VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D786/2004**

CATCHWORDS

Dispute about whether settlement was reached at mediation - whether Tribunal may have regard to offers made at mediation, the circumstances surrounding the making of such offers and the alleged oral settlement –power of the Tribunal to make final orders at a directions hearing – notice of intention to apply for final orders given – ss 80, 93 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 – obligation to abide by the rules of natural justice

[2005] VCAT 918

APPLICANT	The Intercon Group Pty Ltd
FIRST RESPONDENT	Keigo Nakajima
SECOND RESPONDENT	Midori Nakajima
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	3 May 2005
DATE OF ORDER	20 May 2005

ORDER

1. **The hearing of the Respondents' Application for Directions/Orders dated 30 March 2004 is adjourned to 22 June 2005 before Deputy President Aird at 55 King Street Melbourne, commencing at 10 am – allow 1 day at which time any application for costs of the directions hearing on 3 May 2005 will be heard.**

2. By 3 June 2005 the Applicant shall file and serve any Affidavit material in reply.

3. By 14 June 2005 the Respondents shall file and serve any further Affidavit material in reply.

4. The parties shall advise each other at least 7 days prior to the hearing whether they require any deponent to an Affidavit to attend the hearing for the purposes of cross examination.

5. By 17 June 2005 the parties shall file and exchange Statements of Legal Contentions.

6. Liberty to the parties to apply for further directions until 16 June 2005

7. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr G Lucas of Counsel
For 1st and 2nd Respondents	Mr R Andrew of Counsel

REASONS

1. The parties attended a mediation on 17 March 2005 following which the mediator filed a Report of Mediation which records:

> *Parties agree that a dispute has arisen as to whether settlement was reached.*

2. The proceeding was listed for a directions hearing on 3 May 2005. On 12 April 2005 the Respondents filed an 'Application for Directions/Orders' ('the Application') accompanied by an Affidavit in support, seeking the following orders:

    1. A declaration that the proceeding has settled.
    2. A declaration that the parties have mutually released each other from all claims, suits, demands, liabilities and the like arising under the building contract between them dated 4 August 2003, save for any latent defects.
    3. An order that the proceeding be dismissed.
    4. An order that the Applicant pay the Respondents' costs of an incidental to this Application.
    5. Save for Order 4 hereof, there otherwise be no orders as to costs
    6. Such further and other orders as the Tribunal deems appropriate.

3. The Application was accompanied by letter from the Respondents' solicitors dated 6 April 2005 where in the last paragraph they advise:

> *We note that this matter is listed for a directions hearing on 3 May 2005, commencing at 12.00 noon. We propose for the orders sought to be made at that time. We expect that our clients' application will probably require 1 to 2 hours hearing time.*

4. A copy of the Application and accompanying material was apparently served on the Applicant under cover of letter dated 6 April 2005 to the Applicant's solicitors – this is uncontested. On 27 April 2004 the Applicant's solicitors wrote to the Respondents' solicitors advising:

We refer to the above matter and acknowledge receipt of your letter dated 6 April 2005, with enclosures therein, and note your intention to seek the Orders that your clients require at the directions Hearing on 3 May.

We do not believe that final Orders will be obtained at the Directions Hearing as this is a interlocutory application and we are of the belief that all that can transpire on the 3rd is that the Tribunal will give directions as to the further steps that must be complied with before the matter is listed for final hearing.

In any event whilst the Orders that your clients seek will be opposed we are not adverse to agreeing to an agenda of Orders.

5. On 28 April 2005 the Respondents' solicitors responded to the Applicant's solicitors advising:

…

Please be advised that we will be pursuing the said Orders at the Directions Hearing scheduled for 3 May 2005. As you know, an Application for Orders was filed and served in order to effect that purpose on 30 March 2005. A copy of the Application, together with an Affidavit of Darren John Noble and corresponding exhibits, was forwarded to your office on 6 April 2005. We intend to proceed with our clients' application and expect that the Tribunal will deal with the matter at the scheduled Directions Hearing.

We note that your client is yet to file any affidavit material in response to the material provided to you under cover of our letter dated 6 April 2005. If your client chooses not to file any affidavit material in response prior to the Directions Hearing, that is a matter for your client and we will oppose any adjournment on that basis.

Moreover, we inform you that we have briefed Counsel to appear at the Directions Hearing, and if an adjournment is sought on the day, this letter will be produced to the Tribunal on an application for costs on an ***indemnity*** *basis.*

5. On 29 April 2005 the solicitors for the Respondents responded and it is helpful to set out extracts from that letter:

…

Firstly we wish to make it clear that it is inappropriate for your client to bring an application for final orders at the directions hearing. Your application is misconceived.

Any application for final orders should be the subject of a hearing so as all the evidence can be considered by the Tribunal. Our client has a right to be heard and the evidence of each of the practitioners and relevant clients [including the mediator] needs to be given to the tribunal prior to any determination being made regarding your clients allegations that a settlement has been achieved. Would you please explain in writing what basis you believe exists for you to bring an

application for final determination of the proceeding without a hearing date being fixed.

…

We respectfully suggest that the appropriate course to adopt is for your client to propose appropriate directions orders which would include the filing of a counterclaim including the allegations that the proceeding was settled at mediation [which allegation is specifically denied by our client] and also the filing of a reply and defence to that counterclaim…

We also draw your attention to the principal behind all mediations that the matters discussed at mediation are not to be the subject of evidence in the hearing and cannot be used in any hearing. We draw your attention to paragraph 11 of your affidavit in which you quite freely and openly swear to the fact that you requested terms of settlement be drawn. It is our client's contention [amongst other contentions] that without terms of settlement having been drawn and signed by the parties no settlement took place and that it was the parties intention [as disclosed by your affidavit] that terms of settlement were to be prepared and signed and until that occurred no concluded agreement existed. You will appreciate that if this contention is correct no settlement was achieved and your client's allegations to the contrary are ill-conceived.

We put you on notice that if you insist on proceeding with this ill-conceived application we will be presenting the arguments set out above and requesting the tribunal make the usual direction orders for the further conduct of the proceeding. We shall also apply for the costs of the application to be paid by you personally alternatively your client on an indemnity basis

…

6. By letter dated 2 May 2005 the solicitors for the Respondents once again confirmed they would be seeking final orders at the directions hearing.

The directions hearing

7. At the commencement of the directions hearing on 2 May 2005 I enquired whether the matter could proceed on that day in the absence of any affidavit material in response from the Applicant. Counsel for the Applicant, Mr Lucas, indicated he was happy for the application to proceed as he believed the application should be dismissed. However, he said he was first seeking an order that Mr Noble's Affidavit in support of the application be struck from the Tribunal file as breaching the terms of s85(4) of the *Victorian Civil and Administrative Tribunal Act* 1998. I accept the submission of Mr Andrew of

Counsel that s92 of the Act properly refers and not s85 which relates to the confidentiality of the compulsory conference process. Section 92 provides:

> *Evidence of anything said or done in the course of mediation is not admissible in any hearing before the Tribunal in the proceeding, unless all parties agree to the giving of the evidence.*

8. Mr Andrew confirmed that the Respondents' application is brought under s93(1) of the Act which provides:

> If the parties agree to settle a proceeding at ay time, the Tribunal may make any orders necessary to give effect to the settlement.

10. Before exercising its powers under s93(1) the Tribunal must first satisfy itself as to whether settlement has been achieved, and in doing so may have regard to the Terms of Settlement whether they be oral or in writing. As clearly enunciated by Deputy President McKenzie in *Hart v Huna* [1999] VCAT 626

> *To determine whether I can exercise the power to make orders under s93. I must determine this dispute. In other words the dispute about whether or not there has been an agreement to settle. This is not the same as deciding some general question or making some general inquiry about the validity of an agreement or the enforceability of an agreement.*

and

> *I have been careful in this decision not to deal with anything said or done in the course of the mediation, but I have taken the view that in order to determine whether the Tribunal can exercise its powers under s93 it must be able to look at any terms of settlement whether oral or written that are put before it, so they can determine whether there has been an agreement to settle.*

11. In my view, it is therefore entirely appropriate for the Tribunal to have regard to any oral agreement which of itself, in my view, necessitates a consideration of the circumstances surrounding the making and acceptance of any offer.

12.. In *Latif Al-Hakim v Monash University* [1999] VSC 511 Justice Beach approved the following comments by Deputy President McKenzie where at page 11of the decision at first instance she said:

> *However, in my view, as I said, the fact that a settlement has been reached and what the terms of that settlement were is admissible and evidence of those matters is admissible.*

14. His Honour's comments at paragraph 16 are of particular relevance here:

> *…It would seem to me to be an extraordinary situation if in practice parties who have reached agreement to settle a proceeding at mediation cannot then seek to enforce their agreement, particularly when s93(1) of the Act specifically provides that if the parties do agree to settle a proceeding at any time, the tribunal may make any orders necessary to give effect to the settlement.*

15. Mr Andrew did not address me specifically in relation to whether I should strike all or any part of the Affidavit from the Tribunal file. I have carefully considered the Affidavit and whilst on the face of it parts of it may seem to stray into the arena of disclosing what happened at the mediation, I find it is necessary and appropriate background to the alleged agreement to which I may properly have regard. I am therefore satisfied that I should not order that Mr Noble's affidavit be struck from the tribunal file at this time. However, in the event the Respondents' application is unsuccessful it may be appropriate for the Applicant to once again request that the Affidavit be struck from the file.

Can final orders be made at a Directions Hearing

16. I reject the submission made by Mr Lucas that the Tribunal does not have power to make final orders at a directions hearing. Where a party has been put on notice by the other that final orders will be sought there is, in my view, no impediment to such orders being made. The Tribunal's power to make directions is found in s80 of the Act. However, that section, nor any other in the Act, does not contemplate that such directions can only be made at a hearing convened for that purpose. Directions hearings are so described for administrative purposes but their functions are numerous. At all times the Tribunal must be mindful of its obligations under s97 of the Act to 'act fairly and according to the substantial merits of the case in all proceedings' and s98(1)(d) to 'conduct each proceeding with as little formality and technicality and determine each proceeding with as

much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit."

17. Had the Respondents not advised the Applicants on more than one occasion that they would be seeking final orders at the Directions Hearing the situation might well have been different, but I am satisfied the Applicant was on notice, and, in my view, it would have been prudent for it to have filed material in opposition had that been its intention.

Should the Respondents' application be determined in the absence of any material from the Applicant?

18. However, notwithstanding these observations the Tribunal is bound by the rules of natural justice (s98(1)) and, in my view, it would potentially be a denial of natural justice for this application to be considered and determined without the Applicant having the opportunity to file and serve affidavit material in reply. I am unable to say from the material before me whether the failure to file and serve appropriate material arises from the Applicant's instructions or the clearly misconceived position of its solicitors in relation to the Tribunal's powers. These are matters which will properly be taken into consideration in determining any application for costs which may be made by the Respondents and whether any order for costs should be made against the Applicant or their solicitors pursuant to the provisions of s109(4) of the Act.

19. I therefore decline to consider the Respondents' application for final relief until the Applicant has an opportunity to respond.

DEPUTY PRESIDENT C AIRD