VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D216/2007

CATCHWORDS

Reinstatement application. Proceeding between applicant (owner) and respondent (builder) settled in 2011. Applicant seeking to pursue a further claim in respect of alleged defective building works. 10 year limitation period per section 134 Building Act 1993 expired. Applicant makes application to reinstate the prior proceeding to prosecute the further claim. Reinstatement application dismissed.

APPLICANT	Marilyn Stapleton
RESPONDENT	Canny Builders Pty Ltd (ACN081 853 376)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Reinstatement Application
DATE OF HEARING	20 October 2016
DATE OF ORDER	8 November 2016
CITATION	Stapleton v Canny Builders Pty Ltd (Building and Property) [2016] VCAT 1874

ORDERS

1. The applicant's reinstatement application is dismissed.

2. Costs reserved with liberty to apply. Any application for costs to be listed before Senior Member Farrelly with an allocation of 90 minutes.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:	Mr R Fink, of Counsel
For Respondent	Mr B Broadhead, solicitor

REASONS

1 The applicant, Ms Stapleton, and the respondent, Canny Builders Pty Ltd, settled this proceeding in 2011. The applicant now brings an application to reinstate the proceeding. The respondent opposes the application.

BACKGROUND

2 In April 2004, the applicant (owner) entered a building contract with the respondent (builder) for the carrying out of significant renovation works to the applicant's home in Hawthorn, Victoria (" **the building contract**"). The building works were purportedly completed in around February 2005, and on 24 February 2005 the relevant building surveyor, Mr Owen, issued a certificate of final inspection in respect of the building works ("**the final inspection certificate**").

3 The applicant was not satisfied with the quality of the building works. She obtained a number of building consultant reports in respect of the works. By application filed in this Tribunal in around March 2007, the applicant commenced this proceeding against the respondent, claiming damages in respect of numerous items of the building works which were alleged to be defective or not completed in compliance with the building contract. The list of alleged defective works included unsatisfactory paintwork to various windows, and an alleged excessive gap between the external deck flooring and the bottom rail of the decking balustrade.

4 By terms of settlement signed by the parties on 30 November 2009 ("**the first TOS**"), the parties agreed to settle the proceeding. The first TOS provided, in effect:

(a) the respondent to pay the applicant $25,000;

(b) the respondent to replace certain carpet at the home, and reimburse the applicant $550 being the cost incurred by the applicant to obtain a report in respect of the carpet;

(c) the respondent, at its cost, to return to the applicant's home and carry out a number of rectification/further building works as outlined in the schedule attached to the first TOS ("**the scheduled works**"). Provision was made for the times to carry out the scheduled works;

(d) Mr Ray Martin, a building consultant, was nominated to inspect and certify whether the scheduled works were satisfactorily completed by the respondent;

(e) if Mr Martin determined that any of the scheduled works were not satisfactorily completed, he was to prepare a list of the outstanding items. The respondent would then have a further limited time to attend to such outstanding items, following which Mr Martin would again inspect the works;

(f) if, on either his first inspection or his further inspection, Mr Martin determined that the scheduled works had been satisfactorily

completed, the applicant would *" thereupon release the respondent from all claims known or apparent on inspection in respect of the* [scheduled] *works",* subject to the respondent having also complied with its other agreed obligations referred to above in respect of payments to the applicant and replacing carpet; and

(g) if, following his first inspection Mr Martin prepared a list of outstanding items to be completed, and following his second inspection Mr Martin determined that the outstanding items had not been satisfactorily completed, he was to provide a costing as to "*the reasonable market value of an independent builder*" to complete the outstanding items. In such case, the applicant would be entitled to obtain an order against the respondent for the sum of Mr Martin's costing together with the reasonable legal costs incurred in obtaining such order.

5 As a consequence of the settlement agreement, an order was made on 30 November 2009 that the proceeding was struck out with a right of reinstatement.

6 The respondent paid the applicant the sums specified under the first TOS. The respondent also attended to further works, but, according to the applicant, the respondent took far longer than the timeframe contemplated under the first TOS. Because of the respondent's failure to carry out the scheduled works within the agreed timeframe, the applicant made application to reinstate the proceeding. The proceeding was reinstated by order made 17 August 2010.

7 In the reinstated proceeding, the applicant filed Amended Points of Claim briefly setting out the nature of her claim and the relief/remedy sought. As she did in her original claim, the applicant sought damages in respect of defective/incomplete works. Further or alternatively, the applicant sought damages said to have arisen from the respondent's breach of the first TOS, such damages including the cost to complete outstanding items of the scheduled works, delay costs in the form of lost rental income, general damages for distress, inconvenience and disappointment, and further legal costs incurred.

8 In its response Points of Defence, the respondent asserted, amongst other things, that the conduct of applicant prevented the timely completion of the scheduled works.

9 It appears that Mr Martin performed his role under the first TOS. On around 8 February 2011, Mr Martin provided a costing in the sum of $1,303 in respect of outstanding items of the scheduled works which, according to Mr Martin, the respondent had completed.

10 By terms of settlement signed by the parties on 15 July 2011 ("**the second TOS**"), the parties agreed to a settlement of the reinstated proceeding, pursuant to which the respondent agreed to pay the applicant $31,922.91 within 30 days. The terms provided that the settlement sum was comprised of $1,303 as the cost of outstanding items as assessed by Mr Martin, $619.91 being the sum of a particular invoice from "Climate Technologies Pty Ltd" to the applicant, and $30,000 otherwise on account of the applicant's claim for loss and damage.

11 Paragraphs 3 and 4 of the second TOS made provision for a release as follows:

> 3. In consideration of the entry by the respondent into these terms of settlement, and to the fullest extent permitted by law, the applicant releases and forever discharges the respondent from and indemnifies the respondent against all claims, liabilities, expenses, costs, interest and other liabilities arising directly or indirectly out of:
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> a. the claim [in the proceeding];
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> b. the works performed by the respondent under the [building] contract;
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> c. the subject matter of the proceeding;
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> d. the Initial Terms of Settlement [the first TOS],
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> e. the works performed by the respondent pursuant to the Initial Terms of Settlement; and
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> f. the reinstated proceeding;
>
> including but not limited to any such claim in respect of which the applicant is aware or ought reasonably be aware of as at the signing of these terms save and except for any monetary issues arising out of the original contract for building works (collectively **the known matters**).
>
> 4. The parties agree that the release in paragraph 3 does not affect any liability which the respondent has or may have pursuant to the warranties implied in respect of domestic building work under section 8 of the *Domestic Building Contracts Act* 1995, other than in respect of the known matters.

12 As a consequence of the settlement agreement, an order was made on 27 July 2011 that the proceeding was struck out with a right of reinstatement.

13 The respondent duly paid the settlement sum.

14 Some years later, the applicant became concerned at the deterioration in some of the building works, in particular the decking balustrade and some windows which were showing signs of water damage. The applicant engaged a building consultant, Mr O'Donoghue of "Just Inspections", to inspect and report on the building works. Mr O'Donoghue inspected the

home on 23 February 2016 and produced a report dated 31 March 2016. Mr O'Donoghue's report identifies a number of areas of concern, including the water damaged balustrade and windows.

15 By letter to the Tribunal dated 21 May 2016, received by the Tribunal on 7 June 2016, the applicant made application to reinstate the proceeding. The application letter made reference to the alleged defective building works identified in Mr O'Donoghue's report. At the time she made the reinstatement application, the applicant was self- represented. She subsequently retained lawyers.

16 The reinstatement application came before me for hearing on 20 October 2016. Mr Fink of Counsel represented the applicant. Mr Broadhead, solicitor, represented the respondent. Each of the parties had filed and served affidavit material ahead of the hearing.

DISCUSSION

17 The applicant does not found her reinstatement application on any alleged breach by the builder of the first TOS or the second TOS. The applicant's counsel acknowledges that any entitlement arising under or pursuant to the first TOS were overtaken by, or merged into, the second TOS. There is no allegation of breach of the second TOS. The builder paid the settlement sum.

18 Nor does the applicant suggest that the second TOS, in particular the release provision, is contrary to law or otherwise unenforceable.

19 The applicant has provided no proposed "Points of Claim" setting out the claims she wishes to pursue in the event the proceeding is reinstated, however the applicant's counsel confirms that the applicant seeks to pursue a claim for damages in respect of alleged defective building works identified in Mr O'Donoghue's report, in particular the water damaged windows and decking balustrade.

20 The respondent says that the applicant has no entitlement to pursue such a claim because:

- to the extent such claim raises items of alleged defective building work which were part of the subject matter of the settled proceeding, including "known matters" within the meaning of such phrase as set out in paragraph 3 of the second TOS, the applicant is, by reason of the second TOS, estopped from bringing such claim; and
- to the extent the claim raises items of alleged defective building works *not* included in the subject matter of the settled proceeding, including "known matters" as defined in the second TOS, the applicant is time barred pursuant to section 134 of the *Building Act* 1993.

21 Section 134 of the *Building Act* provides:

> Despite anything to the contrary in the **Limitation of Actions Act 1958** or in any other Act or law, a building action cannot be brought

> more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.

22 As noted earlier, the final inspection certificate was issued on 24 February 2005. For this reason, the applicant concedes that she is time barred from bringing a new action in respect of new items of alleged defective building work.

23 However, the applicant submits that the claim in respect of alleged defective building works that she now wishes to bring does not attract the operation of section 134 of the *Building Act*, and nor is it a claim estopped by operation of the release provisions in the second TOS. Her reasoning is as follows.

24 First, the applicant says that the items of alleged defective building work she now wishes to raise, primarily the water damaged windows and decking balustrade, are *closely related* to items of defective work previously raised in the proceeding. In this regard she refers to consultants' reports previously filed in the proceeding (prior to the second TOS) which identify, amongst other things, poor quality of painting to windows and unsatisfactory construction of the balustrade. The applicant draws a distinction between *new* items of alleged defective building work and items *closely related* to the items previously raised in the proceeding. The applicant says that only *new* items attract the operation of section 134 of the *Building Act.*

25 Second, the applicant says that because she had no knowledge of, and could not have had knowledge of, these *closely related* items at the time she signed the second TOS, they are not captured by the release clause in the second TOS. Or, to put it another way, these new *closely related* items do not fall within "the known matters" as referred to in the second TOS. The applicant says that they could not have been "known matters" because the now apparent water damage to the windows and decking balustrade was not apparent or did not exist at the time the second TOS was signed.

26 I do not accept the applicant's reasoning.

27 The applicant submits, in effect, that the claim she now wishes to pursue sits on a middle ground between the claims captured by the release provision in the second TOS, and new claims which are time-barred by section 134 of the *Building Act*.

28 In my view there is no such middle ground.

29 It is clear from Mr O'Donoghue's report that the windows and decking balustrade are water damaged. But that is not the point.

30 Under the second TOS, all claims or potential claims in respect of defective building works which the applicant knew of, or ought reasonably have been aware of, as at the date of the second TOS were settled. There is no breach

of the second TOS on the part of the builder. Accordingly, the applicant cannot further pursue those claims and potential claims.

31 The second TOS did not operate to prevent the applicant from bringing claims in respect of defective building works which were not known or could not reasonably have been known by the applicant as at the date of the second TOS. In this regard, the second TOS did not offend section 10 of the *Domestic Building Contracts Act* 1995. Section 10 provides that an agreement is void to the extent it purports to restrict or remove the right of a person to take proceedings for breach of the implied warranties, set out in section 8 of the Act, in respect of building works carried out under a domestic building contract, other than a breach that was known or ought reasonably to have been known by the person to exist at the time of the agreement.

32 In my view, if the claim the applicant now wishes to pursue is not captured by the release provision in the second TOS – or to put it another way, if the items of alleged defective building work forming the subject matter of the claim the applicant now wishes to pursue do not fall within "the known matters" as defined in the second TOS – the claim raises new items of alleged building defects and attracts the operation of section 134 of the *Building Act*.

33 The applicant might well have brought a new proceeding in respect of such claim, or any other new claim alleging breach of warranty in respect of the building works, provided such proceeding was commenced within 10 years after the date of the final inspection certificate. But she did not do so.

34 The applicant cannot sidestep the 10 year limitation by characterising the new items of alleged defective building works as being *closely related* to items previously raised in the settled proceeding.

35 For the above reasons I find that the applicant is not entitled to reinstate the proceeding and I will order that her application be dismissed. I will reserve costs with liberty to apply.

SENIOR MEMBER M. FARRELLY