

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP2021/2019

CATCHWORDS

Domestic building – when applicant unable to obtain a certificate of conciliation from *Domestic Building Dispute Resolution Victoria* – when appropriate to exercise Tribunal’s discretion under s126(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* to waive compliance with the requirements of s56 of the *Domestic Building Contracts Act 1995*

APPLICANT	Gerard Brennan
FIRST RESPONDENT	N & K Morrice Pty Ltd (ACN: 109 424 857)
SECOND RESPONDENT	Neil Morrice
THIRD RESPONDENT	C Sphinx Consulting Pty Ltd (ACN: 102 410 326)
FOURTH RESPONDENT	Bayshore Building Surveying Pty Ltd (ACN: 092 137 141)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	In Chambers
DATE OF ORDER	9 December 2019
CITATION	Brennan v N & K Morrice Pty Ltd (Building and Property) [2019] VCAT 1950

ORDERS

1. Under s126(b)(2) of the *Victorian Civil and Administrative Tribunal Act 1998* compliance with the requirement in s56 of the *Domestic Building Contracts Act 1995* for the applicant to provide a certificate of conciliation issued by the chief dispute resolution officer of Domestic Building Dispute Resolution Victoria in relation to his domestic building dispute with the third and fourth respondents is waived.
2. The stay ordered on 25 October 2019 is lifted.
3. **I direct the principal registrar to send a copy of this order to the parties with the first listing notices.**

- 4. I direct the principal registrar to email a copy of this order to DBDRV as a courtesy – reference: DBDRV-2018-12-10195.**

DEPUTY PRESIDENT C AIRD

REASONS

- 1 The applicant lodged an application with the Tribunal on 24 October 2019. In the covering letter lodged with the application his solicitors noted that *there is a statute of limitation period due to expire on 27 October 2019*. I understand this to refer to the 10 year limitation period in s134 of the *Building Act 1993* for the bringing of a building action, noting that the occupancy permit for the subject property was issued on 27 October 2009.
- 2 Since 26 April 2017 all domestic building work disputes must be referred to Domestic Building Dispute Resolution Victoria ('DBDRV'). Proceedings in the Tribunal or a court must be accompanied by a certificate of conciliation issued by DBDRV¹ certifying that the dispute is not suitable for conciliation or was not resolved at conciliation.
- 3 The certificate of conciliation which accompanied the application to the Tribunal did not include the third and fourth building practitioner respondents named on the application. Accordingly, orders were made on 25 October 2019 staying the proceeding pending the receipt of an amended or further certificate of conciliation issued by DBDRV.
- 4 DBDRV has refused to issue an amended certificate of conciliation and has indicated it is unable to accept a further referral in relation to the third and fourth respondents due to the expiry of the limitation period. The applicant seeks orders allowing him to proceed with his application in the Tribunal as against the third and fourth respondents without a certificate of conciliation.
- 5 I am satisfied that it is appropriate to exercise the Tribunal's discretion under s126(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') (which will be discussed in detail later in these Reasons), on my own initiative, to waive compliance with the requirement in s56 of the *Domestic Building Contracts Act 1995* ('the DBCA') for the applicant to provide a certificate of conciliation in relation to his domestic building work dispute with the third and fourth respondents.
- 6 These Reasons are published to provide guidance to other parties who are unable to obtain a certificate of conciliation from DBDRV. However, any application under s126(2)(b) will not be considered until a referral has been made to DBDRV and the applicant has received a letter of rejection or correspondence indicating DBDRV will not accept or consider the referral.

THE TRIBUNAL'S ORDERS

- 7 On 25 October 2019 the Tribunal made the following orders:

¹ All references to DBDRV including where a function is carried out by the chief dispute resolution officer will be to DBDRV for ease of reading

OTHER MATTERS

1. The applicant lodged an application with a certificate of conciliation issued by DBDRV.
2. The respondents named in the application are N&K Morrice Pty Ltd and Neil Morrice (the builder), C Sphinx Consulting Pty Ltd (the design engineer) and Bayshore Building Surveying Pty Ltd (the relevant building surveyor).
3. The design engineer and the building surveyor are not named on the certificate of conciliation issued by DBDRV.
4. Having regard to the definition of a 'domestic building work dispute' in s44 of the Domestic Building Contracts Act 1995 and the definition of 'building practitioner' in the Building Act 1993, for the application to proceed in the Tribunal an amended/further certificate of conciliation naming both the engineer and the building surveyor is required.

ORDERS

1. The proceeding is stayed until an amended/further certificate of conciliation issued by DBDRV naming the engineer and the building surveyor is lodged. If an amended/further certificate of conciliation is not lodged by 29 November 2019 the proceeding will be struck out with a right of reinstatement upon the applicant complying with this order.
2. **I direct the principal registrar to email a copy of this order to DBDRV as a courtesy – reference: DBDRV-2018-12-10195.**

THE APPLICANT'S POSITION

- 8 On 26 November 2019 the applicant's solicitor emailed the Tribunal enclosing copies of its correspondence with DBDRV and advising (in summary):
- i. On 31 October 2019 they wrote to the Manager, Legal Department, DBDRV requesting DBDRV to urgently issue an amended/further certificate of conciliation.
 - ii. On 6 November 2019, DBDRV advised that they could not accede to the applicant's request unless there is a different limitation period for the claims against the third and fourth respondents (the 10 year limitation period for the bringing of a building action having apparently expired on or about 27 October 2019).
 - iii. On 7 November 2019 they wrote to DBDRV setting out their submissions as to why DBDRV could issue an amended or further certificate of conciliation.
 - iv. On 15 November 2019 DBDRV responded setting out their reasons why they were unable to amend the certificate of conciliation or process a new referral including:

Under section 45(3) of the DBC Act, a dispute must be referred to the Chief Dispute Resolution Officer within 10 years (of occupancy permit etc). The dispute referred by Mr Brennan did not name or otherwise feature the design engineer or the relevant building

surveyor. The ten years referred to in section 45(3) of the DBC Act had already expired when DBDRV received a courtesy copy of the Order and had already expired when [the applicant's solicitors] wrote to DBDRV on 31 October 2019.

DBDRV cannot amend Mr Brennan's referral nor process a new referral in relation to the domestic building work the subject of the VCAT proceedings.

- 9 The applicant relies on s45(5) of the DBCA in contending that he is unable to refer his domestic building work dispute in relation to the third and fourth respondents to DBDRV. Section 45(5) provides:

A party may not refer a domestic building work dispute under this section [to DBDRV] if proceedings in relation to the matter in dispute have commenced in VCAT or in a court.

- 10 I have previously considered a similar submission in *Warren's Plumbing and Drainage Services Pty Ltd v Sharma*² where I said at [14]:

Mr Ryan contends that because these proceedings have been commenced that the dispute cannot be made to DBDRV. However, it is important to note that s45(5) does not say that DBDRV cannot accept a referral if a proceeding has commenced in VCAT. In my view, the clear intention of s45(5) is that once proceedings have been commenced at VCAT in accordance with the requirements of the DBCA, noting there are exceptions to the requirement for a certificate of conciliation issued by DBDRV before commencement of the proceedings, that a party cannot simultaneously refer the dispute to DBDRV – it is to be dealt with in one forum and not two.

- 11 Although s45(5) does not apply, for reasons which I will discuss later the Tribunal can, on its own initiative, waive compliance with a procedural requirement in the VCAT Act or any enabling enactment under s126(2)(b) of the VCAT Act.

DBDRV'S POWERS

- 12 Sections 45(3), 45A, 45C(2)b), 45C(3)(g) and 45F of the DBCA are relevant.
- 13 Section 45(3) provides a referral to DBDRV in relation to a domestic building work dispute must be referred within:
- (a) 10 years after the date of issue under the Building Act 1993 of the occupancy permit in relation to the domestic building work (whether or not the occupancy permit is subsequently cancelled or varied); or
 - (b) if an occupancy permit is not issued, 10 years after the date of issue under Part 4 of the Building Act 1993 of the certificate of final inspection for the domestic building work; or

² [2018] VCAT 883

- (c) if neither an occupancy permit nor a certificate of final inspection is issued or required in relation to the domestic building work, 10 years after the date of practical completion of the domestic building work; or
 - (d) if neither an occupancy permit nor a certificate of final inspection is issued or required in relation to the domestic building work and a date of practical completion cannot be ascertained, 10 years after the domestic building contract was entered into.³
- 14 Section 45A(b) requires the conciliation officer to carry out an initial assessment of a referral to determine whether the referral was made within the required time (as set out in s45(3))
- 15 Section 45C(1) requires the conciliation officer to recommend to the chief dispute resolution officer whether to accept or reject the referral.
- 16 Section 45C provides that after considering the recommendation, the chief dispute resolution officer may –
- (a) accept the referral; or
 - (b) reject the referral if the chief dispute resolution officer assesses that the dispute is not suitable for conciliation.
- 17 Section 45C(3)(g)(i) provides the chief dispute resolution officer may assess the dispute as not suitable for conciliation if: *the referral is frivolous or otherwise lacking in substance*.⁴ In my view, if a referral is made out of time, it is arguable that it is lacking in substance and that s45C(3)(g)(i) applies.
- 18 Section 45E requires the chief dispute resolution officer to give written notice of decision under s45C or 45D to accept a referral. Section 45E(3) which required the chief dispute resolution officer to give written notice of decision to reject a referral was repealed in 2018. [underlining added]
- 19 If a dispute has been assessed as not suitable for conciliation, section 45F requires the chief dispute resolution officer to issue a certification of conciliation – not suitable, certifying the dispute was referred under s45 and that it has been assessed as being not suitable for conciliation. There no longer appears to be any power in the DBCA for the chief dispute resolution to simply reject a referral or refuse to process a referral without issuing a certificate of conciliation: the clear intention of s45F is that a certificate of conciliation - not suitable is to be issued.

³ Although a referral to DBDRV may be within time under s45(3)(c) and (d) the attention of readers is drawn to *Gledhill v Scotia Property Maintenance Pty Ltd* [2019] VCAT 422 in relation to the limitation period for commencement of a proceeding where there is neither an occupancy permit nor a certificate of final inspection.

⁴ When the amendments were made to the DBCA in 2018 s45C(3)(b), which empowered the chief dispute resolution officer to determine that a dispute was not suitable for conciliation because it was made out of time, was repealed.

DISCUSSION

20 Section 56 of the DBCA provides that a party to a domestic building work dispute must not make an application to the Tribunal without a certificate of conciliation issued by DBDRV, which must accompany the application.

21 In *Warren's Plumbing*⁵ I said at [20]

I am satisfied that this [the requirement for a certificate of conciliation to accompany an application to VCAT] is a procedural requirement which can be cured by the proceeding being stayed pending the applicant obtaining a certificate of conciliation from DBDRV...

22 Where an application is made to the Tribunal shortly prior to, or on the cusp of, the expiry of the 10 year limitation period for the bringing of a building action, and DBDRV refuses to issue a certificate of conciliation, it cannot have been the intention of the legislature that an applicant not be able to proceed with an application to the Tribunal commenced within time, because of its inability to comply with a procedural requirement.

23 I repeat my comments in *Warrens Plumbing* at [18]

It must be remembered that this is consumer protection legislation. It is designed to give parties access to a less formal forum for the resolution of domestic building work disputes. It is not intended to actively prevent persons with genuine disputes from being able to litigate them. It is intended to enhance not hinder access to justice for parties with domestic building work disputes, where one of the parties is an owner.

24 Section 57 of the DBCA provides that VCAT is to be chiefly responsible for resolving domestic building disputes, and s57(2) requires the Supreme Court, the County Court or the Magistrates Court to stay any action arising wholly or predominantly from a domestic building dispute upon application by a party to the action, if it could be heard by VCAT and the Court has not heard any oral evidence concerning the dispute.

25 Section 57A(b) of the DBCA allows a court to grant leave to a person to commence proceedings in a court without a certificate of conciliation. A similar power has not been given to the Tribunal, presumably because s126(2)(b) of the VCAT Act provides:

If the rules permit, the Tribunal, on application by a party or on its own initiative may –

...

(b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.

26 The Tribunal is authorised by rule 4.25 of the *Victorian Civil and Administrative Tribunal Rules 2018* to exercise any of the powers under s126(2).

⁵ *ibid*

- 27 The power under s126(2)(b) is discretionary and, in my view, should only be exercised to waive compliance with the requirement in s56 of the DBCA in limited circumstances such as where a referral has been made to DBDRV and DBDRV has refused to process the referral, rejected the referral, or refused to amend or issue a further certificate of conciliation.
- 28 Further, I note s56(4) of the DBCA provides *This section does not affect the validity of any decision made by VCAT any time before or after commencement* [of this subsection].

CONCLUSION

- 29 Accordingly, I will exercise the Tribunal's discretion under s126(2)(b) of the VCAT Act and waive compliance with the requirement for the applicant to lodge a certificate of conciliation in relation to each of third and fourth respondents.

DEPUTY PRESIDENT C AIRD