph 62 of the Chronology), the Applicant may be said to have agreed with the statement in that paragraph at 62.3 that "Windsor Homes Pty. Ltd. is no longer trading".
40. I heard no proper substantiated evidence about the financial status of Windsor Homes and do not accept the evidence of the Applicant as adequate evidence of such.
41. It was put to me that the suggested trading position of Windsor Homes was an additional reason why the opportunity the Applicant alleges she had, is lost. I do not accept the Applicant's evidence about the financial status of Windsor Homes as one of the reasons why any opportunity which the Applicant may have had can be said to be 'lost'.
42. The Applicant had no right at any stage and irrespective of any action or inaction on behalf of the Respondent to the allowances which she has allegedly lost.
43. As is indicated in paragraph 2, the monies still held in trust by the Applicant's solicitor is an issue for which the reinstatement of the application was sought.

44. Those monies are in his trust account pursuant to the Terms of Settlement which (together with the relevant Legal Practice rules) provide for their disbursement.
45. One of the Terms is set out in paragraph 8. The other is as follows:
- ‘9. Upon payment of the settlement sum the applicants solicitor may deal with the balance of the funds held in his trust account as directed by the applicant.’*
46. It seems to me that there is a simple obligation for the trustee to observe the terms of the trust according to their terms and that there is no basis for the Tribunal to enter the situation nor is there reason for it to do so.
47. Sworn evidence has been given that all the ‘Works (as defined)’ have been completed. It would seem that upon their completion and ‘from the sum of \$5,625.43 held in the Applicant’s Solicitors trust account’, there is to be disbursed for payment to the Respondent by the Applicant the sum of \$4,125.43. As far as I am aware, that sum has not been paid, there would seem to be an obligation in the Applicant to pay that sum to the Respondent, but no action has yet been taken to secure its payment.
48. Further, the balance of funds are to be dealt with in accordance with clause 9 of the Terms as set out in paragraph 45.
49. I can see no basis whatsoever for acceding to what I believed to be a suggestion by the Applicant’s solicitor that, despite the terms of the trust, I might make some order amending those terms to the end that the sum held in trust might remain available pending finalisation of this proceeding including any determination and orders as to costs.

MEMBER M. WALSH