VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D431/2005

CATCHWORDS

Domestic Building List; Application pursuant to Section 75 of *Victorian Civil and Administrative Tribunal Act* 1998; Applicants seem to enforce rights as *'builder'* under two building agreements; Whether settlement and release by one applicant whilst in liquidation provides defence to claim by other applicant; *Partnership Act* 1958 Section 37; *Building Act* 1993 Section 176

APPLICANTS	Tremaine Developments Pty Ltd, K. & K. Industries Pty Ltd
RESPONDENTS	J.G.K. Investments Pty Ltd, George Korfiatis
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	30 June 2008
DATE OF ORDER	4 July 2008
CITATION	Tremaine Developments Pty Ltd v J.G.K. Investments Pty Ltd (Domestic Building) [2008] VCAT 1338

ORDER

1 Respondents' application pursuant to Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 is dismissed.

2 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicants	Mr Horgan of Counsel, instructed by Best Hooper
For Respondents	Mr Joe Forrest of Counsel, instructed by Johnston Construction Lawyers

REASONS

BACKGROUND

1 This proceeding was commenced by the applicants, Tremaine Developments Pty Ltd and K. & K. Industries Pty Ltd as long ago as 22 June 2005. Their claim as originally formulated was in the sum of $215,655.91 plus interest and costs. The points of claim allege that the two companies were duly incorporated and carrying on business as builders. The pleading referred to them collectively as *'the builder'*. The respondents J.G.K. Investments Pty Ltd and George Korfiatis were alleged to be owners of a property known as 12 Bellview Road, East Bentleigh. The applicants were engaged by J.G.K. and Mr Korfiatis to refurbish an existing dwelling on the land and to build a small unit at the rear, hence the parties entered into two contracts, one styled *'Home Improvements Contract'* in a form published by the Master Builders Association of Victoria was executed on 20 August 2003 and related to the renovation of the existing dwelling. The second agreement bearing the same date was styled *'New Homes Contract'*. It was once again in the form HC-5 (edition 3-2001). This contract related to the construction of the new unit.

2 The proceeding has followed a tortuous course through the Tribunal through a multiplicity of interlocutory steps. It has been fixed for hearing on two occasions with those hearing dates both being vacated.

3 In their defence J.G.K. and Mr Korfiatis denied liability, alleging the works were not complete. They made a counterclaim for alleged incomplete work and defective workmanship.

4 Tremaine Developments was a company associated with Mr A. Ktori. K. & K. is a company associated with his son, Mr Hector Ktori. On 16 July 2007 Tremaine was placed into administration and Mr Vince was appointed its administrator. On 10 August 2007 Tremaine was placed in insolvent liquidation.

5 In October 2007 Mr Vince wrote to Mr Korfiatis by e-mail transmission. In that letter Mr Vince noted that Mr Hector Ktori, the principal of K. & K. had offered to purchase a motor vehicle for $9,500 with an assignment of Tremaine's interest in the *'joint venture'*. The joint venture in question was Tremaine's arrangement, whatever it was with K. & K. Mr Vince told Mr Korfiatis:

> I was of the opinion that the value attributed to the assignment of the joint venture was insufficient and accordingly, I was not willing to assign this interest.

6 I note that Tremaine and K. & K. had entered into another arrangement with the Korfiatis interests relative to a development in Port Melbourne. This contract is the subject of separate proceedings in the Tribunal. Whether the *'joint venture'* referred to by Mr Vince related solely to the Bentleigh

project, included the Port Melbourne project or included some long-term joint venture with other contracts involved is not clear. Mr Vince advised that the motor vehicle:

> Was sold for an amount of $7,500 with an allowance for roadworthy and registration in the amount of $1,000.

7 Mr Vince said that he was of the opinion that the vehicle was sold to Mr Ktori *'at market value'*. By letter dated 21 December 2007 under the heading *'Tremaine Developments (in liquidation)'* Mr Vince advised, inter alia as follows:

> I advise that I am prepared to assign the company's [that is Tremaine's] interest in the chose in action represented by the legal proceeding between the company and K. & K. Industries Pty Ltd against J.G.K. Investments Pty Ltd and George Korfiatis (File No.: D431/2005).
>
> In order to assign the company's interest in the legal proceeding relating to the Bentleigh project, I am informing you and Mr Hector Ktori of the availability of this asset so you may purchase it if you so wish.
>
> I request that if you are interested in acquiring the company's interests in the proceeding, then you should provide an offer in writing to my office by no later than 5 pm on 28 December 2007.

8 Once again, this letter was sent by e-mail transmission.

9 What offers if any were made by 5 pm, 28 December is unknown.

10 Previously Mr Fairweather of Best Hooper who commenced acting for K. & K. Industries in approximately September 2007 had a conversation with the liquidator on 26 October 2007 during which Mr Vince told Mr Fairweather that as liquidator he was prepared to assign Tremaine's interest in this proceeding to K. & K. for the sum of $22,000. Mr Fairweather had a further discussion on the same subject with Mr Vince on 14 November 2007.

11 When Mr Fairweather again spoke to Mr Vince on 15 February 2008 Mr Vince told him that he had an agreement with Mr Korfiatis *'regarding the settlement of the chose in action'*. Mr Vince declined to disclose how much had been paid by J.G.K. or Mr Korfiatis. On 20 March Mr Fairweather had a further conversation with Mr Vince in which he sought a copy of the settlement agreement. According to Mr Fairweather, Mr Vince told him that the settlement was not completed:

> As George [presumably Korfiatis] had not paid in full and that he would provide a copy of such within seven days.

12 Mr Fairweather continued to press for a copy of the settlement agreement or deed. Eventually he received a letter dated 23 April 2008 in which Mr Vince stated that despite his previous agreement to furnish a copy, he was:

> Now of the opinion that a copy of this agreement should be requested and obtained from Mr George Korfiatis.

13 Tremaine through its liquidator and K. & K. and Mr Korfiatis entered into a document styled *'deed of settlement'* dated 31 March 2008. The deed recited Tremaine's administration and liquidation and that Tremaine had agreed to resolve this proceeding:

> Against the respondents [that is J.G.K. and Mr Korfiatis] in so far as it concerned [Tremaine] and the respondents only.

14 Paragraph 1 provided for there to be consent orders in the Tribunal that Tremaine's proceeding *'be dismissed and struck out'* with no order as to costs. Clause 2 provided for a settlement sum of $5,001; $1,000 of which had already been paid to be paid in full on or before 1 April. Clause 3 provided that Tremaine accepted the settlement sum:

> In full and final settlement of the Proceedings as between the first applicant [Tremaine] and the respondents [J.G.K. and Korfiatis].

15 The clause continued that subject to receipt of the settlement sum K. & K.:

> Hereby assigns and transfers to [J.G.K. and Korfiatis] all [Tremaine's] right, title and interest in the Proceedings and in the subject matter of the Proceedings.

16 Clause 4 provided:

> [Tremaine] releases and for ever discharges [J.G.K. and Korfiatis] from any further claims, demands or actions of any description whatsoever concerning the Proceedings.

17 The balance of the settlement sum of $4,001 was it seems paid. Deputy President Aird made an order in chambers dated 24 April 2008 as follows:

> 1. The proceedings as between the first applicant and the respondents is dismissed and struck out.
>
> 2. No order as to costs.

18 This was in accordance with proposed consent orders annexed to the Deed of Settlement. These orders were made upon the basis of consents by Tremaine on the one hand and J.G.K. and Mr Korfiatis on the other. No consent was sought or obtained from K. & K.

19 J.G.K. and Mr Korfiatis through their Counsel, Mr J. Forrest, now contend that the settlement transaction releases them from any claim which might now be made by K. & K. in this proceeding or with respect to the Bentleigh project. They have sought orders under Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 for the dismissal or striking out of K. & K.'s claim on the basis that it is frivolous, vexatious, lacking in substance or otherwise an abuse of process. The essence of their contention is that the making of the composition between them on the one hand and Tremaine on the other discharges any claim which Tremaine and K. & K. had in this proceeding.

SUBMISSIONS FOR THE RESPONDENT

20 Mr J. Forrest who appeared for J.G.K. and Korfiatis submitted first, that the entitlements of Tremaine and K. & K. under the two contracts were held by them jointly. He noted first, that the agreement defined these companies as *'the builder'*. Every reference to *'the builder'* in each contract therefore referred to these companies collectively and not separately. There was he said no provision which stated that a reference to the builder included each of them. In contrast Clause 25.9 of both of the agreements stated:

> If there is more than one person named as **owner** under this **contract**, the **owners'** obligations shall be joint and several at all times.

21 The presence of this provision relative to a plurality of owners and its absence in the case of the plurality of builders invoked, said Mr Forrest, the maxim *expressio unius est exclusio alterius*, that is the expression of the one is the exclusion of the other.

22 Next, he referred to both *Halsbury's Laws of England* and *Halsbury's Laws of Australia* which include propositions to similar effect. *Halsbury's Laws of England* Volume 9(1) in the section on contract states at paragraph 1083:

> If two persons covenant generally for themselves without any words of severance, or promise that they or one of them will do a thing, a joint liability is created;

23 He referred to *Halsbury's Laws of Australia* [110-2950] where the learned editors say:

> A joint promise by two or more persons creates a single obligation incumbent upon both or all.

24 Once it was accepted as Mr Forrest submitted it should be, that any obligations which his clients owed to the building companies were owed to them jointly it followed that a release by one of the companies took effect as a release by both. He referred to *Halsbury's Laws of England* Volume 9(1) paragraph [1088] where the learned editors state:

> A release given by one of a number of joint creditors discharges the debt as against all of them, and a partner has implied authority to release any debt due to the firm so as to bind his co-partners, but a debtor will not be allowed to set up a release obtained by him from one of a number of joint creditors in fraud of the others, nor will a merely nominal plaintiff be permitted to release the cause of action without the consent of the persons beneficially interested.

25 According to Mr Forrest, the same applied to the reaching of an accord in satisfaction. *Halsbury's Laws of England* at paragraph [1090] in the same volume stated:

> Accord of satisfaction effected with one of a number of joint creditors discharges the joint debt.

26 *Halsbury's Laws of Australia* at [110-3000] was to the same effect, the learned editors stating:

> Payment to or a release by one joint promisee binds the other but not payment to or a release by several promisee.

27 Next, Mr Forrest referred to a decision of the Full Court of the Supreme Court of Victoria dismissing an appeal from Madden CJ in *Bell v Rowe* (1901) 26 VLR 511. Holroyd J who with A'Beckett and Hood JJ constituted the Full Court said of two mortgagees:

> Bell and Gates -- are entitled to [the mortgage debt] as joint tenants – as joint creditors – both at law and in equity, and in such a case, where the debt is really a joint debt, either of the joint creditors has the right to receive it, and so bind the two; and either of them can, according to the authority of that case, give a release. In equity the presumption is, unless there is something to show the contrary, that joint tenants are really tenants in common, and that when they lend their money each of them intends only to lend his own share of it. That presumption as to joint tenants may be rebutted, and it is rebutted in this case by the fact that they were joint tenants in equity as well as at law, being actually recited in the mortgage deed.
> (1900) 26 VLR 511, 526

28 According to Mr Forrest these principles were once more and much more recently acknowledged by Hodgson J (as he then was), sitting in the Equity Division of the Supreme Court of New South Wales in *Manzo v 555/255 Pitt Street Pty Ltd* (1990) 21 NSWLR 1, 7. Next, Mr Forrest referred to the well known case of *Steeds v Steeds* (1889) 22 QBD 537 where Wills J with whom Huddleston B concurred said that an accord and satisfaction by one joint creditor bound all others but that equity presumed a number of persons who lent money to hold the resultant debt as tenants in common rather than joint tenant.

29 Next he referred to a decision of the Full Federal Court, Davies, Burchutt and Gummow JJ, *McIntyre v Gye* (1994) 51 FCR 472 where their Honours laid down a number of propositions, one of which was as follows:

> Payment to one of a number of joint creditors discharges a debt owed to them jointly at law; in determining, in the course of administration a deceased estates or corporate liquidations, whether or not a claim for debt has been discharged, equity followed the law as to the sufficiency of payment to one of several joint creditors, save where the joint creditors were trustees; *Re C. Flower MP and Metropolitan Board of Works* (1884) 27 Ch D 592; *Powell v Brodhurst* [1901] 2 Ch 160 at 164; *Halsbury's Laws of England* (4th ed, 1974), Vol 9, par 623.

30 Finally Mr Forest referred to *Powell v Brodhurst* itself where Farwell J said:

> In my opinion, the old rule of common law, that payment to one of two joint creditors is a good discharge of the joint debt, still remains good. There was no possible conflict at any equitable rule with this, because no bill would lie in Chancery to recovery a mere money demand. Equity, no doubt, had to deal with debts in the administration of estates of deceased persons and in the liquidation of

> companies, but in determining whether claims for debts had been discharged or not equity followed the law, and indeed in cases of difficulty before the *Chancery Procedure Act, 18*52 sent cases for the opinion of the common law Courts. There is nothing inconsistent with this in *Steeds v Steeds*. The question there was whether it was so clear that the debt claimed was joint that the defence should be struck out, and it was held that there was a conflict between law and equity as to the presumption to be drawn from the existence of a security to two without words of severance, and that the rule of equity as to such presumption now prevails. But this was a conflict of presumptions – whether there was or was not a joint tenancy, and had no relation to the legal consequences flowing from the existence of an admitted joint tenancy. In the present case both sides agree that this is a joint debt, and, having regard to the words of the covenant and the 61st section of the *Conveyancing Act*, 1881, I take this to be correct.

31 Mr Forrest did not as I understood him put any argument based upon the view that Tremaine and K. & K. were partners and that this matter should be analysed as a matter of partnership law.

SUBMISSIONS FOR K. & K.

32 Mr Horgan on behalf of K. & K. submitted that Tremaine simply had no authority to deal separately with the indebtedness of J.G.K. and Mr Korfiatis. Cases such as *Bell v Rowe*, he said, showed that a payment made under the original agreement and in performance of the original agreement which were made to one joint owner or joint creditor bound all. One of a number of joint creditors or promisees however did not have authority to enter into separate transaction affecting the joint property.

33 According to Mr Horgan whether or not the obligations of J.G.K. and Mr Korfiatis under the building contracts were joint or joint and several is a question of construction which depends on the relationship between the parties and the context in which they entered into the agreements. He referred to *Federation Insurance Limited v Wasson* (1987) 163 CLR 303, 317-9. He said a joint promisee had no several right of action. He referred to *Financial Industry Complaint Services Limited v Deakin Financial Services Pty Ltd* [2006] FCA 1805 at [67] per Finkelstein J. He said:

> A joint promisee is required to join all joint promisees to the action to bind them. *Coulls v Bagot's Executor and Trustee Co Limited* (1966) 119 CLR 460, 479, 493.

34 He submitted that in equity the general rule is that where debts or obligations owed to a plurality of persons who are owed to them as tenants in common and not joint tenant. He referred to *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38, 53 per Wicks J.

35 According to Mr Horgan the deed of settlement on its true construction did not purport to affect the rights of K. & K. at all. He referred to Recital C which referred to a desire on the part of Tremaine and the respondents to settle this proceeding:

> Insofar as it concerns the first applicant [Tremaine] and the respondents [J.G.K. and Korfiatis] only.

36 He submitted that the companies should be regarded as tenants in common of their claims against Korfiatis and J.G.K. He referred to *Steeds v Steeds* (1889) 22 QBD 537. He said that in the bankruptcy of one joint creditor affected a severance so that the rights will henceforth be held in common. He referred to *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* [2004] NSWSC 734 at [24] – [26].

37 He submitted that this application under Section 75 should be considered in accordance with the principles laid down by the Court of Appeal with respect to an analogous provision then found in the *Anti-Discrimination Act* as set out in *State Electricity Commission of Victoria v Rabel* [1998] 1 VR 102, 110 per Ormiston JA. Applying those principles he submitted, the application for summary dismissal should itself be dismissed.

CONCLUSION

38 In *Electricity Commission of Victoria v Rabel* [1998] 1 VR 102, 110. Ormiston JA approved as applicable to summary dismissal applications at the Tribunal level the following statement by Dixon JA as he then was in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91-2:

> Prima facie every litigant has a right to have matters of law as well as of fact decided according to the ordinary rules of procedure, which give him full time and opportunity for the presentation of his case to the ordinary tribunals, and the inherent jurisdiction of the Court to protect its process from abuse by depriving a litigant of these rights and summarily disposing of an action as frivolous and vexatious in point of law will never be exercised unless the plaintiff's claim is so obviously untenable that it cannot possibly succeed.

39 It follows that this application under Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 should be successful only if it meets the stringent requirements laid down by Sir Owen Dixon in the passage quoted.

40 It was submitted plausibly, I think, that the arrangements between Tremaine and K. & K. were dictated by Section 176 of the *Building Act* 1993. That section renders it an offence for a builder to carry out domestic building work under a major domestic building contract unless the builder is registered in the appropriate class of domestic builder under that part of the *Building Act*. Mr Ktori senior is registered as a domestic builder, Mr Ktori junior is not. Sub-sections (3) and (4) of Section 176 provide as follows:

> (3) Subsections (1), (2) and (2A) do not apply to the use by a partnership of a title that can only be used by a person registered under this Part or the carrying out by a partnership of work that can only be carried out by a person registered under this Part, if at least one of the partners is registered in the appropriate category or class under this Part.

(4) Subsections (1), (2) and (2A) do not apply to the use by a corporation of a title that can only be used by a person registered under this Part or the carrying out by a corporation of work that can only be carried out by a person so registered if at least one of the directors of the corporation is registered in the appropriate category or class under this Part.

41 The effect then was that K. & K., Mr Ktori junior's company, could only undertake the work under these two major domestic building contracts in partnership with Tremaine. Property held by members of the partnership, even if as joint tenants at law is held by the partners in equity as tenants in common *Spence v Commissioner of Taxation of the Commonwealth of Australia* (1967) 121 CLR 273, 280 per Windeyer J. If the two building companies were in truth in partnership this would seem to subvert the primary proposition put by Mr Forrest. Nor would the passage from the Full Court of the Federal Court from *Gye's* case on which he relied have any application because this is not a case of payment, rather it is a case of release, accord and satisfaction or composition.

42 There was no evidence which could give me a satisfactory basis for a finding as to whether the two companies were in truth in partnership. There was no evidence for instance as to whether any partnership deed existed between them. Apart from the knowledge that the same parties were involved in a dispute over another development at Port Melbourne, there was no indication as to how many other pieces of work the two companies had undertaken together. The liquidator in his correspondence referred to the arrangement between the two companies as a *'joint venture'*, a term which may properly refer to a partnership but may also refer to an arrangement relating solely to a single project which would not constitute the venturers as partners in the full sense. Nor could a finding that a partnership existed at the time that the building contracts were entered into in itself provide a clear answer to the present dispute. As the passage from *Halsbury's Laws of England* referred to above and relied upon by Mr Forrest indicates, one partner can bind his other partners in making a release of a debt or an obligation. Mr Horgan submitted that the liquidation of Tremaine automatically dissolved any partnership that might have existed between the companies. He referred to Section 37 of the *Partnership Act* 1958. That section creates an automatic dissolution absent any provision to the contrary where a partner becomes bankrupt. This automatic dissolution is subject to any agreement to the contrary between the partners and the existence or non-existence of any partnership agreement has not been proven one way or the other. More pertinently however, Section 37 effects an automatic dissolution on *'bankruptcy'*. Companies do not go bankrupt and there is no extended definition of *'bankruptcy'* which would render it applicable to a company liquidation.

43 Again, looking at the issue of joint rights and obligations from what one might describe as the other end, in *Murray-Oates v Jjadd Pty Ltd* (1999) 76 SASR 38 the Full Court of the supreme Court of South Australia considered whether Ms Murray-Oates was released from her liability under a real estate lease where her co-tenant, Mr Clarke, reached a settlement with the landlord in the course of the first day of the proceeding. The lease made the tenants' liability to the landlord joint and several. Counsel for Clarke and counsel for the landlord reached a settlement whereby the landlord accepted $20,000 in full and final satisfaction of all issues between Clarke and the landlord. The Court concluded that this arrangement should be regarded as a covenant not to sue and not as a release. Having considered all the circumstances Wicks J with whom the other members of the Court, Doyle CJ and Mullighan J said:

> The proposed compromise did not effect a release of the defendant because it is clear that the plaintiff is not abandoning its rights against the defendant. The compromise arose on the first day of the hearing of the claim against the defendant. The hearing of such claim proceeded notwithstanding the compromise with Mr Clarke. Clearly the plaintiff was reserving its rights against the defendant and that was understood from the outset. There is an implied covenant not to sue. (1999) 76 SASR 38, 54 [91]

44 Writing on the same subject in 1949 Professor Glenville Williams said:

> The upshot is that at the present day the courts will give effect to any expression in a release that other debtors are not to be discharged. *Joint Obligations* (1949) 113

45 The passages both in the recitals and the operative parts of the deed of release make clear that the settlement that was being reached related only to the claim by Tremaine. Certainly J.G.K. and Mr Korfiatis would have been happy enough to enter into an arrangement which would terminate any liability they might have to K. & K. there is no reason however in the matrix to attribute such an intention to the liquidator of Tremaine. The words chosen in the deed of release are apt to effect Tremaine's claims only, not any that K. & K. might have. It is at least arguable based on the *Murray-Oates'* case that the deed of release would as regards K. & K. take effect as a covenant not to sue by one joint creditor does not bind the other joint creditor *Walmesley v Cooper* (1839) 11 Ad & E 217 per Lord Denman CJ.

46 Glenville Williams and the Court in *Murrary-Oates* were dealing not with the automatic release of all joint promisees claims by a settlement with one but with the release of all joint promisors by settlement with one; but the underlying principle is the same deriving from the existence of only one joint right or joint obligation which if released is released in its totality.

47 It follows in my view that this is not so clear a case as would justify a summary dismissal under Section 75.

48 The application for summary dismissal is itself dismissed.

COSTS

49 I have heard no submissions on costs and so I will reserve them.

MFM:RB