

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D766/2006

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – S.77 – Domestic Building Contracts Act 1995 – S.53(2)(bb) – whether Supreme Court more appropriate forum – jurisdiction – other factors including risk of conflicting decisions.

APPLICANT: Abigroup Contractors Pty Ltd
RESPONDENT: River Street Developments Pty Ltd
WHERE HELD: Melbourne
BEFORE: His Honour Judge Bowman
DATE OF HEARING: 13 June 2007
DATE OF REASONS: 15 June 2007
CITATION: Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd (Domestic Building)[2007] VCAT 1058

ORDERS

1. Respondent's application pursuant to s.77 of the *Victorian Civil and Administrative Tribunal Act 1998* dismissed.
2. Question of any ancillary orders reserved.
3. Liberty to apply.

Judge Bowman
Vice President

APPEARANCES:

For Abigroup Contractors Pty Ltd:

Mr C Scerri QC, with Mr J Twigg of Counsel, instructed by Clayton Utz. .

For River Street Developments Pty Ltd:

Mr J Delany SC, with Mr R Andrew of Counsel, instructed by DLA Phillips Fox.

REASONS FOR DECISION

GENERAL BACKGROUND

- 1 This matter comes before me by way of an application by the Respondent, River Street Developments Pty Ltd (“RSD”) pursuant to s.77 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”). The application of RSD is to strike out the whole of the proceeding brought against it by Abigroup Contractors Pty Ltd (“Abigroup”) and transfer that proceeding to the Supreme Court of Victoria.
- 2 Mr J Delany SC with Mr R Andrew appeared on behalf of RSD. Mr C Scerri QC with Mr J Twigg appeared on behalf of Abigroup. No oral evidence was adduced. Reliance was placed upon affidavits and documentary material. Particularly helpful and concise submissions were made on behalf of each party, and detailed written submissions together with copies of authorities relied upon were made available. I am grateful to all concerned for the manner in which this application was conducted.
- 3 As there is some urgency in relation to this ruling, the future and progress of a related Supreme Court interlocutory proceeding being contingent upon it, the reasons for this ruling are perhaps somewhat more truncated than would otherwise have been the case.

FACTUAL BACKGROUND

- 4 The merits and details of the factual background of this proceeding need not concern us, save for any matters which bear upon the issue of the appropriateness of this Tribunal or of the Supreme Court as being the body which should deal with the proceeding. References to facts are made solely for the purpose of this application. No assertions of fact were tested in cross-examination.
- 5 I accept that a substantial amount of money is involved in the principal proceeding. In its application issued out of this Tribunal on 27th October 2006, Abigroup is seeking an amount in excess of \$4,700,000.00. The dispute arises in relation to a domestic building contract between Abigroup and RSD, such contract in turn relating to major domestic building work. This work involves the construction of apartments known as the Riviera Apartments in River Street, Richmond. The amount now claimed by Abigroup from RSD relates to matters such as alleged variations, delay costs and the like. RSD has counterclaimed against Abigroup, essentially on the basis of alleged defects, and a related claim has also been issued out of this Tribunal by the relevant Body Corporate operating in relation to the apartments. The claim made by the Body Corporate covers some of the same ground as the counterclaim made by RSD. I accept that the Body Corporate consents to its claim being transferred to the Supreme Court should RSD’s application be successful.
- 6 In summary, and without going into the details, I accept that the proceedings issued out of this Tribunal represent a complex piece of litigation involving a very large amount of money.

- 7 There are further complexities. On 25th May 2007, Abigroup commenced in this Tribunal an application seeking interlocutory relief in the form of freezing and asset preservation orders against RSD and various non-parties. Abigroup no longer seeks such orders against the non-parties. It is now seeking such orders by way of interlocutory relief in the Supreme Court. In addition to commencing the application referred to above in relation to non-parties, also sought an order pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act 1995*. The order so sought is to the effect that, pending the determination of the proceeding, any proceeds received by RSD from the sale of any of the units which constitute Riviera Apartments be deposited into the Domestic Builders Fund until the amount deposited is a specified sum in excess of \$7,800,000.00. It was the reference to relief against non-parties contained in the application of 25th May 2007 that seems to have prompted RSD's present application, it being alleged that VCAT could not make orders against non-parties whereas the Supreme Court could. As stated, Abigroup is discontinuing any application before the non-parties in this Tribunal and has instituted such proceedings in the Supreme Court.
- 8 Further, there have been two prior judgments in proceedings between Abigroup and RSD in the Supreme Court and relating to the contract. One of those proceedings – No. 4695 of 2006 – relates to a claim by Abigroup against RSD for a similar but not identical sum and in a similar if not identical factual context. On 10th November 2006 Habersberger J gave judgment in relation to an application for summary judgment by Abigroup. As I understand it, that proceeding related to a progress payment and to the *Building and Construction Industry Security of Payment Act 2002*. Habersberger J gave to RSD leave to defend. Earlier, in proceeding No. 4819 of 2006, Coldrey J granted injunctive relief in relation to a dispute between the parties in relation to the same development.
- 9 It is against this factual background and history of litigation that I make the following ruling.

RULING

- 10 Given the possible urgency of the situation, I shall not set out in detail the careful and well prepared arguments advanced by counsel. I shall deal rather with the principal issues upon which the arguments focussed.
- 11 As stated, I accept that this is complex litigation involving very considerable quantum. Whilst the argument that these factors militate in favour of a transfer to the Supreme Court was not abandoned, it did not receive undue emphasis. In any event, the complexity and quantum of this proceeding are not factors that persuade me that the application pursuant to s.77 should be successful and the proceeding referred to the Supreme Court. This Tribunal is well experienced in dealing with cases of this nature. Whilst it is not a court of pleadings, documents akin to pleadings are frequently employed in such cases, and indeed documents of this kind have already been filed and served in the present case. There are members of this Tribunal well equipped to hear such a case.

- 12 In addition, this Tribunal is effectively the first port of call for proceedings issued under the *Domestic Buildings Contracts Act* and the *Fair Trading Act 1999*. The argument that it was the intention of the legislature that cases such as this should primarily be dealt with by this Tribunal seems to me to be an argument of some force. To employ the words used by Gillard J in *Ewins v BHP Billiton Limited* [2005] VSC 4, for cases such as this, this Tribunal seems to me to be the natural forum based upon connecting factors.
- 13 I indicated from the bench that the two arguments that seem to me to be of greatest moment are centred upon the risk of conflicting decisions and the possible want of jurisdiction in either of the competing forums. Counsel essentially agree with this proposition.
- 14 Of these two important factors, it seems to me that the jurisdictional argument is marginally the more significant. There is little point in striking out a proceeding here and referring it to another court or body that lacks jurisdiction. Indeed, it seems to me that this is an exercise that should not be undertaken if there is even a risk that the body in question may lack the necessary jurisdiction. In *Linton and Vink v Commonwealth Bank of Australia* [2004] VCAT 870, a decision of mine to which I was referred, I upheld an application pursuant to s.77 of the Act because I was of the opinion that some doubt existed as to whether this Tribunal could afford the appropriate relief in an action for possession based upon a mortgage. Whilst arguments each way existed, the fact that such a doubt existed persuaded me to refer the matter to the County Court where no such doubt would exist. That approach seems to me to be equally valid if a doubt exists as to whether the court or body to which referral is sought will entertain the proceeding.
- 15 The aspect of the present proceeding upon which the jurisdictional argument focussed was the payment sought pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act*. Mr Scerri argued that this Tribunal has exclusive jurisdiction to make orders with respect to payments into the Domestic Builders Fund pursuant to that section. Mr Delany's argument was based upon the inherent jurisdiction of the Supreme Court and its preparedness, in an appropriate situation, to order a payment into court, that being akin to the payment into the Domestic Builders Fund being sought in the present case. In relation to such payment into court, he referred me to the decision of *Deputy Commissioner of Taxation of the Commonwealth of Australia v Hooper* [2006] VSC 183. Mr Scerri argued that the decision in *Hooper* was clearly distinguishable from the present situation and was, in a sense, peculiar to its individual facts.
- 16 Despite his best efforts, Mr Delany could not assert with confidence that the Supreme Court possesses the required jurisdiction in relation to the *Domestic Building Contracts Act* and s.53.2(bb) thereof. That cases can be and are referred back to this Tribunal from the Supreme Court because of jurisdictional concerns cannot be denied. One has only to look back as far as the vexed case of *State of Victoria v Bradto Pty Ltd and Tymbook Pty Ltd* – a case in which there have been a multitude of rulings, the first being at [2005] VCAT 1872 – in order to find a complex matter which commenced in the Supreme Court but, for jurisdictional

reasons, then came to this Tribunal. I appreciate that different legislation was involved in *Bradto*, but it is one of a number of cases which demonstrate that situations arise in which a perceived lack of jurisdiction in the Supreme Court results in a matter being referred to this Tribunal.

- 17 On the basis of the arguments advanced and the material relied upon, it seems to me that a risk exists that the Supreme Court would not entertain an application pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act*. When all was said and done, and despite Mr Delany's clever and well constructed arguments, ultimately the jurisdiction of the Supreme Court could not be positively asserted. A risk of the Supreme Court refusing to entertain the proceeding exists. There is no doubt but that this Tribunal possesses the necessary jurisdiction. Given that this Tribunal is the appropriate forum for other reasons set out above and below, RSD's application fails.
- 18 In arriving at this conclusion in relation to jurisdiction, I should add that I do not accept possible arguments that, if a matter is referred, the appropriate jurisdiction is in some way referred with it. That potential argument seems to me to fall a long way short of removing the jurisdictional risk to which I have referred. Secondly, it was not urged upon me that, pursuant to s.77, part of the proceeding should be referred to the Supreme Court and part remain before this Tribunal. This course of action was not sought, and I can understand why.
- 19 I shall also refer briefly to a couple of other factors. It seems to me that, with the application against the non-parties being discontinued before this Tribunal and being pursued in the Supreme Court where jurisdiction exists, the immediate risk of conflicting decisions has been removed. Abigroup can pursue its application pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act*. It is a measure which, if successful, results in the payment of a sum of money into the Fund pending the resolution of the dispute. What happens thereafter may be the topic for debate on another day. In any event, I am satisfied that there is no immediate risk of conflicting decisions, and, in any event, if such a risk existed it would be outweighed by jurisdictional considerations.
- 20 I am also of the view that other factors advanced by Mr Scerri also militate in favour of the proceeding remaining before this Tribunal. The proceeding has already advanced a considerable distance. Factors referred to by Warren J, as she then was, in *Rogan & Ors v Rushton (Qld) Pty Ltd & Ors* [2002] VSC 375, such as costs, delay and inconvenience, also favour Abigroup's position in resisting this application.
- 21 In summary, RSD's application pursuant to s.77 of the Act is dismissed. I shall hear the parties in relation to any ancillary orders that are required and shall reserve liberty to apply.

Judge Bowman
Acting President