VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D679/2007

CATCHWORDS

Whether leave to withdraw earlier admissions should be granted

APPLICANT	Body Corporate Plan No. PS509946A
FIRST RESPONDENT	VM Romano Construction Group Pty Ltd (ACN 097 418 874)
SECOND RESPONDENT	John Demos
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	11 August 2009
DATE OF ORDER	19 August 2009
CITATION	Body Corporate Plan No. PS509946A v VM Romano Construction Group Pty Ltd & Anor (Domestic Building) [2009] VCAT 1662

ORDER

1 Leave is granted to the first respondent to withdraw the admissions in paragraphs 3 and 4 of its Points of Defence dated 17 December 2007 and 10 June 2008.

2 Leave is granted to the first respondent to abandon and withdraw its Further Amended Points of Defence dated 20 May 2009.

3 The first respondent's Amended Points of Defence to the further amended Points of Claim dated 12 February 2009 shall stand as its defence until order 4 has been complied with.

4 By 2 September 2009 the first respondent must file and serve Further Amended Points of Defence specifying the material facts relied upon. Any set-off claimed must be fully set out.

5 Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr P Baker of Counsel
For First Respondent	Mr J Gurr of Counsel
For Second Respondent	No appearance

REASONS

1 This proceeding was commenced on 8 October 2007. It is listed for hearing for 10 days commencing on 5 October 2009. The subject property is a multi-unit development in West Brunswick and the owners corporation has been duly authorised to bring this proceeding both in relation to claims relating to the common property, and damage to individual units. External tiles have fallen from the eastern and northern external walls of the building, and an Emergency Order was issued by the Moreland City Council in May 2006 requiring the removal of all suspect tiles, and the erection of protective scaffolding. The owners corporation brings the application pursuant to s9 of the *Domestic Building Contracts Act* 1995 ('the DBC Act') as the subsequent owner of the common property for breach of the warranties in s8 which are implied into every domestic building contract.

2 The application was accompanied by Points of Claim dated 4 October 2007 in which, relevantly, the owners corporation made the following allegations (I have not included the Particulars):

> 3. Between in or about July 2003 and July 2005, the respondent, as the builder, carried out or managed or arranged the carrying out of the construction of the property for ESP Property Corporation Pty Ltd, as the owner, pursuant to a domestic building contract ("domestic building contract")
>
> 4. The domestic building contract contained the warranties implied by clause 8 of the Domestic Building Contracts Act 1995 ("the warranties'). [emphasis added].

The owners corporation alleges that in carrying out the works the first respondent builder breached the s8 warranties. Relevantly, in its Points of Defence dated and filed on 17 December 2007 the builder says:

> 3. Save that it admits it entered into a domestic building contract in relation to property, it otherwise does not admit the allegations contained in paragraph 3 thereof and says, further, that each allegation is embarrassing and ought to be struck out on the basis that it fails to properly particularise the date and/or alleged construction works set out in the said domestic building contract. [emphasis added]
>
> 4. It admits the allegation contained in paragraph 4 thereof. [re the s8 warranties]

3 On 19 December 2007 the tribunal gave the owners corporation leave to file and serve amended Points of Claim by 18 January 2008. This date was extended by order of the tribunal and amended Points of Claim were filed on 2 May 2008. Paragraphs 3 and 4 were not amended. Amended Points of Defence were filed on 10 June 2008. The defences to paragraphs 3 and 4 were not amended.

4 On 12 November 2008 the tribunal ordered the owners corporation to file and serve further amended Points of Claim (or further and better particulars of its claim) by 3 December 2008. Second Further Amended Points of Claim dated 12 December 2008 with the amendments marked up were filed on 23 December 2008. This time paragraphs 3 and 4 were amended (as marked up):

> 3. Between in or about July 2003 and July 2005, the respondent, as the builder, carried out or managed or arranged the carrying out of the construction of the property ('works') for ESP Property Corporation Pty Ltd ("EPS') as the owners, pursuant to a major domestic building contract ("major domestic building contract"). (sic)
>
> [Particulars of the alleged major domestic building contract are then set out at 3.1 and 3.2]
>
> 4. The major domestic building contract contained the warranties implied by clause 8 of the Domestic Building Contracts Act 1995 ("the warranties') as follows:
>
> [Particulars of the implied warranties are set out 4.1-4.6]

5 The builder's further Amended Points of Defence to the further amended Points of Claim were filed on 12 February 2009 ('the 12 February defence'). Relevantly, the allegations in paragraphs 3 and 4 were not admitted:

> 3. Save that it admits:
>
> (a) that it was engaged by ESP Corporation Pty Ltd to carry out the construction work to the said property; and
>
> (b) that the said engagement was in writing and constituted by the matters referred to in paragraphs 3.1.1, 3.1.2, 3.3.3, 3.1.4 and 3.1.5 of the particulars subjoined to paragraph 3 thereof;
>
> it otherwise does not admit the allegation contained in paragraph 3 thereof.
>
> 4. Save that it acknowledges that section 8 of the *Domestic Building Contracts Act* 1995 contains the implied warranties, it otherwise does not admit the allegation contained in paragraph 4 thereof. [emphasis added]

6 On 7 April 2009, following an unsuccessful compulsory conference conducted on 11 March 2009, the builder was ordered to file and serve Further Amended Points of Defence. These are dated 20 May 2009 ('the 20 May defence') and contain significant amendments to paragraphs 3 and 4 where the following are substituted in lieu of paragraphs 3 and 4 in the 12 February defence. Relevantly the builder says (not including particulars):

> 3. Save that it admits:

(a) that EPS Property Corporation Pty Ltd was at all relevant times the owner of the land situate and known as …('the Property'); (sic)

(b) that ESP Property Corporation Pty Ltd in its capacity as the owner-developer of the Property entered into an agreement with the Respondent to perform the said construction works on the Property for and on behalf of ESP Property Corporation Pty Ltd;

(c) that it was engaged by ESP Property Corporation Pty Ltd to carry out the construction work of the said Property;

(d) that the works at the Property comprised the construction of a multi-level residential development with a mixed use component of retail or a 'shop front';

(e) that the said agreement was in writing and constituted by the matters referred to in paragraphs 3.1.1, 3.1.2, 3.3.3, 3.1.4 and 3.1.5 of the particulars subjoined to paragraph 3 thereof;

it otherwise denies each and every allegation contained in paragraph 3 thereof

3.1 Without limiting the generality of the denial contained in paragraph 3 hereof the First Respondent will contend at the trial of this Proceeding;

(a) that EPS Property Corporation Pty Ltd was at all relevant times the owner of the Property; (sic)

(b) that ESP Property Corporation Pty Ltd in its capacity as the owner-developer of the Property entered into an agreement with the First Respondent to perform the said construction works on the Property for and on behalf of ESP Property Corporation Pty Ltd;

(c) that the said agreement between the ESP Property Corporation Pty Ltd and the First Respondent was not a 'domestic building contract' within the meaning of section 8 of the *Domestic Building Contracts Act* 1995 (Vic);

(d) the said agreement between the ESP Property Corporation Pty Ltd and the First Respondent was not a "major domestic building contract" within the meaning of the section 29 of the *Domestic Building Contracts Act* 1995 (Vic); (sic)

(e) that none of the individual owners of the various subject units to the Property purchased their respective units from ESP Property Corporation Pty Ltd or any related company of ESP Property Corporation Pty Ltd;

(f) that, therefore:

(i) none of the warranties contained in section 8 of the *Domestic Building Contracts Act* 1995(Vic) were

implied into the agreement between ESP Property Corporation Pty Ltd and the First Respondent; and

(ii) none of the warranties contained in section 8 of the *Domestic Building Contracts Act* 1995(Vic) apply to the Applicant (nor any of the individual owners of the said units in the Property.

4. Save that it acknowledges that section 8 of the *Domestic Building Contracts Act* 1995(Vic) contains the said implied warranties, it otherwise denies the allegations contained in paragraph 4 thereof

7 On 15 June 2009 the owners corporation filed an affidavit of Thomas Dudley Shearer, owners corporation manager, in which he refers to the amendments to the builder's defence; states at paragraph 5 that the builder has not obtained leave of the tribunal to withdraw its previous admissions that it had entered into a domestic building contract for the construction of the works to which the s8 warranties applied; and at paragraphs 7 – 34 deposes to the substantial prejudice the owners corporation would suffer if the builder were granted leave to withdraw the previous admissions.

8 On 16 June 2009 orders were made for the filing and service of any affidavit material in reply by the builder, and the directions hearing scheduled for 11 August 2009 extended to half a day to *'enable the parties to argue the issue of withdrawal of admissions'*. No formal application in relation to this issue was received from either party. Mr Gurr of Counsel for the builder submitted that I should consider the submissions of the parties as if they related to an application by the owners corporation under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998. Mr Baker of Counsel for the owners corporation, submitted that if the builder was seeking to withdraw the previous admissions it was required to seek leave to do so. Upon my ruling, towards the end of the directions hearing, that an application for leave to withdraw the admissions was required, counsel formally made that application.

9 At the commencement of the directions hearing, counsel confirmed the builder was no longer seeking to rely on the 20 May defence, and that it wished to reinstate the 12 February defence. This had been the subject of correspondence between the solicitors. Counsel for the owners corporation said it had serious concerns that the abandonment of the 20 May defence was of little import and said the owners corporation anticipated that the builder would rely on the matters set out in paragraphs 3, 3.1 and 4 of the 20 May defence in support of its defence as set out in paragraphs 3 and 4 of the 12 February defence.

Is leave to withdraw previous admissions required?

10 Counsel for the builder contended that leave was not required to withdraw previous admissions that it had entered into a domestic building contract to construct the property, and that the s8 warranties applied. He submitted that leave was not required because in the defence of 12 February the

builder was responding to a different allegation. As I indicated during the course of the directions hearing, I do not accept there is anything significantly different between the initial allegations in paragraph 3 that the contract between ESP and the builder was a 'domestic building contract' and the revised allegation that it was a 'major domestic building contract' especially when considered in conjunction with paragraph 4 which, at all times, has quite clearly alleged that the s8 warranties apply. Irrespective of how it may have been described in the initial allegations, it is simply a matter of definition. The definition of a 'major domestic building contract' in s3 of the DBC Act is relevant:

> ***major domestic building contract*** means a domestic building contract in which the contract price for the carrying out of domestic building work is more than $5000 (or any higher amount fixed by the regulations); [emphasis added]

Accordingly, as I ruled during the directions hearing, leave is required to withdraw the previous admission.

Should leave to withdraw the admission be granted?

11 Whether the contract was a major domestic building contract is far from settled. The builder seeks to amend its defence having regard to a recent County Court decision of *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd* [2008] VCC 1170 which was handed down on 10 September 2008, which, whilst interesting and informative, is not binding on the tribunal. In *Glenrich* Judge Shelton determined that the DBC Act does not apply to an owner-developer. Whether his Honour's attention was drawn to s5(1)(e) or s6(c) of the DBC Act is unclear from his judgement. Relevantly they provide:

> s5(1) This Act applies to -
>
> (e) any work associated with the construction or erection of a building—
>
> (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
>
> (ii) in respect of which a building permit is required under the **Building Act 1993**;
>
> …
>
> s6 This Act does not apply to the following work-
>
> (c) any work in relation to a building intended to be used only for business purposes; [emphasis added]

12 However, I am not required to determine this question at this time. Counsel for the owners corporation conceded that in the normal course one would expect leave to be granted as the amendment is clearly 'open and arguable'. However, leave to withdraw the admission is opposed because the owners corporation says it will suffer significant prejudice if leave is granted. Two

defences have been filed by the builder admitting the contract was a domestic building contract to which the s8 warranties apply. It was not until February 2009, 18 months after the application was filed, that the builder filed a defence in which it said it *'does not admit'* the allegations in paragraphs 3 and 4.

13 The units were sold 'off the plan' by Prime Advice Pty Ltd in or around early or mid 2002. I understand that 21 of the 25 original purchasers still own their units. The land was purchased by Prime Advice Pty Ltd from Forus Pty Ltd in November 2001, which in turn had purchased it from ESP Property Corporation Pty Ltd ('ESP'). The building permit, which is dated 24 July 2002 (after the land was sold by ESP) identifies the owner of the land as ESP and Romano as the builder. Anthony Claudio Romano, who is the registered domestic building practitioner, is the sole director of the builder, and one of three directors of ESP. The director of Prime Advice is Jaques Khouri.

14 It was a condition of the contract of sale that Prime Advice had or would enter into a major domestic building contract for the construction of the units as soon as practicable after the sale. However, for reasons which are unclear, the building contract was entered into by ESP, not by Prime Advice. The owners corporation submits that any action it might have had against Prime Advice for breach of contract, in failing to enter into a major domestic building contract, was statute barred contending that the limitation period expired in or about August 2008. Hence the prejudice it says it will suffer if I allow the builder to withdraw the earlier admission.

15 However, if I grant leave to the builder to withdraw the earlier admission that is not of itself determinative of whether or not there is a major domestic building contract. This is an issue to be determined at the final hearing. As I raised with counsel during the course of the directions hearing, irrespective of admissions that may be made by a party, the tribunal cannot make a decision outside the law. For instance, although parties might agree to submit to the jurisdiction, if the tribunal does not have jurisdiction under the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') or an enabling enactment it cannot hear and determine a matter.

16 I have considered the authorities to which I was referred, and although I am mindful of the owners corporation's concerns that any claim against Prime Advice for breach of contract might be statute barred, I am not persuaded that is sufficient for me to refuse leave to amend. In arguing that the builder is estopped from withdrawing the earlier admissions, the owners corporation relies on the comments by Mason CJ in *Commonwealth v Verwayen* [1990] HCA 39 at 36:

> …The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party

estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption. (See also the conclusion of Lord Denning M.R. in Amalgamated Property Co. v. Texas Bank, at p 122.) (emphasis added)

17 However, his Honour went on to say:

> 39 In an ordinary case, the nature of pleadings and their susceptibility, whether by leave or otherwise, to amendment would make it most unlikely that it could be inferred from the pleadings alone that the pleader had induced another party to make an assumption that a particular matter would or would not be pleaded. The other party might reasonably be expected to appreciate that no inference can be drawn from the state of the pleadings alone at a particular time as to the future course which the pleader may decide to take. Still less would it be reasonable to assume that an implied promise not to amend the pleadings, if such a promise could be identified, would be enforceable in the absence of consideration: see Waltons Stores, at p 403.
>
> 40. However, in the present case the respondent is able to point to more than the mere filing and serving of the defence by the Commonwealth. There were clear indications that a deliberate and considered decision had been made whereby the limitation defence and the defence of no duty of care would not be pleaded in any of the ensuing actions brought by survivors of the collision. Those indications apparently included express representations to some claimants followed by the assessment and award of damages on the footing that no defence was pleaded. In the respondent's case, the Commonwealth had joined in making applications for an expedited hearing of the damages issue. (emphasis added)

18 These comments are pertinent here. It was for the owners corporation to make all necessary enquiries and satisfy itself as to who might be the appropriate respondents to its claim. Unlike in *Verwayen*, the only 'inducement', if it can be called that, as to a legal state affairs on which the applicant relies is the admission in the first two defences. There is no evidence that the builder has made any separate representation or agreement as to the application of the DBC Act which might have induced the owners corporation to look no further than the builder for relief. Any decision to institute proceedings against Prime Advice should have been made independently of, and not in reliance on, the builder's defence, particularly in circumstances where the entity, with which the builder contracted, was neither the owner of the property nor the vendor at the time the contracts of sale to the individual unit owners were entered into.

19 I will therefore grant the builder leave to withdraw the earlier admissions and order that the defence of 12 February stand. I have noted the owners corporation's concerns that in paragraphs 3 and 4 of the defence of 12 February the builder does not deny the allegations but rather 'does not admit' them. Whilst it is true that the tribunal is not a court of pleadings, and formal pleading rules do not apply, now that the defence of 20 May has been abandoned and withdrawn, the orders of 7 April 2009 have not been complied with. Accordingly, I will order that the builder file and serve an amended defence setting out the material facts relied upon. The owners corporation may also, of course, seek further particulars in accordance with paragraph 6.4 of PNDB1 (2007).

DEPUTY PRESIDENT C. AIRD