VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP271/2018

CATCHWORDS

Domestic building – terms of settlement reached at compulsory conference – breach – repudiation – interpretation of terms – whether Senior Member conducting the compulsory conference can give evidence – objective test – evidence of the parties' intentions inadmissible – plain, natural or common meaning of words to be used – proceeding reinstated.

APPLICANTS	Alon Kedmi, Adi Kedmi-Halevy
RESPONDENT	Mass Constructions & Developments (ACN: 153 423 440)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Reinstatement Hearing
DATE OF HEARING	26 September 2018
DATE OF ORDER	4 October 2018
CITATION	Kedmi v Mass Constructions & Developments (Building and Property) [2018] VCAT 1528

ORDERS

1. On the application of the applicants, the proceeding is reinstated.
2. The respondent must pay the applicants $70,000.
3. The respondent must pay the applicants' costs fixed at $560.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr Kedmi and Ms Kedmi-Halevy in person
For the Respondent	Mr D. Caillard, solicitor

REASONS

1. In this proceeding, the applicants originally brought a claim against the respondent for allegedly defective building work carried out at their property by the respondent. The parties attended a compulsory conference on 12 July 2018, which was convened pursuant to Division 5 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"). The compulsory conference was conducted by a Senior Member of this Tribunal ("the Senior Member").

2. The parties settled their dispute at the compulsory conference and signed a written document headed "Terms of Settlement".

3. The application before me was brought by the applicants seeking to enforce the Terms of Settlement, on the grounds that the respondent failed to comply with its terms. The respondent contends that the applicants repudiated the terms of settlement, which repudiation it accepted, and as a result it had no obligations to perform under the terms.

4. Both parties consented to me viewing the Terms of Settlement. The basis of the document was the Building and Property List's pro forma terms for domestic building disputes, with one crucial hand-written addition. The relevant clauses are as follows:

    1. The respondent will pay the applicants the sum of $70,000…

    2 Payment is to be made by instalments of $10,000 on the 15th of each month, commencing on 15 August 2018.

    3 Should the settlement sum (or any part thereof) not be paid by the due date…:

        3.1 the whole of the settlement sum, less any payments previously made will immediately become due and payable, [and]

        3.2 the applicants 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…

    6. There will be no further public disparagement by either party of the other.

5. It is clause 6 which was the hand-written addition, written by the Senior Member. The dispute between the parties turns on the interpretation of that clause, which they refer to as the "Non-Disparagement Clause". Both parties agreed that this clause was an essential term of the agreement.

6. Prior to the compulsory conference being held, the applicants had posted negative reviews of the respondent on the internet, including on websites called Google Reviews, Buildism and Facebook. Following the

compulsory conference, those reviews remained on those websites; the applicants did nothing to remove them. The respondent's solicitors wrote to the applicants on multiple occasions demanding that they remove the existing reviews and alleging that while the reviews remained on the internet, they are public and constitute ongoing disparagements. The respondent contends that disparagement is analogous to defamation and the law of defamation considers that a defamatory remark occurs when a third party reads the publication rather than the time that the publication was made. Each time a third party reads one of the disparaging reviews after the date of settlement, the applicants are therefore breaching the Terms of Settlement.

7. By letter dated 14 August 2018, the respondent's solicitors advised the applicants that:

> "Relying upon the severity of the ongoing breach of the non-disparagement clause, your express refusal to perform the clause despite explanation of the correct interpretation of that clause, and upon the essentiality of the non-disparagement clause to our client, our client accepts your repudiation of the Terms of Settlement and terminates that agreement."

8. The applicants responded to the respondent's solicitors' letters by denying that they were in breach of the Non-Disparagement Clause, saying that the clause applied to future conduct only. They said they have not posted any further reviews on the internet since the compulsory conference (which was conceded). They also said that the respondent was well aware that the term was to prevent future reviews being posted, and did not require any past reviews to be removed. They said this was what was expressly discussed and negotiated during the compulsory conference.

9. The applicants were not legally represented at the hearing before me. They requested that the Senior Member either conduct this hearing, or be called to give evidence about the meaning of the Non-Disparagement Clause, because they were aware of what was discussed and negotiated during the compulsory conference, as can be seen from the fact it was their handwriting which recorded the clause.

10. The respondent' solicitor opposed the application, saying that the clause speaks for itself and should be interpreted "on its face".

11. I explained to the applicants during the hearing that I refused their application to have the Senior Member either hear this application or give evidence. The reasons I gave included that:

    a. The compulsory conference was a confidential process. Orders were expressly made at the commencement by consent that:

"Everything said and done in the course of the compulsory conference is confidential with the exception of the exceptions to s 85 of the *Victorian Civil and Administrative Tribunal Act* 1998".

b. This order is in addition to s.85, which relevantly provides:

> Evidence of anything said or done in the course of a compulsory conference is not admissible in any hearing before the Tribunal in the proceeding, except –
>
> (a) where all parties agree to the giving of the evidence; or
>
> (b) evidence of directions given at a compulsory conference or the reasons for those directions; or
>
> (c) evidence of anything said or done that is relevant to –
>
> (i) a proceeding for an offence in relation to the giving of false or misleading information;
>
> (ii) a proceeding under section 137 (contempt); or
>
> (iii) a proceeding in relation to an order made under section 87(b)(i) [if a party fails to attend a compulsory conference].

c. As the respondent did not agree to evidence being given about the negotiations during the compulsory conference, none of the exceptions to admissibility in s.85 are apply.

d. Further, pursuant to s.143 of the Act, the Senior Member cannot be compelled to give evidence about what happened during the compulsory conference. This section has been considered in relation to mediation. As a compulsory conference is a form of alternative dispute resolution like a mediation, the comments are apt. In *Everest v Credit Corp Services Pty Ltd*[1] Deputy President, Cate McKenzie held:

> 12. I conclude that part of the protection given to mediators by s.143 of the VCAT Act is protection from being compelled to give evidence in the proceeding in which they have acted as mediators. In my view there is good public policy reason why this should be so. If a mediator could later be compelled to give evidence about what happened surrounding the mediation albeit not about the mediation itself, parties would be deterred from going to mediation by consent, speaking freely immediately before and after the mediation and for that matter during it, and

[1] [2004] VCAT 1823 at [12-13]

> from settling. The whole mediation process would be less effective or even futile

e. Lastly, and perhaps most significantly, any evidence that could be given by the Senior Member is irrelevant to my task of interpreting the written terms of an agreement. As was held in *Everest:*

> 13. the question of what the common intention of the parties may have been as to the outcome of the mediation can be satisfactorily decided by the Tribunal on the evidence of the parties. It is not the mediator's understanding of the parties' intention that is relevant here, but the intentions of the parties themselves.

12. The test to be applied when interpreting a term of an agreement was recently confirmed by the High Court in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*[2] at [47-50]:

> 47. In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
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> 48. Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning. …
>
> 50. … What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

13. This approach was recently applied by the Victorian Court of Appeal in *Eureka Operations Pty Ltd v Viva Energy Australia Ltd*[3] and *Melbourne Linh Son Buddhist Society Inc v Gippsreal Ltd*[4].

14. In applying this test to the present proceeding, it is unarguable that any evidence that could be given by the parties or by the Senior Member as to the parties' intentions when negotiating the Non-Disparagement Clause is inadmissible and irrelevant.

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[2] (2015) 256 CLR 104
[3] [2016] VSCA 95
[4] [2017] VSCA 161

15. Accordingly, I must interpret the meaning of the Non-Disparagement Clause, based on the language used by the parties. It is only if the expression is ambiguous, that evidence of surrounding circumstances may be adduced. Again, the surrounding circumstances do not include evidence of the parties' intentions.

16. In any event, I am satisfied that the language of the clause is unambiguous. The relevant words used are "there will be no further public disparagement". The plain, natural or common meaning of the words used is that neither party will do anything <u>further</u> to disparage the other. Doing anything <u>further</u> requires an extra step to be taken. Posting new adverse reviews online would be a further step. However simply leaving what had already been done is not an extra step. Steps that were taken prior to the terms of settlement being agreed are not further steps.

17. Further, there is no reference in the clause (or anywhere else in the Terms of Settlement) to the law of defamation. On the face of the document, there is no basis to imply that the law of defamation should apply. The plain and common meaning of the words "further disparagement" does not require them to be interpreted through the lens of defamation law. If the respondent had intended the word "further" to have the meaning it may do in defamation law, it should have used that definition in drafting the clause.

18. Accordingly, I find that the applicants have not taken any "further steps to publicly disparage" the respondent since signing the Terms of Settlement. They did not repudiate the agreement.

19. As a result of this finding, I find that the respondent is in breach of the Terms of Settlement by failing to pay the first and second instalments of the settlement sum, due 15 August and 15 September 2018.

20. The applicants have elected to rely on clause 3 of the Terms and seek to have the proceeding reinstated and obtain a determination for the sum of $70,000, plus all reasonable costs incurred in so doing.

21. They advised me that their costs are as follows:

Their attendances at the reinstatement hearing – 2 people for 4 hours each @ $70/hour	$560
Their legal costs of and associated with the compulsory conference – • barrister (per memorandum of fees 13.7.18) • solicitors (per invoice 25.7.18)	 $3080 $3596
Total	**$7236**

22. The Terms of Settlement provides that the costs to be paid by the respondent are "all reasonable costs incurred in [having the proceeding

reinstated and obtaining a determination]". There is no reference to s.109 of the Act, and accordingly I need only consider whether or not the costs claimed are reasonable.

23. I will allow the applicants their costs of $560 for their attendances at the reinstatement hearing. I find it reasonable that they attended, and reasonable that they should be reimbursed for their time. Mr Kedmi said that this hourly rate is what he and his wife would earn if they were not at the Tribunal. The other costs claimed by them are not costs incurred in having the proceeding reinstated and obtaining a determination. They are the cost of the compulsory conference itself and are not costs thrown away, since it is the Terms of Settlement that were agreed at that compulsory conference which are the basis for the order made today.

Orders

1. On the application of the applicants, the proceeding is reinstated.

2. The respondent must pay the applicants $70,000.

3. The respondent must pay the applicants' costs fixed at $560.

SENIOR MEMBER S. KIRTON