

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D855/2005

CATCHWORDS

Application for stay of proceedings as against Fourteenth to Seventeenth Respondents– principles to be considered – s60 of the *Victorian Civil and Administrative Tribunal Act 1998* - Fourteenth to Seventeenth Respondents interests affected by determination of application for review – Fourteenth to Seventeenth Respondents to have benefit of and be bound by decision – desirability of all issues being heard and determined at the same time

FIRST APPLICANT	Martin Browne
SECOND APPLICANT	Greenleaf Nominees Pty Ltd
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND TO THIRTEENTH RESPONDENTS	Brett Andrew King, Rebeckah King, Christopher Teston Lane, Dee Christine Lane, Wendy Elizabeth Brown, Body Corporate 442930L att: Peter Michell, Madeleine Louise HO, Geoffrey Phillip Luff, John Edward Wilkinson, Denise Nancy Branson, Michelle Nookdin Hoodbhoy, Margaret Mary Hill
FOURTEENTH RESPONDENT	Robert Cilia
FIFTEENTH RESPONDENT	Omiros Emmanoulides
SIXTEENTH RESPONDENT	Theo Theodorou
SEVENTEENTH RESPONDENT	Metro Roofing Supplies Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 July 2006
DATE OF ORDER	11 August 2006
CITATION	Browne v Greenleaf Nominees Pty Ltd (Domestic Building) [2006] VCAT 1646

ORDER

1. The application by the Fifteenth Respondent for a stay of the proceedings as against the Fourteenth to Seventeenth Respondents until the Applicant's application for a review of the decisions of the First Respondent is dismissed.

2. The proceeding is referred to a further directions hearing on 5 September 2006 at 2.15 p.m. before Deputy President Aird at 55 King Street Melbourne at which time the Applicants' application for joinder dated 8 May 2006, and any application for costs will be heard. Directions for the further conduct of the proceeding will also be made.

3. Costs reserved – liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the First Applicant	Mr J Forrest of Counsel
For the Second Applicant	Mr J Forrest of Counsel
For the First Respondent	Mr M Czapnik, Articled Clerk
For the Second to Thirteenth Respondents	Ms J Morphett, Solicitor
For the Fourteenth Respondent	No appearance
For the Fifteenth Respondent	Mr A McAdam, Solicitor
For the Sixteenth Respondent	Mr P Marzella of Counsel
For the Seventeenth Respondent	No appearance

REASONS

- 1 Pursuant to a building contract dated 22 February 2002 the Second Applicant ('the builder') built an apartment complex comprising 16 apartments and carparking spaces. On 18 and 20 October 2005 the First Respondent (formerly HGFL, now VMIA) accepted the Body Corporate's claim for indemnity and issued a direction to the builder to carry out certain rectification works. These included the rectification of significant water leaks into the carpark below the podium level allegedly caused by the lack of an adequate waterproof membrane, replacement of the pumping and drainage system and replacement of damaged roof tiles and associated works. The builder made application to this Tribunal on 15 November 2005 seeking a review of that decision on the grounds that the 'works were constructed in accordance with plans and specifications provided to the Applicant'. The owners and the Body Corporate were named as Respondents ('the owners'). At a directions hearing on 17 January 2006 orders were made under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the *VCAT Act*') joining the engineer, the architect, the building surveyors, and the supplier of the roof tiles as the Fourteenth to Seventeenth Respondents respectively. Amended Points of Claim were filed on 14 February 2006.
- 2 On 29 March 2006 the Fifteenth Respondent ('the architect') made application that the Points of Claim against it be struck out pursuant to s75 of the *Victorian Civil and Administrative Tribunal Act 1998*. This application was heard on 7 April 2006 at which time it was dismissed and short Reasons provided by Senior Member Cremean. At paragraph 3 he made the following observations:

'...However claims are made in the Amended Points of Claim arising out of the operation of the Wrong (sic) Act section 23B. I am not certain that I agree that the case that is put based on that provision and its operation is a strong one. But that is not the test which I must be guided by. I am unable to say that there is not a triable issue relating to that provision. That means I am unable to be satisfied that I should make a finding that the case against the Fifteenth Respondent although in most respects poorly phrased is so hopeless that it should be immediately struck out...'
- 3 On 8 May 2006 the builder filed a further application for joinder. By letter dated 26 May 2006 (and received by the Tribunal on 29 May 2006) solicitors for the owners advised they had instructions to seek a stay of the proceedings as against what were described as the 'joined parties' but which I understand to mean all Respondents other than the owners. At the directions hearing held on 29 May 2006 various orders were made including an order setting down the stay application for hearing. Orders were also made giving any other party leave to join in the stay application by letter to be filed and served by 5 June 2006.

- 4 On 5 June 2006 the architect's solicitors advised he would be joining in the owners' stay application, and on 13 June 2006 filed Written Submissions. The architect seeks the following orders:
1. The application by the respondents against the first to thirteenth respondents by paragraphs 14 to 18 of the Amended Points of Claim for review of the decisions of the first respondent be heard and determined as a separate question before the hearing of the proceeding by the applicants against the fourteenth to seventeenth respondents.
 2. No further step be taken by the applicants and the fourteenth to seventeenth respondents in relation to the proceeding by the applicants against the fourteenth to seventeenth respondents until further order.
- 5 On 23 June 2006 solicitors for the owners advised the owners wished to withdraw their stay application, and requested that it be dismissed with no order as to costs. By facsimile dated 26 June 2006, the architect's solicitors advised that notwithstanding the owners' withdrawal of their stay application, the architect wished to proceed with his application. On 6 July 2006 Reply Submissions were filed on behalf of the builder.

The architect's position

- 6 The architect seeks a stay of the proceedings as against the Fourteenth to Seventeenth Respondents until the builder's application for review of VMIA's decision has been determined. Mr McAdam, solicitor, who appeared on behalf of the architect, submitted that a stay of the proceeding was '*...necessary for the expeditious and fair hearing and determination of the proceeding as a whole*'. I was referred to paragraphs 29-36 of the Amended Points of Claim and, in particular, to paragraph 33:
33. In the circumstances, in the event that the Applicants are adjudged liable;
 - (a) in respect of the Owners' claim for indemnity for any amount; and/or
 - (b) in respect of the Owners' claim for alleged loss and damage; and/or
 - (c) to rectify the alleged defective workmanship referred to in the Second Respondent's decision and the Schedule of Works; and/or
 - (d) to the Second Respondent by the operation of Part 6 of the House Contracts Guarantee Act 1987then the Applicants will suffer loss and damage
...
 34. Further or alternatively, if the Applicants are adjudged liable (which is denied) for the matters referred to in the preceding paragraph hereof then, pursuant to s23B of the Wrongs Act 1958,

the Applicants are entitled to indemnity or contribution from the Architect in respect of any amount the Applicants are ordered to pay in such proportion as the Tribunal deems just and equitable having regard to the extent of the Architect's responsibility for the loss and damage.

35. Further or alternatively

- (a) the Owners' claim for indemnity and the Owners' alleged loss and damages are claims for economic loss or damage to property arising from a failure to take care pursuant to s24AF of the Wrongs Act 1958;
- (b) the Architect is a concurrent wrongdoer in accordance with Part IVAA of the Wrongs Act 1958 whose acts and omissions as pleaded above caused the Owners' claim for indemnity and/or the Owners' alleged loss and damage; and
- (c) the Architect was responsible for all, or alternatively part, of the Owners' claim for indemnity and/or the Owners' alleged loss and damage.

36. In the circumstances, the Applicant seeks an order pursuant to section 24AI of the Wrongs Act 1958:

- (a) in respect of the Architect's liability as a concurrent wrongdoer relating to the Owners' claim for indemnity and/or the Owners' alleged loss and damage for an amount which reflects that proportion of the loss and damage that the Tribunal considers just having regard to the extent of the Architect's responsibility for the loss or damage;
- (b) for judgement in relation to the Owners' claim for indemnity and/or the Owners' alleged loss and damage.

7 Mr McAdam submitted that until such time as the application for review of VMIA's decision is determined, or the owners make a direct claim against the builder, there is no utility in the contribution and/or apportionment claims being considered. He submitted that if the builder is successful the decision will be set aside. If the builder does not succeed, the decision and the direction to carry out the rectification work will stand. Although the builder may well have a claim against the other persons involved in the building works, he submitted the builder will not have suffered any loss and damage until the works are completed.

8 He also submitted that in considering the application for review, whilst the Tribunal will be required to determine whether the building work the subject of the claim to VMIA is defective thus triggering the insurance policy ('the policy') it will not be required to consider the cause of the defective building work. Further, that once the review proceeding has been determined it will become apparent that the claims against the Fourteenth to Seventeenth Respondents are misconceived.

- 9 I also heard submissions as to the applicability of s24B and 24AI of the *Wrongs Act 1958*.
- 10 Although the owners have withdrawn their stay application and the other Respondents have not made any such application, the architect seeks a stay submitting that it is in the best interests of the owners and the other Respondents.

The builder's position

- 11 Mr Forrest of Counsel appeared on behalf of the builder. He resisted the stay application in a carefully considered submission. He submitted that this was essentially a re-agitation of the s75 application which was dismissed on 7 April 2006. Further, that in considering whether the builder's work was defective it would be necessary to consider the cause of the defects.
- 12 In opposing the stay application, Mr Forrest referred to *Dowie v Northey* [2000] VCAT 823 where Deputy President McKenzie ordered a stay of the proceedings in the Tribunal pending the determination of related defamation proceedings in the County Court. Deputy President McKenzie set out the principles which should be taken into account when considering a stay application:

Prima facie a complainant is entitled to have his or her complaint heard in the ordinary course of the procedure and business of the Tribunal. It is a grave matter to interfere with this entitlement by a stay of proceedings which must be justified on proper grounds. The respondent, or the person who seeks the stay, needs to show that it is just and convenient that the complainant's ordinary right should be interfered with. The Tribunal's task is to balance justice between the parties having regard to all the circumstances. The effect of the stay on both complainant and respondent must be weighed. In appropriate cases proceedings may be allowed to proceed to a certain stage and then stayed.

Discussion

- 13 In Section 1 of the policy 'defective' in relation to 'Domestic Building Work' is defined as:
- (a) a breach of any warranty referred to in section 2.1(a); or
 - (b) a failure by the Builder to maintain a standard or quality of building work performed by the Builder

Section 2 of the policy provides:

- 2.1 The Insurer will indemnify the insured, subject to the limitations, terms and conditions of the Policy against all loss or damage or expense incurred by the Insured during the Period of Insurance which results from:-

- (a) any breach of the warranties by the Builder which are implied under Section 8 of the Act in respect of Domestic Building Work carried out by the Builder, such warranties being that:-
- the work has been or will be carried out in a proper and workmanlike manner and in accordance with the relevant plans and specifications applying to the Domestic Building Work covered by the Policy'

...

- (b) Domestic Building Work which is defective within the meaning of the Domestic Building Contracts Act 1995

14 It is submitted on behalf of the architect that in determining the review application it will not be necessary for the Tribunal to consider the cause of the defective works. This is patently incorrect. In determining whether the builder is liable under the policy the Tribunal must consider the builder's obligations and whether there has been any breach of those obligations. In considering whether there has been any breach of those obligations the Tribunal will necessarily be required to determine how and why the 'defects' arose. In particular, whether the defects were caused by defective building work performed by the builder. The whole substance of the application for review is that the defects were not caused by defective building work performed by the builder.

15 Although both parties referred me to s51 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') it should be read in conjunction with s59A of the *Domestic Building Contracts Act 1995* ('the DBC Act') which confers jurisdiction on the Tribunal to 'hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim'. Section 60 (1) and (3) of the DBC Act provide:

- (1) The Tribunal may review any decision of an insurer with respect to anything arising from any required insurance under the Building Act 1993 that a builder is covered by in relation to domestic building work or from a guarantee under the House Contracts Guarantee Act 1987 or from an indemnity under Part 6 of the House Contracts Guarantee Act 1987.

...

- (3) After conducting a review, the Tribunal may confirm, annul, vary or reverse the decision, and may make any order necessary to give effect to its decision.

16 I accept the Tribunal has power to vary the decision which includes substituting another decision but I am not persuaded that there would be any reason for the Tribunal to vary the direction to carry out the works in the absence of any application to do so by the owners. This is not an application for variation of the decision but rather an application by the

builder for a review of the decision to indemnify and the direction to carry out the works. No decision has been made on quantum by VMIA, and, as I understand it, no claim for payment of any damages in lieu of the builder carrying out the rectification works has been made by the owners.

- 17 Much of the material set out in the architect's submissions is a replication of the submissions in support of his application under s75 which was dismissed. Although the application before me is for a stay of the proceeding, any consideration of the submissions in relation to the applicability of the *Wrongs Act* submissions would by their very nature require me to reconsider issues which have already been determined by the Tribunal in dismissing the s75 application. The architect has not sought leave to appeal that decision.

Conclusion

- 18 In simple terms it might be argued that this application is not about the cause of the defects but whether the defects are the builder's responsibility and trigger the insurance policy. In determining whether the defects are the result of defective work performed by the builder (as defined in the policy) it will, in my view, necessitate a consideration of the cause of the defect so that the builder's liability or otherwise can be determined.
- 19 In considering whether to allow this stay application, I respectfully agree with the principles enunciated by Deputy President McKenzie in *Dowie* – it must be just and convenient to do so. The difficulty with allowing this application would be that the Tribunal could very well determine the application for review in a way that would otherwise prejudice the architect's (and the other Respondents') interests. It seems to me that taking into account the provisions of s60 of the *VCAT Act* it is desirable that all matters be determined at the same time and it would not be just and convenient to do otherwise. The Respondents' interests will clearly be affected by the outcome, and they should have the benefit of any decision that is made. One might expect in such circumstances that they would welcome an opportunity to be heard so as to minimise any potential liability. I am reinforced in this conclusion by the withdrawal of their stay application by the owners and the indication from Mr Marzella of Counsel who appeared on behalf of the Sixteenth Respondent building surveyor that, if the stay application was granted, he anticipated his client would seek leave to appear at the hearing in order to protect his interests.
- 20 Further, s97 of the *VCAT Act* requires the Tribunal to act fairly and in accordance with the substantial merits of the case. It is clearly desirable that all issues in relation to determining whether the defects are attributable to defective building work performed by the builder be determined at the same time to avoid duplication of evidence and any possibility of inconsistent findings, or findings which may be to the detriment of one of the Fourteenth to Seventeenth Respondents if they are denied an opportunity of 'defending' their interests.

- 21 I do not consider the costs which might be incurred by the builder or the architect depending on the outcome of this application to be a relevant factor to take into account. I am satisfied for the reasons set out above that it is in the interests of all parties that this application not be granted, it being desirable that all issues be ventilated and considered at the same time.
- 22 The application for a stay of the proceedings will therefore be dismissed, and the proceeding set down for a further directions hearing at which time the Applicants' application for joinder will be heard. I will also reserve the question of costs of this application with liberty to apply.

DEPUTY PRESIDENT C. AIRD