VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D544/2005

CATCHWORDS

Assessment of costs – referral of question of law from principal registrar – whether there has been an accord and satisfaction – whether monies provided by a third party for a special purpose – whether monies held on trust for benefit of provider of monies – whether as monies not returned to respondent the matter has been finalised.

APPLICANT	Ian Wolstenholme
RESPONDENT	Eagle Homes Pty Ltd (ACN 054 049 777)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing following referral from the principal registrar
DATE OF HEARING	7 April 2009
DATE OF ORDER	9 June 2009
CITATION	Wolstenholme v Eagle Homes Pty Ltd (Domestic Building) [2009] VCAT 974

ORDER

1 **The principal registrar is directed to re-list the assessment of costs on the first available date and to advise the parties of the date and time on which it will take place.**

2 Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr L Guymer, Solicitor
For Respondent	Mr C Morey, Solicitor

REASONS

1 The issues in dispute between the parties in the substantive proceeding are irrelevant, suffice to note they concerned a dispute between a building owner and a builder. Settlement was reached and, on 27 June 2007, the tribunal made orders by consent that the proceeding be struck out with a right to apply for reinstatement. The terms of settlement were not complied with and on 11 October 2007, upon hearing the applicant's application for reinstatement, I made the following orders:

1. The proceeding is reinstated as between the Applicant and the Respondent.
2. The Respondent shall pay the Applicant the sum of $21,000.00 forthwith.
3. The Respondent shall pay the Applicant interest fixed at $610.85 forthwith.
4. The Respondent shall pay the Applicant costs fixed at $825.00 forthwith.
5. The Respondent shall pay the Applicant's costs of the proceeding up to and including 27 June 2007, including counsel's fees for 27 June 2007. In default of the agreement such costs are to be assessed by the Principal Registrar on a party/party basis on County Court Scale C.

The total amount the respondent was ordered to pay the applicants under orders 2, 3 and 4 was $22,435.85.

2 Following the respondent's failure to pay, the applicant served on the respondent a Creditor's Statutory Demand for Payment of Debt, by sending it to its solicitors on 19 December 2007. On 10 January 2008 the respondent paid $1000. A further amount of $21,435.85 was paid and was deposited into the applicant's solicitors' trust account on 1 August 2008.

3 On 30 January 2009 the applicant's solicitors wrote to the tribunal seeking an assessment of costs by the principal registrar in accordance with order 5 of the orders made on 11 October 2007. This assessment of costs was listed for 6 April 2009. I understand that prior to the commencement of the assessment, the respondent's solicitors objected to it proceeding. They contended that their client was not obliged to pay any costs to the applicant as there had been an 'accord and satisfaction'. Alternatively, as the funds had been provided by a third party for a special purpose: so that they could be paid in full and final settlement; and where they were not accepted for that special purpose they could not be retained in part payment, and the matter was therefore at an end. The issue was referred back to me to determine.

Has there been an accord and satisfaction?

4 The respondent relies on an affidavit sworn by its solicitor, Paul Antony Holdway, on 6 April 2009, in which he deposes to having received trust monies from a third party, in July 2008, for the purpose of settling the ongoing dispute between the respondent and the applicant. The third party is not identified. Under cover of a letter dated 31 July 2007, addressed to the applicant's solicitors, the respondent's solicitors tendered a trust account cheque for $21,435.85. It is helpful to set out the relevant parts of that letter:

> We enclose our trust cheque in the sum of $21,435.85 in full payment of monies owed by our client to your client in relation to this matter as requested.
>
> Kindly acknowledge receipt.
>
> …
>
> Our client has made an effort to resolve this matter, but despite your client's apparent non-acceptance of our client's offer with the letter of 26 March 2008 they [the respondent] have in all the circumstances instructed us to not negotiate any further but just pay the sum of $21,435.85 in full and final settlement as requested by you.
>
> For reasons of clarity we confirm that banking of the cheque is deemed to be finalisation of this matter.
>
> Our client is, given the history of the matter, wanting to finalise the matter once and for all and so if you have any question whatsoever about the payment which is made as requested in your letter requesting please return the cheque outlining the issues. (sic)
>
> We will then get further instructions.
>
> The funds were placed in our trust account by a third party given all the circumstances and the third party has now instructed us to release the monies only on the strict condition that this matter is at an end.
>
> We trust it is given in your letter.
>
> We await your receipt by return.

5 On 5 August 2008 the applicant's solicitors responded as follows:

> We acknowledge receipt of your letter dated 31 July 2008 and enclosed trust account cheque in the sum of $21,435.85.
>
> …
>
> In relation to the payment offered, we note that:-
>
> 1. Orders were made in VCAT against your client on 11 October 2007. Interest has therefore accumulated to 31 July 2008 at 12% totalling $2,071.85 and is outstanding and payable.
> 2. The VCAT Order also provided for payment by your client of our client's costs to be calculated on County Court Scale 'C'. Those costs have yet to be assessed. We shall now have a bill in taxable

form prepared to see whether agreement can be reached on the same, or failing which have VCAT assess the same.

3. We confirm we are instructed our client does not accept the conditions upon which you have proffered your client's cheque. Our client would naturally also like finalisation of this matter as he is the innocent party, but requires payment of the interest and costs mentioned above. There is therefore no accord and satisfaction, and we advise your client's cheque has been banked as a part payment only.

We reserve our client's rights and away your reply (sic).

6 The respondent relies on *F T Jeffrey Pty Ltd v Evington Holdings Pty Ltd* (VSC unreported, 24 November 1977). However, I am not persuaded this assists the respondent. Although in that case the denial of acceptance of the amount offered in full and final settlement preceded the banking of the cheque, Young CJ's comments at page 13 are pertinent:

> The only evidence relied upon as showing acceptance was the banking of the cheque in the circumstances of the offer made by the respondent. But than banking could not, as it seems to me, be taken to indicate acceptance of the offer when the claimant expressly denied that he was doing so.

7 The respondent contends that the banking of the cheque in this case, before the denial of acceptance is fatal to the applicant's claim. However, this was considered in *Wiseman v MQH Developments* (VSC unreported, 19 May 1997[1]). In *Wiseman* a cheque was sent to the plaintiff purportedly made in full and final settlement of the plaintiff's claim. The wording in the accompanying letter was remarkably similar to the apparent intent of the letter of 31 July 2007:

> Accordingly we enclose our cheque for $11,860.22 on the strict proviso that your acceptance of such payment represented full and final payment for the works performed by you on our behalf. Should you not accept such a proviso, the cheque should be returned and we will resolve any dispute between our legal representatives.

8 The plaintiff banked the cheque on 15 July 1996 and, on 18 July 1996, his solicitors wrote to the defendant confirming that the cheque was accepted as part payment only. Chernov J considered a number of authorities including the comments by Dixon J in *McDermott v Black* (1940) 63 CLR 161 where he said at p183-4:

> the essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement … The accord is the agreement or consent to accept the satisfaction.

9 Further, Chernov J concluded:

[1] Although the decision seemingly predates the decision in *FT Jeffrey Pty Ltd* it seems the decision may have been misdated as reference is made to *FT Jeffrey Pty Ltd*

> In my view, the authorities dealing with accord and satisfaction referred to earlier indicate that the mere banking of the relevant cheque, albeit received under cover of a letter such as Exhibit P2 [set out above], does not establish that there has been such a meeting of the minds as to constitute an accord. Something more is necessary to establish this. As Lush J said (p15) in Jeffrey's case, it is not just a matter of analysing the question by analogy with offer and acceptance principles. Consensus or concurrence of minds as to exist (determinant on an objective basis) before it can be said that an accord has arisen.

10 I am therefore not persuaded that the banking of the cheque by the applicant's solicitors into their trust account on 1 August 2007 before they wrote to the respondent's solicitors on 5 August 2007 is fatal. In my view, it is clear that the applicant has not agreed to accept the cheque in full and final settlement of his claim, and having regard to *Jeffrey* and *Wiseman* I am satisfied there can be, and is, no accord and satisfaction. Further, although an applicant might choose for a number of commercial reasons to negotiate a settlement where an order of the tribunal has been made, having regard to the tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 I do not think it would be fair to deprive the applicant of the fruits of his judgement – the judgement sum plus interest and costs.

Provision of funds by a third party for a 'special' purpose

11 The respondent contends that as the funds were provided by a third party for a special purpose: final resolution of the dispute with the applicant, the funds could not be retained as part payment by the applicant. The respondent relies on *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC567 and contends that, if payment was not accepted in final resolution of the proceeding, it was held on trust for the benefit of the third party who provided the money. The applicant having retained the funds, the matter is therefore completed.

12 It is worth revisiting certain relevant paragraphs of the letter of 31 July 2007. In the third paragraph the respondent's solicitors set out their instructions:

> Our client has made an effort to resolve this matter, but despite your client's apparent non-acceptance of our client's offer with the letter of 26 March 2008 <u>they [the respondent] have in all the circumstances instructed us to not negotiate any further but just pay the sum of $21,435.85 in full and final settlement as requested by you</u>. (emphasis added)

then in the fifth paragraph:

> <u>Our client</u> is, given the history of the matter, <u>wanting to finalise the matter once and for all</u> and so if you have any question whatsoever about the payment which is made as requested in your letter requesting please return the cheque outlining the issues.

13 It is not until the sixth paragraph that the issue of the funds having been provided by a third party is mentioned, and then the third party is not identified. The third party has still not been identified.

> The funds were placed in our trust account by a third party given all the circumstances and the third party has now instructed us to release the monies only on the strict condition that this matter is at an end.

Not only is the third party not identified, but until this qualification towards the end of the letter, it is clear from a plain reading of the third and fifth paragraphs that the respondent's solicitor is acting on his client's instructions; not on the instructions of a third party.

14 The facts and circumstances in *Barclays Bank* are quite different to those in the present case. In *Barclays Bank* funds were borrowed from an identified third party and paid into a separate joint account which was opened for a special express purpose: the payment of an ordinary share dividend which the borrower had declared but had insufficient funds to meet. In the present case, the funds were purportedly provided by an unidentified third party, purportedly to finalise the matter. There is no evidence to support these propositions and further, as noted above, the qualification is inconsistent with the statement of the respondent's instructions to its solicitors as set out in the letter of 31 July 2007.

15 Accordingly, I find the applicant was entitled to retain the funds as part payment and that the respondent is obliged to pay his costs as ordered on 11 October 2007. I direct the principal registrar to re-list the assessment of costs.

DEPUTY PRESIDENT C. AIRD