

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D127/2005

CATCHWORDS

Domestic building, discovery

FIRST APPLICANT	L & M Shoebridge Constructions Pty Ltd (ACN 091 768 697) t/as Belbridge Homes
SECOND APPLICANT	Homes For Today Pty Ltd (ACN 092 287 691) t/as RPG Property Group
RESPONDENT	Ashjam Pty Ltd (ACN 065 166 798) t/as Rodian Homes
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	26 April 2006
DATE OF REASONS	8 August 2006
CITATION	L and M Shoebridge Constructions v Homes For Today Pty Ltd (Domestic Building) [2006] VCAT 1606

REASONS

- 1 On 26 April 2006 I ordered, in a Directions Hearing, that the application by the Respondent for further discovery was dismissed, with costs to the Applicants.
- 2 On 2 May 2006 the proceedings, being a claim and counter-claim, were struck out with a right to apply for reinstatement and no order as to costs. These orders were made at the conclusion of a compulsory conference conducted by Member Walsh.
- 3 On 3 May the Respondents sought reasons for the decision of 26 April 2006.

The application for discovery

- 4 The application was:

“That the Applicants provide supplementary discovery by 27 April 2006 of all documents in their power or possession relating to:

- (A) Transactions and monetary dealings with Selcroft Pty Ltd including records of payments made to Selcroft Pty Ltd in respect of each property the subject of the Applicants' claims, and bank or other records of all moneys received and disbursed by the Applicants in respect of each property the subject of the Applicant's claims.
 - (B) Payments by the Applicants or either of them to Mr M Steinmetz."
- 5 Mr Fink of Counsel for the Respondent said that his client sells house and land packages, and that the proceedings concerned twenty-four packages sold in 2002-3.

The pleadings

- 6 The pleadings demonstrate that the relationships between the parties were highly complex. It is common ground that the Respondent was a builder who built homes and sold house and land packages. Between August 2002 and April 2003 there was apparently an arrangement whereby the Applicants would seek land for Selcroft Pty Ltd ("Selcroft") to sell, and were also locating for the Respondent parties who wished to have homes built for them. The Respondent alleged that the Second Applicant and Selcroft were, at all relevant times, licensed estate agents under the Estate Agents Act 1980 ("the Act") and held themselves out as ready to sell properties. It also alleged that the First Applicant held itself out as ready to sell properties and was thus an "agent" or "estate agent" within the meaning of s4 of the Act.

Discovery regarding Selcroft

- 7 At paragraph 52 of the amended Points of Defence and Counterclaim of 17 November 2005 the Respondent alleged that the Applicants and Selcroft breached s49A(1) of the Act, in that the Applicants were alleged to have sought payment in respect of the sale of land without providing the required information or obtaining the required engagement or authorities, and then at paragraph 55 the Respondent claimed that Selcroft was not entitled to recover or retain commission. However the link between these allegations and loss to the Respondent, or a defence against the Applicants' claims, was not demonstrated. The relationship between the Respondent and Selcroft was not clearly set out.
- 8 The Respondent alleged at paragraph 31(e) that details of all amounts paid or payable to third parties would be disclosed to the Respondent, but did not say how this was relevant to amounts paid or payable by or to the Respondent. In particular, paragraph 31(b)(ii) is extremely vague about how payments by the Respondent were to be calculated.
- 9 The particulars to paragraphs 32 and 33 make reference to alleged failures to provide details regarding Selcroft, and those paragraphs refer, in turn, to sub-paragraphs 31(f), (g) and (h). No such sub-paragraphs appear in the document sent to the Tribunal by facsimile transmission on 17 November 2005, and as there is no missing page number, the absence of these

paragraphs has only become apparent to me when writing these reasons. I mention it not as the basis upon which my decision was made, but to demonstrate the difficulty Mr Fink had in persuading me that there was any legitimate reason for the Respondent to have wide-ranging discovery concerning Selcroft. I asked Mr Fink to demonstrate the link and was not referred to the missing paragraphs during submissions.

Claim for discovery regarding alleged payments to Mr Steinmetz

- 10 The Respondent's Points of Defence and Counterclaim of 17 November 2005 make no allegations regarding payments to Mr Steinmetz, with the exception of paragraph 51, which alleges that he was one of a number of persons who might have appropriated the sum of \$5,400.00. It was not demonstrated to me how giving the discovery sought regarding payments to Mr Steinmetz would assist the Respondent in proving its case as pleaded, or disproving the case pleaded against it.
- 11 My requests to Mr Fink to establish how the discovery sought would assist the Respondent to prove its case did not receive answers which convinced me that such discovery was necessary. The application appeared rather, to be a fishing expedition, and was dismissed.

SENIOR MEMBER M. LOTHIAN