CITATION: *Red Sand Art Gallery Pty Ltd, King & King v Harper & Eccles* [2008] NTMC 074

PARTIES: RED SAND ART GALLERY PTY LTD
PETER ANTHONY KING
NATHAN JOHN KING

v

ALISON ELIVIRA HARPER
&
JEREMY ECCLES

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20813436

DELIVERED ON: 21 November 2008 (By consent emailed to parties)

DELIVERED AT: Darwin

HEARING DATE(s): 15 October 2008 (Written Submissions 17 October 2008 and further material 20 October 2008)

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

MEDIATION – SETTLEMENT – CONFIDENTIALITY

Supreme Court Rule 48.13(8)
Local Court Rule 1.12
Law of Property Act (NT) s 65

Al-Hakim v Monash University [1999] VSC 511
Masters v Cameron (1954) 91 CLR 353
United Scientific Holdings Limited v Burnley [1978] AC 904
Gollin and Co Ltd v Karen Lee Nominees Pty Ltd (1983) 153 CLR 455

Lawrence Boulle, Mediation Principles Process Practice, 2nd Edition
Cheshire and Fifoot, Law of Contract, (9th Australian Edition)

INDEMNITY COSTS
Penfold & Anor v Higgin & Anor [2003] NTSC 89

REPRESENTATION:

Counsel:	
Plaintiff:	Mr Whitelum
Defendant:	Mr Harper
Solicitors:	
Plaintiff:	CridlandsMB
Defendant:	Laurence and Laurence
Judgment category classification:	B
Judgment ID number:	[2008] NTMC 074
Number of paragraphs:	18

IN THE LOCAL COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20813436

[2008] NTMC 074

BETWEEN:

RED SAND ART GALLERY PTY LTD
PETER ANTHONY KING
NATHAN JOHN KING
Plaintiffs

AND:

ALISON ELIVIRA HARPER
&
JEREMY ECCLES

Defendants

Judgment

(Delivered 21 November 2008)

JENNY BLOKLAND CM:

Introduction

1. This action commenced by Statement of Claim in the Local Court for the sum of $60,000, claimed to be due and owing by the Defendants to the Plaintiffs pursuant to an agreement made between the parties, (referred throughout as "*Terms of Settlement")* dated 9 April 2008.

2. These proceedings were filed on 15 May 2008 in the Local Court at Alice Springs. The *Terms of Settlement* related to a matter that had been settled under the auspices of the Supreme Court of the Northern Territory. Although initially when the matter was argued the *Terms of Settlement* were not before me, I requested that notwithstanding the issue of confidentially, the *Terms of Settlement* be provided to me as the issues could not be

determined without reference to it. The *Terms of Settlement* provide the Defendants will pay the sum of $60,000 to the Plaintiffs inclusive of interest and costs and that payment was to be made within 28 days of 9 April 2008. I will refer only to those parts of the *Terms of Settlement* that necessity dictates must be cited in order to determine this matter.

3. Between the proceeding being issued and listed before Judicial Registrar McNamarra on 23 September 2008, the defendant had paid the $60,000 claimed by the Plaintiffs, however the Plaintiffs continue to seek their costs and interest as the payment was not made in accordance with the agreement and not made until after the statement of claim issued. The Plaintiffs seek costs on an indemnity basis. The Defendants argue that it was not necessary for the Plaintiffs to issue proceedings in this matter and that the Plaintiffs should not be entitled to a costs order. Further, the Defendants argue the Plaintiffs are in breach of the confidentiality provisions of the *Terms of Settlement.*

4. *Supreme Court Rule* 48.13(8) permits the *Terms of Settlement* to be disclosed to prove they exist:

> "Except to prove that a settlement was reached between the parties and the terms of the settlement, evidence of things said or admissions made at a mediation is not admissible in either the proceeding or a court without the consent of those parties".

5. In my view these proceedings sought to "prove that a settlement was reached". Although these proceedings were commenced in the Local Court, there is no specific *Local Court Rule* dealing with the matter, hence pursuant to *Local Court Rule* 1.12, the Court may adopt the Supreme Court procedure. In any event the application of the Supreme Court Rule is the appropriate rule as the *Terms of Settlement* were concluded under the auspices of the Supreme Court. I note also an argument similar to what is put by the Defendants was rejected in *Al-Hakim v Monash University* [1999] VSC 511 where "Heads of Agreement" had been signed after a mediation

under the auspices of the Victorian Civil and Administrative Tribunal. Section 92 of the Act provided:

> "92. Evidence inadmissible. Evidence of anything said or done in the course of mediation is not admissible in any hearing before the tribunal in the proceeding unless all parties agree to the giving of the evidence,"

And clause 26 of Schedule 1 to the Act, which reads,

> "26. Evidence of mediation not admissible even if the parties agree. (1) Evidence of anything said or done in the course of a mediation in a proceeding under the Equal Opportunity Act 1995 is not admissible in any hearing before the tribunal in the proceeding, whether or not the parties agree to the giving of the evidence. (2) Section 92 does not apply to a proceeding under the Equal Opportunity Act 1995."

6. His Honour Justice Beach applied *Masters v Cameron* (1954) 91 CLR 353 at 360 to determine whether the parties had arrived at a concluded agreement:

> "Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document".

7. His Honour agreed the "Heads of Agreement" came within the first of these categories and in rejecting an argument that the "Heads of Agreement" was inadmissible stated [at 14]:

> "It would seem to me to be an extraordinary situation if in practice parties who have reached agreement to settle a proceeding at mediation cannot then seek to enforce their agreement, particularly when s.93(1) of the Act specifically provides that if the parties do agree to settle a proceeding at any time, the tribunal may make any orders necessary to give effect to the settlement".

8. I would respectfully also adopt Professor Boulle's remarks where he states: *"if this approach is not taken, a party could reach agreement in mediation and later refuse to abide by it and prevent it being tendered which would defeat the objective"*. (See Lawrence Boulle, Mediation Principles Process Practice, 2nd Edition at 560).

History of Compliance with Terms of Settlement

9. The facts relied on by me are drawn from the affidavit of Anthony Ross Whitelum ("ARW"): (1 October 2008) and the affidavit of Angus Graham Reny Harper ("AGH"): (20 October 2008). Further, I have been informed by the oral submissions made on 15 October 2008. It will be recalled Mr Harper, (counsel for the Defendants), who had been given leave to appear by phone advised the Court that he could not hear properly. Orders were then made that the matter proceed on the papers with the Defendants to file and serve any further affidavit material by midday 16 October 2008 and the Plaintiff to file and serve written submissions by 17 October 2008.. The Plaintiffs complied with that order, the Defendants did not. Given much of the material in the late affidavit filed on behalf of the Defendants concerns material in common with the parties, I will accept and consider that affidavit notwithstanding it does not comply with the consent orders.

10. On 8 May 2008 the solicitor for the Plaintiffs emailed the Defendants' solicitors noting the payment for $60,000 was to be made by "twelve

midnight tomorrow". The email also sought to confirm that payment would be made by then. (AGH1); the Defendants' solicitor emailed the Plaintiffs' solicitor on 9 May 2008 stating that payment would be made to a particular account: (AGH1). A further email request was made by the Plaintiffs' solicitors on 12 May 2008 (AGH2). The Defendant's solicitor responded on 13 May 2008 stating "I am instructed that money is being paid into your clients account today. It should be there tomorrow"; (AGH2). On 15 May 2008 the Plaintiffs' solicitor emailed the Defendants' solicitor confirming that the Plaintiffs had still not received the payment and accordingly they had been instructed to file a Statement of Claim. On 15 May 2008 the Defendants' solicitor sent an email to the Plaintiffs' solicitor stating "I was instructed that a payment was made earlier this week". In relation to issuing proceedings it was stated by the Defendants' solicitor "with regard to your threats concerning the issue of a statement you need to be aware that your clients have entered into binding undertakings that the terms of the settlement of the proceedings remain confidential between. (sic) The issue of proceedings by your client may well breach these undertakings resulting in the issue of a cross claim and endangering the performance of other terms of the settlement including the issue of a statement". (ARW4) The Plaintiffs' solicitor confirmed some eleven minutes later that their client had not received the payment and that they were instructed to file a Statement of Claim. (ARW4)

11. On 16 May a lengthy email was sent by the Plaintiffs' solicitor to the Defendants' solicitor briefly summarising the history of the matter and advising that proceedings were filed in the Local Court on 15 May 2008. On 16 May 2008 the Defendants' solicitor emailed the Plaintiffs' solicitors asking if the Plaintiffs had received "any part of the $60,000 claimed by them". The Plaintiffs' solicitor asked whether the Defendants wished to nominate solicitors in the Northern Territory to accept service advising if no one was nominated by close of business 19 May 2008, solicitors for the

Defendants would be served. (ARW5) On Friday 16 May 2008 the Defendants' solicitors were advised that still no payment had been made (ARW6) and a further query was made in relation to service. On 17 May 2008 solicitors for the Defendants' were advised that $20,000 had been deposited in the Plaintiffs' bank account overnight. (ARW7) Solicitors for the Plaintiff then sought information on when the balance would be paid and when a response about acceptance of service would be made. On 19 May solicitors for the Defendants stated to the Plaintiffs' solicitor that the Plaintiffs "have now breached the confidentiality provision of the *Terms of Settlement* by apparently proceeding with the issue of a Statement of Claim. All rights reserved". (ARW8) Further, solicitors for the Defendants advised that they will recommend to their clients that a further $30,000 be paid on the basis that the Statement of Claim is immediately withdrawn and that a balance of $10,000 will be withheld by the Defendants in order to assess if any damage has flowed as a result of the alleged breach by the Plaintiff.

12. On 21 May 2008 solicitors for the Plaintiffs confirmed that $30,000 was paid on 20 May 2008 and that the balance of $10,000 was still outstanding and advised that personal service will be affected. (ARW9) On 4 June 2008 the Defendants' solicitor advised the Plaintiffs' solicitor that the $10,000 would be received by the Plaintiffs' "shortly". (ARW10) The final payment was made on 18 June 2008. On 24 June 2008 the Plaintiffs' solicitors advised that the Plaintiffs' would not discontinue Local Court proceedings without their costs and interest on the unpaid settlement monies. The correspondence indicates offers on the part of both parties to settle these proceedings in the Local Court but settlement was not successful. I am left to determine interest and costs.

Further discussion of the issues

13. The Defendants argue these proceedings were doomed to failure as there was no provision that "time was of the essence" relating to the payment of

monies by the Defendants to the Plaintiffs. The Defendants submit that in the absence of an express provision, there is a general presumption that time is not of the essence. The Defendants rely on *United Scientific Holdings Limited v Burnley* [1978] AC 904 and *Gollin and Co Ltd v Karen Lee Nominees Pty Ltd* (1983) 153 CLR 455. Further, the Defendants argue s 65 *Law of Property Act* applies.

14. That principle referred to by the Defendant is well entrenched. The result of this argument is an acceptance that 'the rules of equity' prevail in relation to certain contracts and circumstances of breach, although it is difficult to see what the role of equity might be where there has been a consensus that payment will happen at a particular time. This is not a case where the right to rescind for failure of performance is an issue. This case simply involves an agreement in which after an agreed time, an agreed sum owing fell due. In any event I note the view in Cheshire and Fifoot, Law of Contract, (9th Australian Edition) at 1027 that prima facie in relation to commercial contracts the courts have traditionally regarded performance on time of all significant obligations as essential. I regard it essential here. Further, and in any event the Plaintiffs notified the Defendants of their intention to enforce their rights once the money became due under the "*Terms of Settlement*".

15. The Defendants assert that at the time of the issue of the Statement of Claim the *Terms of Settlement* were being performed by the Defendants even if "a few days late" and argued the Plaintiffs were aware of this. That is not my view of the situation. There was a time set under the terms. None of the material before me indicates that the Defendants have sought to advise the Plaintiffs that there would be some problem in complying with the date. The history set out above since the sum became due smacks of delaying tactics. The Defendants delayed on the payment to the degree that objectively they appeared unwilling to comply with their obligations or comply fully with their obligations. In all the circumstances given the history and tone of the correspondence as set out above, it was reasonable

for the Plaintiffs to issue proceedings in order to be paid the outstanding sum.

16. I will order the outstanding interest be paid that I note from ARW2 is $375.81. The Plaintiffs seek costs on an indemnity basis on the grounds that the Defendants engaged in "unmeritorious conduct" as they had not complied with the *Terms of Settlement,* did not provide an explanation on why they did not pay on time and, purported to with-hold $10,000 for "damages" for an alleged breach of confidentiality. The Plaintiffs rely on *Penfold & Anor v Higgin & Anor* [2003] NTSC 89. I accept what the Plaintiffs submit in relation to the Defendants' conduct, however, in my view, annoying as it may be to the Plaintiffs, it is not of the order of conduct that would attract indemnity costs. The Defendants have not filed a defence to the matter. They have delayed payment, but in that regard, it is little different to any other debt. The Plaintiffs should however be entitled to their costs on the ordinary basis. Given the fact this matter required argument on a number of points and written submissions, I set costs at 100% of the Supreme Court Scale.

17. Orders:

- Judgement for the Plaintiffs in the sum of $375.81
- The Defendants are to pay the Plaintiffs' costs of and incidental to these proceedings on a standard basis at 100% of the Supreme Court Scale.
- Costs to be taxed in default of agreement.

18. By arrangement with my Chambers, these orders will be made today in the Darwin Registry and copies of the orders forwarded by email to the legal representatives. A signed copy will be forwarded in due course.

Dated this 21st day of November 2008.

Jenny Blokland
CHIEF MAGISTRATE