

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D629/2005

CATCHWORDS

Withdrawal of claim against Second Respondent – application for costs by Second Respondent under s74(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* – previous unsuccessful application by the Second Respondent under s75 of the Act.

FIRST APPLICANT	Jennifer Green
SECOND APPLICANT	Colin Green
FIRST RESPONDENT	Stonehaven Homes (Vic) Pty Ltd (ACN 006 258 082)
SECOND RESPONDENT	Barry Gale Nominees Pty Ltd (ACN 007 430 668)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Costs Hearing
DATE OF HEARING	27 July 2006
DATE OF ORDER	31 July 2006
CITATION	Green v Stonehaven Homes (Domestic Building) [2006] VCAT 1565

ORDER

1. Leave is granted to the First Respondent to withdraw its application for joinder dated 9 March 2006 and it is now withdrawn.
2. Leave is granted to the Applicants to withdraw their claim against the Second Respondent and it is now withdrawn.
3. The Second Respondent's application for costs is dismissed. The Applicants and the Second Respondent shall bear their own costs of the proceeding.
4. The proceeding as between the Applicants and the First Respondent is adjourned to an Administrative Mention on 11 August 2006.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicants	Mr R Squirrell of Counsel
For the First Respondent	Mr D Brett of Counsel
For the Second Respondent	Mr T Rosen of Counsel

REASONS

- 1 By application dated 20 July 2006, the Applicants seek leave to withdraw their proceeding against the Second Respondent and that each party bear their own costs of the proceeding. Extensive affidavit material has been filed in support of the application. Mr Squirrel of Counsel appeared on behalf of the Applicants.
- 2 Although an Affidavit in Opposition has been filed, Mr Rosen of Counsel appearing on behalf of the Second Respondent indicated that the Second Respondent did not oppose the granting of leave to the Applicants to withdraw but that it was seeking its costs of the proceeding on an indemnity basis. Leave to withdraw was granted.
- 3 In support of the Second Respondent's application for costs, it was submitted that I should have regard to the facts, circumstances and conduct of the Applicants before the proceeding was issued. The subject property was built in 1999. It is common ground that the Second Respondent was engaged by the First Respondent to prepare engineering drawings. Certain defective works were identified in 2000 which was resolved between the Applicants and the First Respondent's solicitors. Further damage to the property and the Applicants' belongings occurred during the following years, and in their Points of Claim the Applicants indicate they had received an interim payment from the First Respondent's insurer in relation to some of the damage they had suffered. The claims against the Second Respondent are set out in paragraphs 14-19 of the Points of Claim.
- 4 The claim against the Second Respondent relates to the loss and damage suffered by the Applicants by water penetration into the 'vault'. The Second Respondent has always maintained it had a limited retainer extending to the provision of structural engineering and certification services only and was not retained to provide any services in relation to drainage and waterproofing. An application by the Second Respondent that the claim against it be dismissed or struck out under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* was dismissed on 20 January 2006, at which time costs were reserved, with liberty to apply. There has been no application for costs of that application. Although the application was dismissed liberty was reserved to the Second Applicant in the final paragraph of the Reasons for the claim to be '*...agitated again if the Second Respondent has further proof of lack of cause of action or a demonstrably complete defence.*' No further application under s75 has been made.
- 5 Following an unsuccessful mediation the proceeding was referred to a Compulsory Conference which was adjourned part-heard from 24 April 2006 to 19 June 2006. It is apparent from the orders made on 24 April 2006 that the adjournment of the Compulsory Conference was only in relation to the Applicants' claim for 'consequential loss', and the Second Respondent was excused from attending. Although that Compulsory Conference was unsuccessful, negotiations apparently continued and in the Affidavit filed in

support of the application, the Applicants' solicitor deposes to a compromise having been reached between the Applicants and the First Respondent. However, Mr Squirrell confirmed there were some outstanding matters still to be attended to. The terms of any settlement between the Applicants and the First Respondent are not, in my view, relevant to the consideration of the Second Respondent's application for costs. Similarly, the correspondence between the solicitors for the Applicants and the First Respondent as to the First Respondent's position as to any liability of the Second Respondent is not relevant in considering this application.

THE SECOND RESPONDENT'S APPLICATION FOR COSTS

6 Section 74 of the *VCAT Act* provides:

74. Withdrawal of proceedings

- (1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.
- (2) If an applicant withdraws an application or referral—
 - (a) the applicant must notify all other parties in writing of the withdrawal; and
 - (b) the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding; and
 - (c) the principal registrar may refund any application fee paid by the applicant; and
 - (d) the applicant cannot make a further application or request or require a further referral in relation to the same facts and circumstances without the leave of the Tribunal.
- (3) Sub-section (2)(a) does not apply if the principal registrar notifies the other parties in writing on behalf of the applicant.

7 The Second Respondent's application for costs is made under s74(2)(b) under which the Tribunal's powers to make an order for costs is discretionary. In considering whether to exercise that discretion the Tribunal must have regard to what is fair as enunciated by Deputy President McKenzie in *Asghari v SBS Radio [2001] VCAT 1755* where she made the following observation:

“Section 74(2)(b) is a separate power to order costs on the withdrawal of a proceeding. There is no rule here that costs lie where they fall, unless the Tribunal considers it fair to order otherwise. Here the Tribunal has an unfettered and broad discretion as to costs

8 The Tribunal has previously held that in considering whether to exercise its discretion under s74(2) it is appropriate to have regard to matters similar to those as set out in s109(3) (*Fernandez v Amatek Pty Ltd [2001] VCAT 1979*).

- 9 As I understand the submissions on behalf of the Second Respondent, it contends it is entitled to recover its costs on an indemnity basis from the Applicants because proceedings should never have been commenced against it. It was suggested that it was apparent from material before the Tribunal that the First Respondent had been endeavouring to rectify the defects, that proceedings were issued in an attempt to expedite resolution and that it would therefore have been more appropriate to issue proceedings, in the first instance, against the First Respondent and seek to join the Second Respondent at a later date if necessary. I reject this submission. The identification at any early stage of all parties who an Applicant alleges are responsible for their loss and damage is desirable in the interests of avoiding unnecessary interlocutory applications for joinder, and the associated costs to such parties of such applications. This is especially prudent and appropriate following the introduction of Part IVAA of the *Wrongs Act* 1958.
- 10 There are a number of factors which may result in a commercial approach to the resolution of a proceeding, which may include an Applicant seeking leave to withdraw its claim against one or more parties. However, this is not of itself indicative that their claim was lacking in merit or doomed to fail (s109(3)(c)). In this case there has not been an adjudication on the merits. The fact the Applicants have sought leave to withdraw their claim against the Second Respondent does not mean that the Applicants accept, that if the matter had proceeded to a hearing and determination, they would not have succeeded against the Second Respondent.
- 11 Rather, the Second Respondent's application under s75 of the *VCAT Act* was unsuccessful because the Tribunal was not satisfied on the material before it that the Applicants' claim was not "*obviously hopeless, obviously unsustainable in fact or in law, or on reasonable view can justify relief, or is bound to fail*" [8].
- 12 It would, in my view, set an unfortunate precedent, and possibly act as an impediment to settlement, if parties were discouraged from taking a commercial approach because of a risk of costs being ordered if they withdraw or discontinue against a party that is not prepared to participate in any settlement.
- 13 Further, I note there was no evidence before me that the Second Respondent has taken any steps to protect itself on costs by, for example, making an offer of compromise.
- 14 I am not satisfied I should exercise the Tribunal's discretion under s74(2)(b) and will therefore dismiss the Second Respondent's application for costs.

DEPUTY PRESIDENT C. AIRD