

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D819/2004

CATCHWORDS

Joint Venture Agreement – Declaration of Trust – Settlement between Respondent and Interested Parties prior to joinder. Whether authority of Applicant under Joint Venture Agreement and Declaration of Trust to lodge, prosecute and maintain defence set-off and counterclaim is a domestic building dispute within meaning of s54 of *Domestic Building Contracts Act 1995* – application under ss75 and 78 of the *Victorian Civil and Administrative Act 1998* – statutory obligations imposed on Tribunal by ss97 and 99 of the *Victorian Civil and Administrative Act 1998*.

[2005] VCAT 1643

APPLICANT: Deco Group Holdings Pty Ltd (ABN 14 092 196 917)

RESPONDENT: Seaford Developments Pty Ltd (ACN 099 871 633)

INTERESTED PARTY 1: Helen Bude

INTERESTED PARTY 2: Universal Star Properties Pty Ltd (ACN 100 270 255)

INTERESTED PARTY 3: Pajess Enterprises Pty Ltd (ACN 100 062 511)

INTERESTED PARTY 4: C.A.T. Enterprises Pty Ltd (ACN 100 325 460)

INTERESTED PARTY 5: Carina Properties Pty Ltd (ACN 099 943 405)

INTERESTED PARTY 6: Dale Robert Service Pty Ltd (ACN 100 308 898)

INTERESTED PARTY 7: Zcott Holdings Pty Ltd (ACN 100 293 276)

INTERESTED PARTY 8: Gratemin Pty Ltd (ACN 100 244 166)

BEFORE: Deputy President C. Aird

HEARING TYPE: Directions Hearing

DATE OF HEARING: 15 June 2005

DATE OF ORDER: 11 August 2005

ORDERS

1. The application by the Applicant that the Respondent's Points of Defence insofar as they relate to a set-off and Counterclaim be dismissed or struck out is dismissed.
2. **Direct the principal registrar to list this proceeding for a directions hearing before Deputy President Aird 55 King Street Melbourne on 2 September 2005 commencing at 10 a.m. – allow one day.**

3. Should any party be seeking orders other than a variation to the timetable for the final hearing of this proceeding, they must file and serve an Application for Directions/Orders by 22 August 2005, accompanied by affidavit material in support as appropriate.
4. Any affidavit material in reply must be filed and served by 12 noon on 30 August 2005.
5. Costs reserved – liberty to the parties to apply. Any application for costs shall be heard at the further directions hearing on 2 September 2005.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant:	Mr J Nixon of Counsel
For the Respondent:	Mr J Levine of Counsel
For the Interested Parties:	Mr M Settle of Counsel

REASONS

1. A Joint Venture Agreement ('the JVA') was entered into between eleven joint venture partners ('the JVPs') and the Respondent (Seaford) on 11 June 2002 for the purposes of purchasing the land, demolishing any structures on the land, subdividing the land into 17 lots, and constructing 17 townhouses on the land with townhouses to be transferred to each JVP on completion. Seaford purchased the land as trustee for the JVPs, the beneficiaries under a Declaration of Trust made on 11 June 2002. The Applicant builder ('Deco') and Seaford entered into a building contract on 23 August 2003 for the construction of the 17 townhouses.
2. This dispute has had an unfortunate history. It first came before me in November 2004 when Seaford was seeking an injunction requiring Deco to reinstate fittings which had been removed from the property. A few days later Deco lodged its own application and an injunction was granted by Deputy President Macnamara restraining Seaford from transferring the individual units to the JVPs. Deco subsequently amended its application to include a claim for the balance of the contract price, damages arising from Seaford's alleged repudiation of the building contract, and payment for variations allegedly requested by Seaford. The proceedings were consolidated to avoid unnecessary duplication of documents and Seaford lodged a counterclaim on 1 March 2004, dated 28 February 2004, seeking damages for the cost of completion and rectification works, variation credits and liquidated damages.
3. There have been a number of directions hearings arising out of Seaford's failure to comply with certain directions made by the tribunal in relation to the conduct of the proceeding. At a directions hearing on 3 June 2005, ostensibly to consider a further failure by Seaford to comply with directions, eight of the Joint Venture Partners ('the eight JVPs') sought leave to file and serve an affidavit by Effie Kavadas their solicitor, setting out the history of the joint venture and including the assertion that Seaford did not have authority under the JVA and the

Declaration of Trust to institute, let alone maintain, the counterclaim. They were not parties to this proceeding at that time. I joined them as interested parties under s60 of the *Victorian Civil and Administrative Tribunal Act 1998* as their interests are clearly affected by this proceeding, particularly as it is alleged by Seaford that the JVP's will be liable for any judgement against Seaford under the terms of the JVA and Declaration of Trust. I then gave them leave to file and serve the affidavit which, having regard to the provisions of s99 of the *Victorian Civil and Administrative Tribunal Act 1998*, I considered would provide me with a greater understanding of the relevant background to this proceeding. On 3 June 2005 I also gave the parties leave to make any application arising out of Ms Kavadas' affidavit with orders made for the filing and service, by specified dates, of affidavit material in support and reply.

4. On 9 June 2005 Deco made application that Seaford's points of defence and counterclaim be dismissed or, alternatively, struck out, pursuant to ss75 and/or 78 of the Act, or alternatively that the counterclaim be dismissed or struck out, and certain paragraphs of the points of defence dated 1 March 2005 be struck out. Deco also sought a further order, in the alternative, that its claim proceed to hearing on 8 August 2005 (the scheduled hearing date) with Seaford's counterclaim and defence insofar as it relates to a set-off to be heard on a later date to be fixed. Deco's application was set down for hearing on 15 June 2005. The hearing date of 8 August 2005 was subsequently vacated pending delivery of my reserved decision.

Admissibility of Affidavit Material

5. At the commencement of this hearing on 15 June 2005, Seaford objected to an affidavit of Michael Witt, Deco's solicitor sworn 9 June 2005, remaining on the Tribunal file and being taken into account in determining Deco's application. An affidavit of Isaac Brott, Seaford's solicitor, sworn on 15 June 2005 was filed in support of this objection. The primary objection to Mr Witt's affidavit is that it contains evidence of confidential, 'without prejudice' settlement negotiations.

Much of the material contained in Mr Witt's affidavit was included in the affidavit of Effie Kavadas which I had given the eight JVPs leave to file on 3 June 2005. Although, that affidavit was produced at the commencement of the directions hearing on 3 June 2005, and Seaford's advisers only had a short time to consider it before I granted leave, as I recall, no objection was raised on the grounds of it containing evidence of confidential negotiations. In addition, I note that much of the information contained in Mr Brott's affidavit also refers to the settlement negotiations, and exhibits copies of 'without prejudice' correspondence and documentation prepared during the course of those negotiations.

6. Having regard to the provisions of s98 of the Act (to conduct hearings with as little formality and technicality and determine proceedings with as much speed...as is possible), I reserved my ruling on the admissibility of the affidavit material and continued with the hearing. Having now had an opportunity of considering the affidavit material, in my view, it is appropriate for me to have had it before me in determining this application, particularly having regard to the provisions of s99 of the Act. As indicated to the parties some months ago I will not preside at the final hearing because of disclosures that have been made to me at some of the directions hearings so no prejudice will be suffered by any party in the final determination of the proceeding by my having regard to it now. However, I am prepared to consider any application that it (and Mr Brott's affidavit) be removed from the tribunal file now this application has been determined.

Deco's application

7. The eight JVPs entered into Terms of Settlement with Deco whereby Deco agreed to carry out certain rectification works, and withdraw its caveats over each of the allotments and they each made individual payments of \$19,705.88 to Deco on 16 February 2005, with the exception of one of the eight JVPs who made its payment to Deco in March. Thereafter their allotted townhouses were transferred

into their names. Subsequently, by counterclaim dated 28 February 2005, filed on 1 March 2005, Seaford claimed damages for incomplete and defective works, variation credits and liquidated damages. Settlement between Deco and the eight JVPs occurred prior to the lodging of the counterclaim by Seaford.

8. Deco submits that the defence and counterclaim should be dismissed or struck out because Seaford did not and does not have the authority of the Committee of Management to defend its claim or institute or maintain the counterclaim. In this regard Deco relies on the provisions of clauses 5.2 and 5.3 of the JVA which provide:

5.2 During the subsistence of the Joint Venture the overall supervision and control of all matters pertaining to the conduct of the Joint Venture will be exercised by the Management Committee which will carry out its duties and responsibilities on the terms and conditions set out in Clause 6 and

5.3 Subject to the overall direction and supervision of the Management Committee the Project Manager shall be responsible for the day to day management and control of the Project on the terms and conditions set out in Clause 8.

9. Mr Witt at paragraphs 9 and 10 of his Affidavit sworn 9 June 2005 states:

9. I have examined the Terms of Settlement and the Amended Terms of Settlement and in particular the signatures of the parties to those documents. From such examination I believe that each of the representatives nominated to the Management Committee have signed the relevant documents and therefore it has been resolved by the Committee that Seaford was to settle the proceeding in accordance with those Terms and not to continue contesting the Applicant's claim in this proceeding. Further, this decision was made prior to the filing of the Points of Defence and Counterclaim in this proceeding and as a result I believe that Seaford did not have authority to file its Points of Defence and Counterclaim.

10. Further, so far as I am aware, there has been no subsequent decision of the Committee of Management which has authorised the filing of the Points of Defence and Counterclaim.

Discussion

10. This proceeding (including the counterclaim) concerns a domestic building dispute arising under a domestic building contract between Seaford as owner and

Deco as builder. A 'domestic building dispute' is defined in s54 of the *Domestic Building Contracts Act 1995* which provides:

(1) A "domestic building dispute" is a dispute or claim arising—

- (a) between a building owner and—
 - (i) a builder; or
 - (ii) a building practitioner (as defined in the Building Act 1993); or
 - (iii) a sub-contractor; or
 - (iv) an architect—

in relation to a domestic building contract or the carrying out of domestic building work; or

- (b) between a builder and—
 - (i) another builder; or
 - (ii) a building practitioner (as defined in the Building Act 1993); or
 - (iii) a sub-contractor; or
 - (iv) an insurer—

in relation to a domestic building contract or the carrying out of domestic building work; or

- (c) between a building owner or a builder and—
 - (i) an architect; or
 - (ii) a building practitioner registered under the Building Act 1993 as an engineer or draftsman—

in relation to any design work carried out by the architect or building practitioner in respect of domestic building work.

(2) For the purposes of sub-section (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.

(3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

11. In determining this proceeding the Tribunal must be concerned with the contractual rights and obligations of the parties to the building contract – Seaford and Deco – under which the domestic building dispute arises. Questions as to the authority of Seaford as trustee to institute and prosecute the counterclaim are matters between the eight JVPs and Seaford which do not, in my view, fall within

the definition of a domestic building dispute as set out above. Rather, the dispute between the eight JVPs and Seaford is internal to the joint venture in which Deco is not directly involved and with which this proceeding is not concerned.

12. I have also had the opportunity of briefly considering an expert report of Dr Ian Eilenberg filed by Seaford under cover of a letter dated 8 July 2005 from its solicitors. Dr Eilenberg reports there are significant defects with the external areas of the building and he estimates the cost of rectification of those items to be approximately \$1m plus an allowance of \$5000 per unit for completion works in each of the 17 units. In addition, he reports that Seaford has invoices totalling \$188,026 for certain works it has carried out which, it is alleged, should have been done by the builder, with further works allegedly required for completion at an estimated cost of \$161,500. Whilst eight of the JVPs may have entered into terms of settlement with the builder, and purportedly given the builder releases in relation to the incomplete and defective works in each of their units – the effect and enforceability about which I make no findings – such negotiations and settlement were seemingly not in compromise of this proceeding. Although Mr Witt deposes in his affidavit, referred to at paragraph 10 above, that the signatories to the Terms of Settlement and Amended Terms of Settlement are those of the Members of the Management Committee, I cannot be satisfied on the evidence before me that they have entered into those Terms in any capacity other than on their own behalf.
13. Further, even if I were satisfied I should do so, I am concerned that a summary dismissal or striking out of the counterclaim would potentially be a denial of natural justice to Seaford. Although the eight JVPs have indicated they do not wish Seaford to proceed with the counterclaim, for the reasons set out above, I am of the view any question about the authority of Seaford as trustee is not a domestic building dispute, and in any event there is no application before me by the eight JVPs. Even if there were, I am not persuaded I would have jurisdiction

to consider it under the provisions of the *Domestic Building Contracts Act 1995*.

14. The issue of whether Seaford can make a claim for damages under the contract in respect of the units it no longer owns or controls was raised. Whilst there may be an argument that the eight JVPs have released the builder in relation to their individual units, such release, if it is effective and enforceable and I make no findings in that regard, would not seem on the face of it to extend to the whole of the building and in particular to the whole of the external areas. Whilst it is true that the statutory warranties run with the land, and many of the units have now been transferred into the names of the eight JVPs, that is not of itself sufficient reason to summarily dismiss the counterclaim. Further, the counterclaim is not only in respect of incomplete and defective works in the individual units, or even for the building as a whole, but includes claims under the contract including disputed variations and a claim for liquidated damages. These are matters which are properly a domestic building dispute between the parties to the building contract – Seaford and Deco – and whether Seaford will be able to prove that it has suffered any loss and damage will be considered and determined by the Tribunal at the final hearing.

15. Whether the trust is continuing is also a matter internal to the joint venture. However I note in passing that if Mr Nixon's submission that it is at an end and Seaford therefore does not have authority to conduct this proceeding is correct, it would be difficult to conclude, as submitted by him, that on the one hand Seaford could be required to fulfil its obligations under the building contract but on the other denied of its rights under the contract. However, I make no findings in relation to the status of the trust for the reasons set out above.

Sections 75 and 78 of the Act

16. Section 75 provides:

75. Summary dismissal of unjustified proceedings

- (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
 - (a) is frivolous, vexatious, misconceived or lacking in substance; or
 - (b) is otherwise an abuse of process.
- (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.
- ...
- (5) For the purposes of this Act, the question whether or not an application is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process is a question of law".

17. I refer here to my decision in *Singleton v Australian International Insurance* [2004] VCAT 2632 where I considered an application under s75, and in particular to paragraph 4 which I set out in full:

I am assisted by the decision of Deputy President McKenzie in *Norman v Australian Red Cross Society* 1998 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. p.102 she said:

- (a) *The application is for the summary termination of the proceedings. It is not the full hearing of the proceeding.*
- (b) *The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.*
- (c) *If the Complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a Complainant indicates to the Tribunal that there is other evidence that he or she can call to support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the Complainant's material contains the whole of his or her case.*
- (d) *An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would*

generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.

- (e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is **obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail.** (emphasis added) This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding.*
- (f) On an application to terminate a complaint summarily, the Tribunal must clearly distinguish between the complaint itself and the evidence which is to be given in support of it. A complaint cannot be struck out as lacking in substance because it does not itself contain the evidence which supports the claims.*
- (g) The test for determining whether a complaint is frivolous, vexatious, misconceived or lacking in substance is different from that applied in other Australian Anti-Discrimination jurisdictions where the legislative context is different from Victoria. It is similar to that applied by the Supreme Court in civil proceedings for the purposes of RSC r23.01.*
- (h) The Tribunal should not apply technical, artificial or mechanical rules in construing a complaint or coming to a view about the case a Complainant wishes to advance.*

18. It is clear that where application is made under s75 of the Act the basis upon which the application should be dismissed or struck out should be clearly enunciated with reference to the wording of that section. The required material does not form part of the Application for Consent/Directions filed on 9 June 2005. At the hearing, Mr Nixon submitted the filing of the points of defence and counterclaim were misconceived, vexatious and an abuse of process in support of which he relied on the affidavits of Effie Kavadas and Michael Witt referred to above. However he failed to persuade me that the dispute between the eight JVPs and Seaford, which I have found is internal to the joint venture, supports an application under s75.

19. The application under s78 is apparently made under s78(1)(f) – conducting the

proceeding vexatiously. Mr Nixon also submitted I should take into account Seaford's persistent and constant failure to comply with directions. Section 78 of the Act provides:

78. Conduct of proceeding causing disadvantage

- (1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—
 - (a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or
 - (b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or
 - (c) asking for an adjournment as a result of (a) or (b); or
 - (d) causing an adjournment; or
 - (e) attempting to deceive another party or the Tribunal; or
 - (f) vexatiously conducting the proceeding; or
 - (g) failing to attend mediation or the hearing of the proceeding.
- (2) If this section applies, the Tribunal may—
 - (a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or
 - (b) if the party causing the disadvantage is not the applicant—
 - (i) determine the proceeding in favour of the applicant and make any appropriate orders; or
 - (ii) order that the party causing the disadvantage be struck out of the proceeding;
 - (c) make an order for costs under section 109.
- (3) The Tribunal's powers under this section are exercisable by the presiding member.

20. The tribunal's exercise of its powers under s78 is entirely discretionary but should not be exercised without caution. I must have regard to the principles set out *Queensland v JL Holdings Pty Ltd* (1997) ALJR 294 and in particular the comments of the joint majority at page 296 that "*it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that*

aim." I must also act in accordance with the requirements of s97 of the Act that 'the Tribunal must act fairly and according to the substantial merits of the case in all proceedings'. In *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255 Ashley J set out the matters which the tribunal should take into account when considering whether to exercise its discretion under s78(2). Of particular relevance here are the requirements that the discretion only be exercised 'as a last resort and not a first resort' and that in exercising its discretion the tribunal be mindful of the requirements to act fairly (s97) and to comply with the rules of natural justice (s98). An exercise of the discretion under s78(2) would not comply with these requirements, particularly where it is clear that there are real issues to be tried as between the parties to the building contract – Seaford and Deco and is disallowed. In relation to the application under s75 I am not persuaded that the dispute which is internal to the joint venture demonstrates this proceeding is being conducted vexatiously.

Application for the claim and counterclaim to be heard separately

21. Application has been made by Deco that the claim and counterclaim be heard separately. Having regard to the provisions on ss97 and 99 of the Act and in the interests of ensuring all parties are accorded natural justice and procedural fairness, the matters raised in the defence, insofar as they relate to a set-off, and the counterclaim should properly be heard at the same time as the claim. I therefore decline to make the orders sought.

DEPUTY PRESIDENT C AIRD