

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP56/2014

CATCHWORDS

Terms of settlement between the applicant (builder) and respondent provided for settlement payment to the applicant upon completion of rectification works by the applicant and the certification of satisfactory completion of the works by designated expert consultants. Works done and certified, but Respondent claims entitlement to withhold the settlement payment arguing that the rectification works were not satisfactorily completed, and that the experts should not have certified the works as having been satisfactorily completed. Alternatively, the respondent claims an entitlement to set-off its obligation against alleged new claims. Finding that the parties are bound by the experts' certification as to satisfactory completion of the rectification works. Finding that the respondent has no entitlement to set-off. Order for payment of the settlement payment plus costs. Applicant's claim for interest unsuccessful as the terms of settlement made no provision for interest.

APPLICANT	Element Five Pty Ltd (ACN100 789 179)
RESPONDENT	Asseraf Superannuation Pty Ltd ATF The Asseraf Superannuation Fund (ACN144 786 514)
WHERE HELD	Melbourne
BEFORE	Senior Member Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	30 January 2017
DATE OF ORDER	28 February 2017
CITATION	Element Five Pty Ltd v Asseraf Superannuation Pty Ltd (Building and Property) [2017] VCAT 295

ORDERS

1. The respondent must pay the applicant \$135,571.43.
2. The respondent must also pay the applicant's costs of the reinstated proceeding, including the costs of the applicant's application to reinstate the proceeding filed on 14 October 2016. The sum of such costs, if not agreed, is to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant:

Mr K Oliver of Counsel

For Respondents

Ms J Johnston, solicitor

REASONS

- 1 In 2011 the applicant, a builder, entered a contract with the respondent for the construction of a 13 apartment complex in Hawthorn, Victoria. In July 2014, the applicant commenced this proceeding seeking an order for, amongst other things, monies owed in relation to the contract (“**the applicant’s proceeding**”). Soon after, the respondent commenced another proceeding seeking damages in respect of alleged defective building works (“**the respondent’s counterclaim proceeding**”).
- 2 On 30 January 2015, the applicant and the respondent entered terms of settlement (“**the TOS**”) to resolve the claims and disputes in the applicant’s proceeding and the respondent’s counterclaim proceeding. Pursuant to the TOS, consent orders were made on 30 January 2015 striking the proceedings out with a right to apply for reinstatement.
- 3 In essence, the TOS provided for the applicant to carry out an agreed scope of rectification works within 8 weeks and, subject to certification by expert consultants as to the satisfactory completion of those rectification works, the respondent agreed to pay the applicant \$139,000, less an allowance of \$8000 per week in the event rectification works were completed late. The respondent provided \$139,000 to its lawyer to be held in trust. As stated in the TOS, the settlement payment was to be made from the respondent’s lawyers trust account.
- 4 The applicant says the rectification works were completed by 27 April 2016, 3 days after the due completion date, and the experts’ certifications were provided. The applicant says that, that after allowing a deduction of \$3428.57 for 3 days late completion, settlement payment in the sum of \$135,571.43 was due on 6 May 2016. It says the respondent wrongfully refused to make the payment. On 14 October 2016 the applicant filed an application for the reinstatement of the applicant’s proceeding. The applicant seeks payment of the outstanding sum, plus interest, plus costs.
- 5 The respondent says that it was, and is, entitled to withhold payment, essentially for two reasons. First, it says that the rectification works were not satisfactorily completed. Second, it says that further defects in the building works have emerged since the TOS were signed.
- 6 By orders made 5 December 2016, the applicant’s proceeding was reinstated and orders were made for the filing and service of submissions ahead of the hearing.
- 7 The hearing came before me on 30 January 2017. Mr Oliver of Counsel represented the applicant and Ms Johnston, solicitor, represented the respondent.

THE TOS

- 8 The TOS, not including the annexures to it, is reproduced and attached to these reasons.

- 9 The rectification works to be carried out by the applicant are set out in clause 3 of the TOS (“**the rectification works**”). Clause 3 references annexures to the TOS. One of the annexures is a drawing/specification for air-conditioning works. Under the TOS, expert consultants Mr Maroulis and Mr Brodribb were to certify satisfactory completion of these air-conditioning works. The respondent accepts that these works were satisfactorily completed and properly certified as such by Mr Maroulis and Mr Brodribb.
- 10 The other annexure to the TOS is a joint report identifying various building works prepared by expert consultants Mr R Lees and Mr T Croucher. Under the TOS, Mr Lees and Mr Croucher were to certify satisfactory completion of works set out in their joint report. Such works included improving the detailing of articulation joints in the exterior rendered walls and applying a membrane coat to the exterior walls. The respondent says that these works, in particular, have not been satisfactorily carried out and are the cause, or a contributing cause, to ongoing leaks at the apartment complex. The respondent has obtained expert opinion from a new consultant, Mr Beck, in this regard. Mr Beck is not referenced in the TOS.
- 11 The respondent says also that there are other emerging building defects in the apartment complex which were not included or referenced in the TOS, and they have also obtained Mr Beck’s opinion in respect of these further alleged building defects.
- 12 The respondent submits that in circumstances where the rectification works have not been satisfactorily completed, and there are further additional defective works not addressed in the TOS, it is entitled to withhold payment of the settlement payment to the applicant. The respondent’s submissions are discussed in more detail later in these reasons.
- 13 The applicant rejects the respondent’s submissions, and says the respondent is bound by the TOS. Under clause 7 in the TOS, the parties agreed to appoint expert consultants to certify whether the rectification works had been satisfactorily completed (“**the experts’ certifications**”). The applicant says that the experts’ certifications were provided, and as such the respondent must honour its obligation to pay the applicant. The applicant says the respondent has no entitlement to avoid that obligation by challenging the opinions of the experts. The applicant says also that the respondent is not entitled to set-off its obligation to make the settlement payment against some new claim it has or might have against the applicant.
- 14 As discussed later in these reasons, I accept the applicant’s submissions. Before turning to that discussion, I will first briefly set out relevant events and findings I make in respect of those events.

Events and findings

- 15 The parties initially disagreed on certain matters such as the date the rectification works were purportedly completed and when the experts’

certifications were provided. During the hearing, however, concessions were made so that a number of matters previously disputed are now not in dispute.

- 16 The parties accept 15 February 2016 as the commencement date for the rectification works and, accordingly, 11 April 2016 is agreed as the due completion date, subject to any extension of time allowed pursuant to clause 8 in the TOS.
- 17 The parties agree that, pursuant to clause 8 in the TOS, on 30 March 2016 the applicant provided 7 days' notice of the anticipated date that it would complete the rectification works. Accordingly, the anticipated date of completion was 6 April 2016, and the parties were to arrange for the certifying experts to attend the site on that day to inspect the works. The applicant was to arrange the attendance of Mr Lees and Mr Maroulis. The respondent was to arrange the attendance of Mr Croucher and Mr Brodribb.
- 18 The experts carried out inspections, however it is not disputed that one of them, Mr Maroulis, was unable to attend the site until 19 April 2016. The applicant says that under clause 8 in the TOS, it is entitled to claim an extension of time of 13 days, that being the period from 6 April 2016 (the anticipated completion date and intended inspection date for the experts) to 19 April 2016 when Mr Maroulis was able to attend to inspect works. A 13 day extension extends the due completion date from 11 April 2016 to 24 April 2016. As I understand it, the respondent now does not take issue with this. On the evidence before me, I find the due date for completion of the rectification works was 24 April 2016.
- 19 It is unclear, from the evidence before me, the extent to which Mr Lees and Mr Croucher, following their inspection, made directions as to further works required to bring the rectification works (that is the portion of the rectification works requiring their certification) to satisfactory completion. What is clear, however, is that Mr Lees and Mr Croucher certified satisfactory completion of the rectification works on 28 April 2016. The certification is confirmed in a letter emailed by Mr Lees to the applicant dated 28 April 2016, which states:

The information provided in your report dated 20/4/2016 with the photos of the completed "outstanding" items has been reviewed and discussed with Mr Croucher. We are both of the opinion that a further inspection is not necessary and we consider the works to be complete.
- 20 The respondent does not dispute that the letter confirms Mr Lees' and Mr Croucher's certification of satisfactory completion of the rectification works. However, the respondent says that Mr Lees and Mr Croucher should not have provided their certification because the works were not in fact satisfactorily completed.
- 21 Mr Mouralis' and Mr Brodribb's certification of satisfactory completion of the air-conditioning works is not contentious. On 27 April 2016, Mr Brodribb sent photos to Mr Maroulis and an email confirming his

satisfaction with the works. On 29 April 2016, Mr Maroulis emailed the parties representatives advising:

Based on our inspection and the photos sent to me by Peter Brodribb I am satisfied that the air-conditioning works that were to be undertaken as part of the legal settlement, have been completed satisfactorily.

22 As to the date of completion of the rectification works, the applicant says it completed the works by 27 April 2016, and that this date can also be presumed because:

- a) it is clear from the certification of Mr Lees and Mr Croucher that the last item for their consideration in certifying satisfactory completion of the works was a report dated 20 April 2016; and
- b) it is clear from an email from Mr Brodribb to Mr Mouralis and the parties representatives dated 27 April 2016 that:
 - i. Mr Brodribb, at that time, considered the air-conditioning works to have been satisfactorily completed, and
 - ii. the photos referred to in Mr Mouralis' above-mentioned email dated 29 April 2017 were sent to him by not later than 27 April 2016.

23 As I understand it, the respondent accepts that 27 April 2016 may be taken as the date the rectification works were purportedly completed (noting the respondent maintains that the certification of Mr Lees and Mr Croucher should not have been given). On the evidence before me, I accept 27 April 2016 as the date of completion of the rectification works.

24 As noted above, the due date for completion of the rectification works was 24 April 2016. The actual completion date was three days later, 27 April 2016. The applicant says that the deduction allowance for late completion should be \$3428.57, calculated as 3/7ths of \$8000. After allowing such deduction, the applicant says it was entitled to payment of \$135,571.43, and pursuant to clause 2 in the TOS, the payment ought to have been made by 6 May 2016, that being 7 days after the last of the experts' certifications.

25 The respondent says that if it is determined that it was obliged to make the settlement payment to the applicant, it accepts 6 May 2016 as the due date for payment, but it says that the deduction for late completion should be \$8000. It says that the allowance of \$8000 per week provided for in clause 6 in the TOS should be construed as \$8000 for each week *or part week*.

26 It could just as easily be argued, in my view, that \$8000 per week be construed as \$8000 for each *complete* week, so that a delay of 3 days attracts no deduction at all.

27 It is clear, from the terms of the TOS, that the parties intended there should be an allowance for late completion of the works. In my view, in the face of

the ambiguity as to what, if any, allowance should be made for *part* of a week, the intention of the parties is best met by allowing a pro-rata deduction as suggested by the applicant. That is, an allowance of 3/7ths of \$8000 provides, in my view, an outcome that sits most comfortably with the intention of the parties insofar as that intention can be ascertained from the TOS.

- 28 I am satisfied that \$3428.57 is the appropriate deduction for late completion, leaving a sum of \$135,571.43 due and payable to the applicant on 6 May 2016.
- 29 I will now discuss the reasons why I accept the applicant's submissions that the respondent has no entitlement to withhold the payment.

Expert Certification

- 30 The respondent objects to Mr Lees' and Mr Croucher's certification as to satisfactory completion of the rectification works. The respondent asserts that the works were not satisfactorily completed and it proffers alternative expert opinion to support the assertion.
- 31 It is not unusual in building disputes for parties to enter terms of settlement which nominate a designated expert consultant to certify whether designated rectification works have been satisfactorily completed. As part of their agreement to bring finality to their dispute, parties agree to accept as binding the evaluation or certification of an expert consultant who has been selected by the parties.
- 32 In such cases, where parties have agreed upon expert evaluation, the guiding principle is that the evaluation will generally be unimpeachable provided it has been carried out in accordance with the terms of the agreement between the parties.¹
- 33 Mr Lees and Mr Croucher performed the task assigned to them under the TOS. They inspected rectification works carried out by the applicant and they certified that such works had been satisfactorily completed. That the respondent, or another building consultant, may have a differing view to Mr Lees and Mr Croucher is beside the point.
- 34 The respondent submits that Mr Lees and Mr Croucher ought not to have certified the works because the applicant did not comply with the 'instructions' of Mr Lees and Mr Croucher in respect of the works. The respondent seeks to present the opinion of another building consultant, Mr Beck, in this regard. The respondent says that Mr Beck's opinion, that the rectification works were not satisfactorily completed, demonstrates that Mr Lees and Mr Croucher's instructions were not followed. The respondent says further that, by certifying satisfactory completion of the works when

¹ Legal & General Life of Australia Ltd v A Hudson Pty Ltd [(1985) 1 NSWLR 314, AT 331-337 per McHugh JA

their own instructions had not been followed, Mr Lees and Mr Croucher have not acted in accordance with the TOS.

- 35 I do not accept the respondent's submission. It is simply another way of saying that the Respondent disagrees with the opinion of Mr Lees and Mr Croucher. Whether or not any 'instructions' were given, expressly or impliedly, the simple fact remains that Mr Lees and Mr Croucher inspected the works and certified them as having been satisfactorily completed. They have not acted beyond, or contrary to, their roles as set out in the TOS. Their certification that the works were satisfactorily completed is unequivocal. In these circumstances, the respondent's submission is rejected.

Set – off

- 36 The respondent submits that it is entitled to set-off, against its obligation to make the settlement payment under the TOS, claims it has against the applicant.

Alleged Implied term

- 37 The first claim arises from an alleged implied term in the TOS. The respondent says that the TOS include an implied term that the rectification works would be undertaken with due care and skill. It says the term is implied by section 8 of the *Domestic Building Contracts Act 1995* ("the DBC Act"). It says the rectification works have not been carried out with due care and skill.
- 38 Section 8 of the DBC Act sets out mandatory warranties in respect of domestic building work which are implied into domestic building contracts ("the s.8 warranties"), one of those warranties being that the builder warrants that the work will be carried out with reasonable care and skill.
- 39 Under section 3 in the DBC Act, a 'domestic building contract' is defined as "a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor."
- 40 As I understand it, the respondent submits that the TOS is a contract which provides for the carrying out of *domestic building work*, and as such the TOS itself is a *domestic building contract* which includes the implied s.8 warranties in respect of the rectification works. The respondent says the warranty as to works being carried out with reasonable skill and care has been breached, and that it now has a claim for damages in respect of that breach. It says that such claim can be set off against its obligation to make the settlement payment under the TOS.
- 41 In my view, this is really a submission that the applicant has no entitlement to the settlement payment because it has breached the TOS, rather than a potential set-off of claims.
- 42 Whichever way it is put, I do not accept the submission.

- 43 By its claim filed in the respondent's counterclaim proceeding, the respondent alleged, amongst other things, a breach of the s.8 warranties by the applicant.
- 44 The TOS recites the building contract, the dispute in relation to that contract, and the proceedings brought by the parties in respect of the dispute. The TOS then sets out the terms on which the parties agree to settle the dispute and the proceedings.
- 45 I do not accept that the TOS constitutes a new, separate *domestic building contract*. In my view, the TOS is properly characterised as a contract to settle disputes arising under an *existing* domestic building contract, that existing domestic building contract being the original contract between the parties for the construction of the apartment complex. The disputes in relation to that existing contract included allegations by the respondent as to the applicant's breach of the s.8 warranties in respect of alleged defective building works. The disputes were settled by the TOS which provided, amongst other things, that the rectification works would be carried out and certified as satisfactorily completed by nominated experts. In my view, there is no implied additional requirement that the rectification works meet some other form of quality evaluation or certification.

New claim

- 46 The respondent says it has a new claim in respect of defective building works in the apartment complex which have emerged or become apparent after the parties entered the TOS. The respondent says the claim is significant in that the cost to rectify the defects will exceed \$100,000, and in this regard it relies upon expert reports it has recently obtained.
- 47 The respondent may well have such a new claim, however I do not accept that the respondent's obligation to make the settlement payment under the TOS may be set off against any such new claim.
- 48 As noted in the applicant's submissions, the TOS did not purport to, and do not, exclude potential future liability of the applicant in respect of 'breaches' which were not known or could not have reasonably been known to the respondent at the time the TOS were executed. The parties agreed that the settlement payment would be made on the happening of specified events, while at the same time agreeing that future claims might be brought by the respondent. The TOS do not sanction a set-off between the settlement payment obligation and future claims that might arise before the settlement payment is made.
- 49 Can there be an equitable set-off of the respondent's obligation to make the settlement payment against the respondent's alleged new claim?
- 50 The guiding principle is that in determining whether there is an equitable set-off between claims, one must consider the nature of the connection

between the claims and the closeness of such claims, and whether the connection is sufficient to impeach the plaintiff's [applicant's] claim.²

- 51 Is there a nexus or closeness between the applicant's claim for payment pursuant to the TOS, and the respondent's new 'claim' for damages in respect of alleged defective building works, sufficient to impeach the applicant's claim? In my view, there is not sufficient closeness.
- 52 The applicant's claim is for payment pursuant to the agreement between the parties as set out in the TOS. That the respondent may bring a new claim, such as it now asserts, is testament to the preservation of the respondent's right in respect of 'unknown' breaches pursuant to clause 15 in the TOS. The preservation of such right is also mandated by section 10 of the DBC Act. In my view, the applicant's claim for payment owing pursuant to the TOS is not closely related or connected to the respondent's potential new claim as to alleged defective building works.
- 53 Clause 15 in the TOS recognises the possibility of future claims of the type the respondent now raises. In my view, the TOS demonstrate the parties' intention that the respondent's obligation to make the settlement payment stands clear of, and cannot be altered by, a possible future claim such as the one now raised by the respondent. The TOS goes so far as to confirm the respondent's 'irrevocable' consent to orders in favour of the applicant in the event the settlement payment was not made. In my view, it would not be equitable to release the applicant from its 'irrevocable' consent.
- 54 For completeness, I confirm that I reject the respondent's submission that it is entitled to reinstate the proceedings (the applicant's proceeding and/or the respondent's counterclaim proceeding) to prosecute its alleged new claim. Any new claim the respondent may have is precisely that, a *new* claim. The claims in the existing proceedings were settled on the terms set out in the TOS. As noted above, the TOS preserves the respondent's entitlement to bring a new claim for breaches unknown at the time the TOS was executed. If the respondent wishes to prosecute a new claim, it must commence a new proceeding.

Property damage and cleaning

- 55 In its written submissions, the respondent makes reference to a sum of \$5000 incurred in respect of temporary repairs by a plumber. Affidavit material filed by the respondent exhibits correspondence from the respondent's lawyer to the applicant's lawyer dated 5 May 2016 which makes reference to, amongst other things, broad cost estimates to rectify alleged defective works, property damage, and cleaning costs.
- 56 The basis upon which the respondent raises these matters is not entirely clear, as they were mentioned only very briefly at the hearing.

² Lakic v Prior [2016] VSC 293 at [167]

57 In my view, to the extent the respondent might be entitled to pursue these claimed items, they are claims that belong in a new proceeding. For the reasons already canvassed, the respondent is not entitled to a set-off against its obligation to make the settlement payment under the TOS.

Service charges

58 In written submissions, the respondent briefly refers to an agreement, and a related dispute, as to payment of certain service charges, such as electricity, incurred during the period of construction. In the written submissions, the respondent suggests that this item is 'intrinsically tied' to the TOS and 'ought be dealt with as part of a set off.' At the hearing, the respondent's solicitor confirmed that this submission was no longer pursued.

Estoppel

59 The respondent says that there is a possibility that it might be estopped from prosecuting a new claim, or parts of a new claim, in a new proceeding.

60 That may well be the case. The applicant might successfully argue, in any new proceeding, that the respondent is estopped from bringing the claim, or parts of the claim. An estoppel might arise by reason of the release in clause 15 of the TOS.

61 However, such possibility does not raise an entitlement to the respondent to avoid its obligation to make the settlement payment under the TOS. If the respondent brings a new proceeding, the applicant will no doubt raise arguable defences. The possibility that the applicant might succeed in its defence has no bearing on the respondent's current obligation to make the settlement payment.

Finding

62 For the above reasons, I find that the respondent had no entitlement to withhold payment of the settlement payment, \$135,571.43, when it was due on 6 May 2016, and no entitlement to withhold the payment has subsequently arisen.

Costs

63 The applicant seeks an order that the respondent pay the applicant's costs of the reinstated proceeding.

64 Having determined that the applicant is entitled to the settlement payment under the TOS, I accept the applicant's submission that it is also entitled to costs pursuant to clause 13.2 in the TOS.

65 The respondent concedes that, in the event I find [as I have] that the applicant is entitled to receive the settlement payment, the applicant would also be entitled to costs pursuant to clause 13.2 in the TOS.

- 66 Clause 13.2 in the TOS provides that the costs shall be all *reasonable* costs incurred by the applicant in reinstating the proceeding and obtaining a determination.
- 67 There are generally two alternative bases for calculating costs, namely “standard” and “indemnity”. The “standard” basis generally includes all costs necessary or proper for the attainment of justice or for defending the matter. The higher “indemnity” basis generally includes all costs *actually* incurred save in so far as they are of an unreasonable amount or have been unreasonably incurred.
- 68 The applicant seeks costs ordered on an indemnity basis, whereas the respondent says the standard basis is the appropriate level.
- 69 Having regard to the fact that the TOS specify that the costs be the *reasonable* costs incurred by the applicant, I think it is appropriate to order costs on a standard basis.
- 70 Having regard also to rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008*, which provides that, unless the tribunal orders otherwise, the applicable Scale of costs for a costs order made by the tribunal is the County Court scale, I will order that the respondent pay the applicant’s costs of the reinstatement application which, if not agreed, are to be assessed pursuant to the County Court scale on a standard basis.

Interest

- 71 The applicant also seeks an order for interest on the settlement payment. It says payment of interest is contemplated under clause 13.4 in the TOS. Alternatively, it seeks an order for interest pursuant to the Tribunal’s general discretion. The applicant submits the interest should be calculated from the day after the settlement payment was due, 7 May 2016, at the rate prescribed from time to time pursuant to section 2 of the *Penalty Interest Rates Act 1983*.
- 72 The respondent submits that, in the event I determine [as I have] that the applicant is entitled to payment of the settlement payment, interest should not be awarded because the TOS do not provide for it.
- 73 Unlike the applicant’s entitlement to costs, which is clearly specified in the TOS, the TOS do not specify an entitlement to interest.
- 74 Clause 13 in the TOS is the general clause setting out the applicant’s entitlement to reinstate the proceeding and to obtain a determination. Sub-clause 13.2 specifies the applicant’s entitlement to payment of the settlement payment (to the extent it has not been paid) plus reasonable costs.
- 75 The only reference to ‘interest’ in the TOS is in clause 13.4 which references affidavit material to be filed setting out details of the alleged default, payments made and the orders being sought ‘*including calculation of the outstanding balance and any interest and costs*’ [underlining added].

- 76 A reference to how *any* interest might be calculated does not equate to an entitlement to an order for interest. I do not accept that the TOS provide any entitlement to the applicant to seek an order for interest on top of an order for the settlement payment and costs.
- 77 Nor do I accept that the tribunal has, in this case, a general discretion to order interest. By the TOS, the parties agreed to the terms upon which the proceedings were settled. The agreement includes, in the event the settlement payment is not made as required pursuant to the TOS, an entitlement to the applicant to apply to have the proceeding reinstated for the purpose of obtaining orders for payment of the settlement payment outstanding and reasonable costs. The applicant has made such application. In my view, the tribunal does not have a general discretion to expand on the applicant's entitlements, beyond those specified in the TOS. For this reason, I find that there should be no order for interest.

Conclusion

- 78 For the reasons set out above, I will order the respondent to pay the applicant \$135,571.43. I will also order that the respondent pay the applicant's costs of the reinstated proceeding, including the costs of the application to reinstate the proceeding, the sum of such costs, if not agreed, to be assessed by the Victorian Costs Court on a standard basis pursuant to the County Court scale.
- 79 For completeness, I note the discussion at the hearing as to a possible deduction, from the sum to be paid to the applicant, of \$1,100 owed to one of the expert consultants. The matter had been raised in prior correspondence between the parties' lawyers. As indicated to the parties at the hearing, I will not make any deduction, or order, in relation to payment to an expert consultant. The parties may reach their own agreement in relation to this.

SENIOR MEMBER M. FARRELLY

THE VICTORIAN CIVIL & ADMINISTRATIVE TRIBUNAL
DOMESTIC BUILDING LIST
(Victorian Civil & Administrative Tribunal Act 1998)

BETWEEN

Element Five Pty Ltd	E5
- and -	
Asseraf Superannuation Pty Ltd (ACN 144 786 514) atf Asseraf Superannuation Fund	Asseraf

TERMS OF SETTLEMENT

DATED the 30th day of January 2015

WHEREAS:

- I. Element Five Pty Ltd ("E5") and the Asseraf Superannuation Pty Ltd (ACN 144 786 514) atf the Asseraf Superannuation Fund ("Asseraf") entered into a building contract dated 1 April 2011 ("the Contract") for the construction of a basement and 13 apartments ("the Works") at 516 Glenferrie Road, Hawthorn, in the State of Victoria ("the Property").
- II. A dispute arose between E5 and Asseraf in relation to the Works performed and monies owed under the Contract ("the Dispute").
- III. E5 and Asseraf each filed separate applications in VCAT (proceeding numbers BP56/2014 and BP97/2014 ~~and #11~~) to determine the issues comprised in the Dispute ("the Proceedings").

In the interests of avoiding further costs and expense, the parties have agreed to a settlement of the Proceedings and the Dispute in the following terms:

1. Subject to the Lees/Croucher Certification and the Maroulis/Brodribb Certification and paragraph 6 of these Terms, Asseraf will pay E5 the sum of \$139,000 ("the settlement sum").
2. Payment of the settlement sum shall be made from Asseraf's lawyers trust account to E5 within 7 days of the Lees/Croucher Certification and the Maroulis/Brodribb Certification ("the due date").
3. Subject to the performance of these Terms of Settlement by Asseraf, E5 agree to undertake the following work:
 - a. The work identified in the joint report prepared by Rob Lees and Tony Croucher dated 27/28 January 2015 annexed to these Terms of Settlement;
 - b. The work identified in the drawing entitled "Mechanical Services Ducted A/C Unit Option to meet MRA Architect Specification" dated Feb 2014 prepared by NJM design consulting engineers annexed to these Terms of Settlement;

ToS NOVEMBER 2006



- (f) arrange for Lase Electrics to attend the Property and undertake any work recommended by Lase Electrics in relation to the ^{intercom common lighting of the building and the outage of power} fence
- c. Rectification to the satisfaction of Rob Lees and Tony Croucher of the boundary fence between 514 and 516 Glenferrie Road, Hawthorn;
 - d. Remove the mulch from the retaining wall referred to in item 14 of the joint report prepared by Lees and Croucher dated 27/28 January 2015 annexed to these Terms of Settlement and replace it with crushed rock;
 - e. Remove the compressed cement sheet in the balustrade identified in item 15 of the joint report prepared by Lees and Croucher dated 27/28 January 2015 annexed to these Terms of Settlement and replace it with a balustrade to the required height in accordance with the design drawings that formed part of the Contract;
- (c) Replace the kickboard and dishwasher panel in apartment number 12; and
 (h) Install additional soundproofing between bedroom 1 of apartments 3 and 4 to achieve a D(ntw)=C(tr) of at least 45 (collectively the "Rectification Work")

4. E5 shall commence the Rectification Work upon the later of the following:
 - a. Asseraf providing E5 with exclusive, vacant and unfettered possession of the Property;
 - b. 6 weeks after Asseraf provides E5 with written notice of when exclusive, vacant and unfettered possession of the Property will be available;
 - c. 10 weeks after Asseraf provides E5 with a reasonable opportunity to inspect apartments 7, 12 and 14;
 - d. confirmation to E5's lawyer from Asseraf's lawyer that the settlement sum has been paid into the trust account of Asseraf's lawyer; and
 - e. Asseraf and E5 signing an existing conditions report of the Property
 provided that such commencement date is not between the period of 1 December 2015 and 26 January 2016 ("the Commencement Date")
5. Subject to clause 8 below, ~~if~~ E5 shall complete the Rectification Work within 8 weeks of the Commencement Date.
6. Subject to clause 8 below, ~~if~~ E5 fails to have the Rectification Work completed within 8 weeks of the Commencement Date, E5 shall pay Asseraf the sum of \$8,000 per week, which sum may be deducted from the settlement sum.
7. The parties agree to appoint:
 - a. Rob Lees and Tony Croucher as the joint independent experts to certify whether the Rectification Work identified in paragraph 3 (a), (c), (d), (e) and (f) has been satisfactorily completed; and
 - b. John Maroulis and Peter Brodribb as the joint independent experts to certify whether the Rectification Work identified in paragraph 3 (b) has been satisfactorily completed.
8. E5's lawyer shall provide notice to Asseraf's lawyer at least 7 days prior to the date upon which E5 considers that the Rectification Work will be completed. E5 shall arrange for Rob Lees and John Maroulis to attend the Property on the date identified in the notice. Asseraf shall arrange for Tony Croucher and Peter Brodribb to attend the Property on the date identified in the notice. If either party is not able to arrange for its experts to attend on the date specified in the notice, or any of Rob Lees, Tony Croucher, John Maroulis or Peter Brodribb fail to provide notice within the time required under clauses 9 and 10 of these Terms, E5 shall be entitled to an extension of time to the period set out in clause 5 from the date in the notice until all experts are able to attend the Property and/or the date that Rob Lees, Tony Croucher, John Maroulis or Peter Brodribb provide their notice pursuant to clauses 9 and 10 after they were required to provide their notice under clauses 9 and 10 of these Terms.

ToS NOVEMBER 2006

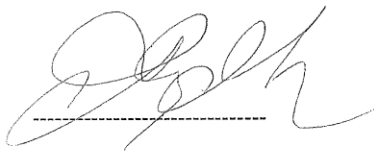
[Handwritten signature] S.A.

9. Rob Lees and Tony Croucher will report to the parties within 2 business days of their inspection on their opinion of whether the Rectification Work identified in paragraph 3 (a), (c), (d), (e) and (f) has been satisfactorily completed ("Lees/Croucher Certification"). If Rob Lees and Tony Croucher consider that the Rectification Work identified in paragraph 3 (a), (c), (d), (e) and (f) has not been satisfactorily completed they will provide the parties within 2 business days of their inspection what further work is required to be undertaken by E5. This process and that identified in paragraph 8 will continue until Rob Lees and Tony Croucher are satisfied that the Rectification Work identified in paragraph 3 (a), (c), (d), (e) and (f) has been satisfactorily completed.
10. John Maroulis and Peter Brodribb will report to the parties within 2 business days of their inspection on their opinion of whether the Rectification Work identified in paragraph 3 (b) has been satisfactorily completed ("Maroulis/Brodribb Certification"). If John Maroulis and Peter Brodribb consider that the Rectification Work identified in paragraph 3 (b) has not been satisfactorily completed they will provide the parties within 2 business days of their inspection what further work is required to be undertaken by E5. This process and that identified in paragraph 8 will continue until John Maroulis and Peter Brodribb are satisfied that the Rectification Work identified in paragraph 3 (b) has been satisfactorily completed.
11. E5 agrees to pay the cost at the rates previously charged to the parties associated with the work the subject of the Lees/Croucher Certification and the Maroulis/Brodribb Certification.
12. The parties agree to not communicate with any of Rob Lees, Tony Croucher, John Maroulis and/or Peter Brodribb in a manner that attempts to affect the independence of either Rob Lees, Tony Croucher, John Maroulis and/or Peter Brodribb.
13. Should the settlement sum (or any part thereof) not be paid by the due date, E5 and Asseraf irrevocably consent to the following:
 - 13.1 the whole of the settlement sum, less any payments previously made, will immediately become due and payable,
 - 13.2 E5 will be at liberty to apply to have the proceeding reinstated and to obtain a determination for the sum then outstanding plus all reasonable costs incurred in so doing,
 - 13.3 these terms of settlement may be produced as conclusive evidence of all necessary consents on the part of E5 and Asseraf, and
 - 13.4 the party seeking a default determination must either file and serve an affidavit setting out details of the alleged default including details of any payments made and the orders sought (including calculation of the outstanding balance and any interest and costs) or may write to the Tribunal and the other party giving notice of their intention to seek a default determination setting out the above details and be prepared to give sworn evidence in any hearing of their application.
14. The parties agree and consent to the following orders being made by the Tribunal in the Proceedings:
 - 14.1 the Proceedings are struck out with a right to apply for reinstatement, and

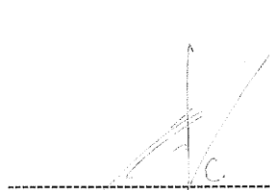
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14.2 no order as to costs.

15. In consideration of the parties entering into these terms of settlement and subject to their performance, the parties mutually release and discharge each other and all of their past and present directors, officers, agents and assigns from all further claims, demands, suits and costs of whatsoever nature, however arising out of or connected with the subject matter of the Dispute, the Contract, the Works, the Proceedings and subject to the Lees/Croucher Certification and the Maroulis/Brodribb Certification, the Rectification Work . Where the Owner is a party, this release does not apply to a breach other than a breach that was known, or ought reasonably to have been known, to the Owner to exist at the time these Terms of Settlement were executed.
16. The parties agree to keep these Terms of Settlement and all discussions and negotiations leading up to their execution confidential save and except where required by law to disclose them or to obtain legal advice.



Executed for and on behalf of Element Five Pty Ltd



Executed for and on behalf of Asseraf Superannuation Pty Ltd (ACN 144 786 514) at the Asseraf Superannuation Fund

ToS NOVEMBER 2006