VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

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

CATCHWORDS

Mediation - whether settlement reached at mediation – whether offer can be withdrawn once accepted

[2005] VCAT 1703

APPLICANT	The Intercon Group Pty Ltd
RESPONDENT	Keigo Nakajima
SECOND RESPONDENT	Midori Nakajima
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	11 July 2005
DATE OF ORDER	19 August 2005

ORDER

1. The Tribunal declares that the parties settled the proceeding including any claims they may have had or about which they ought reasonably to have known at mediation on 17 March 2005 on the basis that each party walk away and bear their own costs with mutual releases.

2. Costs of the applications heard on 3 May and 22 June 2005 reserved - liberty to apply until 31 August 2005 - any costs hearing to be listed before Deputy President Aird

3. Should any application for costs not be made by 9 September 2005 the proceeding shall stand struck out with no orders as to costs, otherwise final orders will be made following the hearing and determination of any application for costs.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr G Lucas of Counsel
For Respondents	Mr R Andrew of Counsel

REASONS

1. On 20 May 2005 I determined that the Tribunal could consider the circumstances surrounding an alleged settlement reached at mediation for the purposes of exercising its powers under s93(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 and, in so doing, could have regard to any terms of settlement whether they be oral or in writing (paragraph 10). I adjourned the hearing of the Respondents' ('the owners') application for an order to be made under s93(1) giving effect to what, they allege, was a settlement reached at mediation to give the Applicant ('the builder') an opportunity to file and serve any answering material.

2. To briefly recap – the owners allege that an agreement to settle the proceeding, including any claims they may have had or about which they ought reasonably to have known, was reached at mediation on 17 March 2005 when they accepted the builder's offer to walk away with each party bearing their own costs. The builder denies that settlement occurred asserting the agreement was conditional upon satisfactory terms of settlement, including appropriate releases, being prepared and signed by the parties. In support of their application, the owners filed an affidavit of their solicitor, Darren Noble, wherein he deposes to the circumstances surrounding the alleged settlement. The builder filed two affidavits – one of James Nixon of Counsel who appeared for the builder at the mediation, and another by a director of the builder, Mr Zemski – both of which, surprisingly,

contained detailed information about what took place at both mediation sessions, including evidence of other settlement offers.

3. Having filed these affidavits, Mr Lucas of Counsel, who appeared on behalf of the builder, submitted that I should not have regard to their contents as they disclosed confidential information about what occurred at the mediation in contravention of s92 of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides:

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

This was a curious submission in circumstances where the disclosure was made by the builder in the affidavits filed on its behalf. I reject the submission by Mr Lucas that these affidavits were necessarily detailed having been filed in compliance with the directions I made on 20 May 2005. Those directions simply required:

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

4. Mr Andrew of Counsel, who appeared on behalf of the owners, submitted that by filing the affidavits, the builder consented to disclosure of what happened at the mediation (which I accept) and that the owners consented to such disclosure as evidenced by Mr Noble's detailed answering affidavit. However, he noted Mr

Noble, being mindful of s92 of the Act, had been careful to avoid such disclosure in his initial affidavit filed in support of the owners' application.

The meaning of the offer

5. It was suggested by Mr Lucas that in the absence of a counterclaim, a defined list of defects, or full particulars of the owners' claim being filed or at least served on the builder, any settlement would be meaningless because it would be impossible to identify what had been compromised between the parties.

6. Mr Noble gave evidence that the negotiations proceeded on the basis that any settlement would resolve all claims of both parties. He said that during the mediation it was clearly understood by both parties that the defects under discussion were as contained in a report by Mr David Cheong, a copy of which was provided to the builder at the first mediation session. Mr Nixon agrees that the builder received this list at the first mediation session and that it had been given earlier lists by the architect. The mediation was apparently adjourned to enable the builder to obtain its own expert report. Mr Nixon states that the builder's expert, Mr Lees addressed the earlier lists of defects only and that he rejected many of the alleged defects. Nevertheless, I accept the defects identified in Mr Cheong's report were those that were the subject of the negotiations.

7. It is common practice for parties to proceedings in the Domestic Building List to attend mediation in the absence of a defence or counterclaim being filed. This

does not prevent the parties from settling their dispute at mediation where all issues can be freely and openly discussed. It is clearly irrelevant whether the list of defects was agreed and I understand it is the exception rather than the rule for a list to be attached to any terms of settlement. It would be undesirable to require parties to incur the expense of formal pleadings before mediation, particularly having regard to the tribunal's obligations under s99 of the *Victorian Civil and Administrative Tribunal Act* 1998 to '…conduct proceedings with as little formality and technicality…'(s99(1)(d)).

8. After the offer had been accepted, Mr Nixon said there was some discussion about terms being drawn. He said that Mr Noble was of the view that simple terms with mutual releases were all that was required but that he disagreed. He said he would have included additional terms because he contemplated there were several other issues including any claim the owners might have for liquidated damages, and the question of any proportionate liability between the builder and the architect. Care would have been taken to ensure that the terms would not preclude any claim against the architect. However, although the first offer in the negotiations had been put subject to terms, and the possible joinder of the architect had been discussed, he conceded these issues had not been mentioned or discussed at the time the 'walk-away' offer was put and accepted. In particular, although it had been his intention, it had not been restated that the 'walk-away' offer was subject to terms.

Was the offer accepted within the stipulated time?

9. Mr Zemski said he gave Mr Nixon instructions to put an offer to settle on a 'walk away' basis but that such offer would only be open for five minutes and he would have his clock on. Although he was unable to say how long it was before Mr Nixon conveyed the owners' acceptance of the offer to him, be believes it was longer than the stipulated five minutes. He said he understood written terms confirming the settlement would be prepared and signed by the parties. Mr Nixon's evidence is that he is unsure whether the offer was accepted within the stipulated five minutes but *'…If I had to speculate I would say the response was between 4 and 6 minutes'* (paragraph 34 of his affidavit sworn 3 June 2005).

10. Mr Noble said he understood the 'walk away offer' was open for five minutes, and that although he did not look at his watch at the time, he was careful to ensure the owner's acceptance was conveyed promptly and believed it was within the stipulated five minutes. He also said that until receiving Mr Zemski's affidavit he was not aware of any allegation that the offer had not been accepted within time. I am satisfied on the evidence before me that the offer was accepted within five minutes of it being conveyed to Mr Noble particularly in circumstances where this issue was not raised at the time the offer was accepted.

Was Mr Zemski under a special disadvantage?

11. In his Affidavit Mr Zemski states that he suffers from bi-polar condition and that because of this illness his judgement is sometimes impaired. A copy of a

medical report from his G.P., Dr Elisha, dated 31 May 2005 is exhibited to his affidavit. Dr Elisha reports, that Mr Zemski may be confused and "*may be coerced into making the wrong decision quite easily*"

and

> "*It appears Mr Zemski was in fact coerced to make a quick decision on a day when he has forgotten to take his medication. It is very likely that under these circumstances the patient could very easily make the wrong decision*".

and at paragraph 2.11 of his affidavit Mr Zemski states that

> "*it was under these circumstances that I succumbed to the advices of my Barrister to offer a walk-away to get rid of this dispute and finish the mediation on two conditions. The final condition was that the offer was open for 5 minutes, and 5 minutes only. Secondly, the offer was conditional upon the parties entering into Terms of Settlement*".

and at paragraph 2.8 of his Affidavit

> "*…I had not taken my prescribed medication that morning, nor had I eaten anything and was feeling nauseous, dizzy and "detached."*

12. Mr Zemski gave evidence that he found the mediator to be aggressive and said he used foul language. I reject this, it being in stark contrast to the evidence of both Mr Nixon and Mr Noble. Mr Nixon said that had found the mediator to be fair. Mr Noble gave evidence that the mediation was conducted in '*a proper and professional manner'* by the mediator in his '*usual amiable manner'* (paragraph 14 of his affidavit sworn 14 June 2005). He also said that he had felt pressured into settling by Mr Nixon and the mediator with Mr Nixon telling him what it would mean to continue to hearing in terms of risk and costs.

13. As I understand it, Mr Zemski asserts that if I find a settlement has been reached it should be set aside because he alleges he was under a special disadvantage because of his mental health because of which he was coerced into settlement. I was not referred to any authorities which might assist. However, it is clear that where a party considers himself to be under a special disadvantage he must make the other party aware of the disadvantage, or it should be so obvious to the other party from his conduct. (*National Australia Bank Ltd v Freeman* [2001] QCA 473, *Begbie v State Bank of New South Wales Limited* (1994) ATPR 41-288).

14. There is simply no evidence that it was readily apparent to anyone that Mr Zemski was suffering from the symptoms he describes in his affidavit. Mr Noble, at paragraph 15 of his second affidavit of 14 June 2005 states:

> *…Whilst in my presence Mr Zemski did not appear nauseous, dizzy or detached. On the contrary he was actively involved in the joint session discussions. …He was able to follow the discussion and contribute to it without any obvious difficulties, he displayed a forceful character, not shy or withdrawn, indeed at times he was quite outspoken, confident and forthright in putting his views and making sure that his barrister did not miss any points which he believed were relevant or important. …*

15. Further, his own Counsel had not noticed anything particularly unusual. Mr Nixon confirmed that Mr Zemski did not indicate to him at any time during the second mediation session that he was feeling unwell, although he did seem confused on occasion. However confusion in itself is not indicative of a special disadvantage or an incapacity to make a reasonable decision.

Mr Zemski's authority to settle and change of mind

16. There is no evidence that Mr Zemski indicated to his barrister, the mediator, the owners and/or their solicitor that any settlement was subject to approval by Mr Symons - a builder and director of Sicon Australia Pty Ltd which he states *"acts in a joint venture arrangement with the Applicant"* (paragraph 2.3 of his Affidavit sworn 3 June 2005) but was not a party to the building contract. In fact at paragraph 5 of his initial affidavit sworn 30 March 2005 Mr Noble states in relation to the first mediation session on 1 February 2005:

> *"…also present on behalf of the builder were Mr Michael Zemski, the director of the builder, and a person named Martin Symons, whom Mr Zemski identified as his 'partner'. In answer to any inquiry by Mr Anderson, Mr Zemski confirmed that he possessed unlimited authority to attend on behalf of the builder to resolve the matter".*

17. Mr Nixon said that on returning to advise Mr Zemski that the offer had been accepted, he found Mr Zemski on the telephone to Mr Symons. Mr Nixon said Mr Symons clearly did not agree that a 'walk away' settlement was appropriate. Mr Nixon said that after talking to Mr Symons on Mr Zemski's mobile telephone for ten minutes or so it was clear that Mr Symons was not prepared to agree to a 'walk away' settlement. At that time Mr Zemski was apparently still prepared to settle on a 'walk away' basis but wanted the weekend to discuss the situation further with Mr Symons. On the Monday he instructed Mr Nixon the builder would not settle on a 'walk away'.

Has there been an accord and satisfaction?

18. Mr Lucas submitted that as Terms of Settlement had not been signed there was no accord and satisfaction. He relied on *Osburn v McDermott* [1998] 3VR 1 for the proposition that where an agreement has been reached but has not been executed there is an accord but no satisfaction. However, I note that in *Osburn* it was a term of the settlement agreement that the repairer deliver up the motor vehicle which he failed to do so. I am satisfied that there has been an accord and satisfaction – the parties agreed to settle all claims including all claims the owners may have had or ought reasonably to have known about once and for all, and to give each other mutual releases. There is simply no evidence that any agreement was subject to and conditional upon the agreement of further terms and the execution of written terms.

The VCAT Guidelines to Mediation

19. Mr Lucas referred me to the Mediation Guidelines on the VCAT website which indicate that parties should be prepared to sign written terms of settlement if settlement is reached. He described the Guidelines as being in the nature of directives as to how the mediation process should be conducted. I reject this submission. These are Guidelines only intended to provide information to participants in mediation about the process. They are not definitive nor directive. I accept that written terms of settlement provide certainty and that they generally give rise to orders being made (as required by s93 of the Act) but, in this case, the dispute about whether settlement had been reached arose before written terms had

been prepared. The application by the owners is for a declaration that the proceeding has settled with consequential orders to be made.

Has a settlement been reached?

20. Mr Lucas once again addressed me about the sanctity of the mediation process. He persisted in this approach throughout his final submissions suggesting that it would be an error of law to allow parties to present evidence about what was said and done in a mediation. He submitted that by reason of s92 of the Act the offer of settlement and its acceptance were 'without prejudice' and confidential to the mediation process, and should not be disclosed and that I can only have regard to the terms of any written agreement. I confirm my previous ruling that I can have regard to alleged terms of settlement, including oral terms to determine whether a settlement has been reached and in doing so may have regard to the circumstances surrounding the making and acceptance of any offer (paragraph 11 of my Reasons dated 20 May 2005). I again refer to Deputy President McKenzie's comments in *Hart v Huna* [1999] VCAT 626

21. Mr Lucas' submission that one of the reasons for confidentiality of the mediation process is to protect parties if they change their minds is rejected. If it is clear, as it is here, that a party makes an offer expecting a proceeding to settle if it is accepted, once accepted there is a concluded settlement.

22. Unusually it was submitted by Mr Lucas that mediation at VCAT was not a commercial process, otherwise it would be governed by separate rules. I found his submission difficult to follow, but as I understand it: mediation negotiations cannot be treated as commercial negotiations as mediation often includes lawyers who, he suggested, would also say that written terms of settlement including the orders to be made, are required for a concluded settlement. He said that what he described as the "*Masters v Cameron* environment" could not apply to mediation. This is a nonsense submission and is rejected.

23. Whether parties had reached agreement to settle a proceeding was considered by Deputy President Cremean (as he then was) in *Fifield & O'Leary v Strarm Developments Pty Ltd (in liq)* [2002] VCAT 1343 where he considered various authorities. I refer in particular to his observations at paragraph 8.

> One thing however, is clear upon the authorities. For agreement to exist, it is necessary that there be *consensus ad idem*: the consensus comes about when there is a meeting of the minds which usually is manifested by acceptance of an offer: see *MacRobertson Miller Airlines Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125 at 136. The question, however, whether agreement exists or not is one of objective fact: see *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 709. It is entirely possible though for parties to be held to have entered into a binding contract, considered objectively, in the expectation that at a later date a further agreement will be arrived at containing additional terms facilitating and clarifying the initial contract. See per lpp J in *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101 at 102. The position on this was authoritatively laid down by the High Court in *Masters v Cameron* (1954) 91 CLR 353 at 360 in the following terms:
>
> > *"Where parties in negotiation reach agreement upon terms of a contractual nature, and also agree that the matter of their negotiation shall be dealt with by a formal contract the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same*

> *time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, and unless and until they execute a formal contract".*

In this regard I should also wish to mention what was said by Kennedy J in *Terrex Resources NL v Magnet Petroleum Pty Ltd* (1988) 1 WAR 144 at 159.

> *"An agreement does not have to be worked out in meticulous detail. A bargain can be made containing certain terms, regarded as essentials, whilst the parties recognise that a formal document will eventually be drawn up in the full expectation that a number of additional terms will, by consent be included in that document."*

24. I am satisfied on the evidence before me that the parties were of the same mind when the offer was made and accepted – that they would settle the proceeding on the basis that each party walk away and bear their own costs. It was only after the offer was accepted that the builder changed his mind.

25. Mr Lucas also referred me to ss90 and 91 of the Act which set out a mediator's obligations to advise the tribunal whether settlement has been effected. Section 90 provides:

> "If the parties agree to settle a proceeding as a result of mediation, the mediator must notify the Principal Registrar that the parties have agreed to settle"

and s91:

> "If the mediator has attempted unsuccessfully to settle the proceeding by mediation, the mediator must notify the Principal Registrar that mediation has been unsuccessful.

In this regard he sought to rely on the mediator's report that:

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

I reject the suggestion that it is incumbent on the mediator to determine whether settlement has been reached – this is clearly a matter which it is appropriate for the tribunal to determine.

27. I accept the tribunal does not have a supervisory role and that it should not direct parties to enter into terms of settlement or the form of any release. However, this is not what I am asked to do by the owners. They simply request that I determine whether or not settlement has been achieved, the basis of such settlement and order the proceeding be dismissed.

Conclusion

28. I am satisfied on the evidence before me that the parties reached a settlement on the basis that each party 'walk away' bear their own costs with an implied term that such settlement would be with mutual releases. The legal representatives for both parties are practitioners who have significant experience before the Domestic Building List. I accept it is well understood that a 'walk away' offer is one where both parties give up their rights to any claims they have or ought reasonably to have known they might have as at the date of the settlement and give mutual releases. This was a matter where the builder simply changed his mind after its offer had been accepted and settlement reached. If it was intended that there be additional terms or conditions they should have been included in any

offer. I am unable to say whose omission it was in not including such terms or conditions when the builder's offer was conveyed to the owners' solicitors.

29. As I intend reserving the question of costs I will not make orders striking out the proceeding until the question of costs has been determined. However to facilitate a timely disposal of this proceeding I will order that any application for costs be made by 31 August 2005 otherwise the proceeding will be struck out.

DEPUTY PRESIDENT C AIRD