VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D629/2005**

CATCHWORDS

Domestic Building, strike out application, s75 of the VCAT Act, obviously hopeless, unsustainable and bound to fail, premature application

[2006] VCAT 6

APPLICANT:	Jennifer Green, Colin Green
FIRST RESPONDENT:	Stonehaven Homes (Vic) Pty Ltd (ACN 006 258 082)
SECOND RESPONDENT:	Barry Gale Nominees Pty Ltd (ACN 007 430 668)
WHERE HELD:	Melbourne
BEFORE:	Senior Member M. Lothian
HEARING TYPE:	Hearing
DATE OF HEARING:	16 January 2006
DATE OF ORDER:	20 January 2006

ORDERS

1. The application by the Second Respondent pursuant to s.75 to strike out the Applicants' proceeding against the Second Respondent is dismissed.

2. The mediation to be conducted on 24 January 2006 shall proceed.

3. Costs of this application are reserved and any application for costs arising out of this application may be made after 24 January 2006.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants:	Mr R Squirrell of Counsel
For the First Respondent:	Mr R Johnson, Solicitor
For the Second Respondent:	Mr T Rosen of Counsel

REASONS

1. This is an application by the Second Respondent that the Applicants' proceedings be dismissed or struck pursuant to s75 (1) of the *Victorian Civil and Administrative Tribunal Act* 1998 and that the Tribunal make such consequential orders as may be appropriate pursuant to 75 (2) of the Act. The Applicants own a two story home at 5 Tiffany Grove, Templestowe which was built for them pursuant to a contract with the First Respondent. The parties agree that the Second Respondent was engaged to provide engineering drawings S1, S2 and S3 and S4 by the First Respondent and that there was no contract between the Applicant and the Second Respondent. The substance of the Applicants' claim against the Second Respondent is found in paragraphs 14-18 of the Points of Claim. They plead that the Second Respondent owed the Applicants a duty of care and it is useful to reproduce paragraph 18 of the pleadings, as follows:

> "18. In breach of its duty of care the Second Respondent,
>
> (a) "Drafted drawings calling for water proofing of walls in accordance with architect's details when it knew or ought to have known that there were no architect details in the First Respondent's drawings.
>
> (b) Drafted drawings calling for water proofing of walls in accordance with architect's details, when it knew or ought to have known that there were no architect's drawings, as the First Respondent was responsible for the plans.
>
> (c) Failed to call for a proper damp course in compliance with BCA, AS 3700 and AS 2311.
>
> (d) Failed to call for any proper system of agricultural drainage to protect the integrity of the dwelling.
>
> (e) Drafted drawings of a retaining wall that did not properly integrated [sic] with the concrete slab by means of a water stop".

2. Mr Gale is a director of the Second Respondent and made an affidavit on its

behalf on 7 December 2005. In his affidavit he asserted that the loss or damage alleged by the Applicants in paragraphs 19 and 20 of the Points of Claim, which are consequent upon the penetration of water into the area of the Applicants' home known as either the store or the vault "could not have been caused by the breach of any duty of care owed by the Second Respondent to the Applicants".

3. Further, it is asserted that the Second Respondent was engaged to provide structural engineering and structural certification services only and that the provision of drainage and water proofing services were not part of the service provided by the Second Respondent. It is noted that on drawing S3, section 4 there is the note "water proofing to architect's details" and this note also appears on drawing S4, section 5. The note is adjacent to an arrow which points to a dotted line around the below ground portion of the relevant sections and which appears to indicate some form of tanking. On drawing S2 the same line is used to indicate polythene membrane. There is no indication on the drawings nor mention of agricultural or other drainage.

4. At paragraph 10 of Mr Gale's affidavit he says "In this case, as is usual in the building industry, all matters relating to drainage and the water proofing of the proposed building, either above or below ground, were the responsibility of the architect and the builder and not the structural engineer". He also mentioned in the same paragraph that he had discussed the matter with the Managing Director of the First Respondent, David Newnham, who had confirmed that these matters were the responsibility of the First Respondent. It is noted that the Tribunal received a letter from Messrs Coadys, solicitors for the First Respondent, on 11 January 2006, which contained a copy of a letter to solicitors for the Applicants. The relevant parts of the letter to the Applicants' solicitors is as follows:

> "We are instructed that the First Respondent affirms the references to agreements and/or arrangements between the First and Second Respondents, and the discussions with David Newnham as described in paragraphs 8-14 inclusive in the affidavit by Barry Gale sworn 13 December 2005.

The First Respondent has no objection to the application by the Second Respondent to dismiss or strike out such part of the proceedings … that relate to or involve the Second Respondent".

The Law

5. Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides as follows:

"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) that 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 proceedings"

6. I am guided by Deputy President McKenzie's decision in *Norman v Australian Red Cross Society* [1998] 14 VAR 243 where she summarised the decision of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. 102, saying:

"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.

…The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is so obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. 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 contain the evidence which supports the claims.

…

(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".

Discussion

7. Mr Rosen submitted on behalf of the Second Respondent that the matters complained of by the Applicants in paragraphs 19 and 20 of the Points of Claim do not relate to any compromised integrity of the building but rather to water penetration. The submission is not without merit. He also submitted that, in circumstances where the Respondents agree that any responsibility is the First Respondent's responsibility, it is difficult for the Applicants to argue that some of the responsibility lies, or might lie with the Second Respondent. Nevertheless, Mr Squirrel's submission is accepted that an unsworn letter from solicitors for the First Respondent falls short of a document which would prevent the Tribunal from finding, pursuant to s.24 AF of the *Wrongs Act* 1958 that there should be no apportionment of liability for the damage complained of by the Applicants against the Second Respondent.

8. In these circumstances and particularly in circumstances where the Second Respondent has asserted, but not proven, that it is "usual in the building industry [that] all matters relating to drainage … were the responsibility of the architect and the builder and not the structural engineer". It is found that the Second Respondent's application under s.75 is premature and that it has failed to establish, in the words of Deputy President McKenzie, that the case against it is "obviously hopeless, obviously unsustainable in fact or in law, or on reasonable view can justify relief, or is bound to fail".

9. The application under s.75 is therefore dismissed but may be agitated again if the Second Respondent has further proof of lack of cause of action or a demonstrably complete defence.

SENIOR MEMBER M. LOTHIAN