

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP1095/2015

**CATCHWORDS**

Building and property list - Application for reinstatement - matter previously settled - no new fact or circumstances. Costs- no reasonable basis in fact of law for making application. *Victorian Civil and Administrative Tribunal Act 1998* (Vic) - s 109.

<b>FIRST APPLICANT</b>	Mrs Caroline Seecamp
<b>SECOND APPLICANT</b>	Mr Marcus Seecamp
<b>FIRST RESPONDENT</b>	Michael Parker Building Pty Ltd (ACN 135 086 761)
<b>SECOND RESPONDENT</b>	Mr Michael Parker
<b>THIRD RESPONDENT</b>	NJG Building Surveyors Pty Ltd (ACN 115 282 089)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Robert Davis, Senior Member
<b>HEARING TYPE</b>	Reinstatement Hearing
<b>DATE OF HEARING</b>	25 September 2018
<b>DATE OF ORDER</b>	25 September 2018
<b>DATE OF WRITTEN REASONS</b>	19 November 2018
<b>CITATION</b>	Seecamp v Michael Parker Building Pty Ltd (Building and Property) [2018] VCAT 1806

**ORDERS**

1. The Applicants' application for reinstatement is dismissed.
2. The Applicants pay each of the Respondents' costs of and incidental to the application for reinstatement on a standard basis on the County Court Scale to be determined by the Costs Court in default of agreement.

**Robert Davis**  
**Senior Member**

**APPEARANCES:**

For Applicants: Ms C. Seecamp, in person and on behalf of Mr M. Seecamp

For First and Second Respondents: Mr J.D. Catlin of Counsel

For the Third Respondent: Mr J. Tesarsch of Counsel

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

## REASONS

### Reinstatement

- 1 This is an application to reinstate this proceeding.
- 2 The proceeding was struck out in chambers by Deputy President Aird on 27 October 2015 and there was a right to apply for reinstatement.
- 3 The applicants are now applying for this proceeding to be reinstated.
- 4 The proceeding was initially commenced by the applicants in 2015, where they alleged that there were breaches of the building contract in relation to the construction of their home at 41 Grantham Drive, Highton in Victoria.
- 5 The applicants also alleged that there was negligence and breach by the building surveyor in this matter. They alleged a number of defects.
- 6 The matter was referred to mediation and, on 6 October 2015, there were terms of settlements signed by all the parties.
- 7 The applicants alleged that both their lawyer and the mediator made misrepresentations to them, because they were told by their own lawyer and the mediator that the settlement would not invalidate their home warranty.
- 8 The applicants say that the proceeding has now invalidated their home warranty. I make no comment on that because I do not need to. Further, this is not a proceeding in which the applicants' lawyers are involved and, in any event, the mediator has the usual protections in the Act of mediating matters in this Tribunal.
- 9 The terms of settlement provided that the respondent denied any liability to the applicants and without any admission of liabilities the parties have settled the claim against the respondents who must make payments to the applicants. It is conceded that all payments that were due by the respondents to the applicants have been now being made and the respondents have fulfilled their side of the terms of settlements.
- 10 It is also noted that there were mutual releases in the terms of settlements where in the parties discharged each other from any and all claims and allegations in the claim that was before the Tribunal and that any other further claims connected or related to the factual circumstances that gave rise to the claim.
- 11 In particular, in paragraph 4b of the terms of settlement, it is stated that terms may be pleaded by the respondents in relation to any suit, claim, or demand. The applicants will indemnify the respondents in relation to all proceedings now or hereinafter commenced by the applicants to or either of them their successors or assigns or any other person arising out of or in

connection with the proceeding or anything which is the subject matter of the proceeding.

- 12 In my view the release clause is sufficient to bar all claims that are related to the subject matter of the proceeding.
- 13 The claims which the applicants are now making against the respondent are very similar ilk (almost identical) to those claims which were made in the original points of claim.
- 14 Therefore, they are barred by the terms of settlements.
- 15 As such, it is not open to the applicants to relitigate the matters.
- 16 The matters have been settled and are complete and it is not open to the applicants to have a “second bite of the cherry”.
- 17 The applicants complain that they were misled by their lawyer, that may or may not be a matter between them and their lawyer. It is certainly not a matter between them and the respondents in this proceeding.
- 18 The terms of settlement have been fully complied with, in so far as the respondents are concerned and the obligation of the applicant in the terms of settlement is to bar them from further proceedings as I have already referred to clause 4b of the terms of settlement.
- 19 Thus, the terms of settlement which are an agreement between the parties bar any further action.
- 20 Apparently, the applicants made a complaint to the Legal Services Commissioner about their lawyer and the commissioner has written back that the applicants had a right to go to VCAT.
- 21 However, that right to go to VCAT does not enable the applicants to do something that contractual obligation (i.e. terms of settlement) would forbid them from doing.
- 22 Thus, I place no weight on their complaint to the Commissioner, in any event that appears to be a complaint concerning the lawyer and the applicants, not the respondents in this proceeding.
- 23 Given the circumstances, in my view, the applicants cannot possibly relitigate this matters because they are barred from doing so.
- 24 That being the case, it would be fruitless to reinstate the proceeding and thus I will make an order that the application for reinstatement is dismissed.

### **Costs**

- 25 Both Counsel for the respondents made an application for costs for this application. The application is made on the basis that VCAT has jurisdiction to make an order for costs when it is fair to do so (see *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)* s109 (2)(3)).
- 26 The applicant’s claim for reinstatement had no strength and was not tenable in either fact or law (see *VCAT Act 1998* s109 (3)(c)).

- 27 I agree that the applicants' claim for reinstatement has no tenable basis in either fact or law. In fact, after I heard the applicants' submission before me and read all the materials (all the materials which the applicants put in were quite substantial), I formed the tentative view that the application did not have any basis in fact or law. This view was strengthened when I read the material by the respondents.
- 28 In order for an application for reinstatement to be successful, in this situation the applicants would need to show the terms of settlement have been breached by the respondents.
- 29 It is conceded by the applicants that the terms of settlements were not breached by the respondents. What the applicants are complaining about is the quality of the workmanship and other matters in relation to the building. That was to do with the original dispute in relation to when the parties signed terms of settlement including a release.
- 30 Thus, I find that there is no basis in fact or law for making the application for reinstatement. The respondents have had the legal representation in this matters by employing members of counsel.
- 31 In my view, it was quite reasonable they should have done so, it was important that the matters which were put to the Tribunal were put properly and also, as Counsel says on behalf of the third respondent, that there were very serious allegations made against his client and his client's professional reputation. Those allegations continued to be made up until last Sunday.
- 32 In my view, it is quite appropriate that I should award costs in this proceeding in relation to this application.
- 33 The applicants say that they were told by the Legal Services Commissioner that it was right to bring an application to VCAT. However, that seems to be a matter between them and their solicitor, even a simple reading of the letter from the Legal Services Commissioner, it is clear that the Commissioner was referring to the *Legal Profession Practice Act* and not talking about the *Building Act* or the *Domestic Building Act*.
- 34 Given those circumstances, I will make an order for costs.
- 35 The proposed order is that the applicants pay each of the respondents' costs of an incidental to the application for reinstatement on a standard basis on the County Court scale to be determined by the Costs Court in default of agreement.

**Robert Davis**  
**Senior Member**