

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D274/2011

### CATCHWORDS

Section 6 of the *Domestic Building Contracts Act 1995* – jurisdiction of Tribunal; whether single trades listed in r.6 of the *Domestic Building Contract Regulations 2007* excluded from operation of *Domestic Building Contracts Act 1995*

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|--------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| <b>APPLICANT</b>         | Owners Corporation PS505245E and Ors                                                                                                    |
| <b>FIRST RESPONDENT</b>  | Moresi Builders Pty Ltd<br>(ACN 007 243 692)                                                                                            |
| <b>SECOND RESPONDENT</b> | Zurich Australian Insurance Ltd<br>(ACN 000 296 640)                                                                                    |
| <b>BEFORE</b>            | Senior Member E. Riegler                                                                                                                |
| <b>HEARING TYPE</b>      | Interlocutory Hearing                                                                                                                   |
| <b>DATE OF HEARING</b>   | 11 August 2011                                                                                                                          |
| <b>DATE OF ORDER</b>     | 23 August 2011                                                                                                                          |
| <b>CITATION</b>          | Owners Corporation PS505245E and Ors v<br>Moresi Builders Pty Ltd (ACN 007 243 692)<br>and Anor (Domestic Building) [2011] VCAT<br>1630 |

### ORDER

1. The Second Respondents application for summary dismissal of the Applicant's claim against it is dismissed.
2. The costs of this application are reserved pending further hearing.
3. **This proceeding, together with proceedings D152/11 and D508/11 are all listed for a directions hearing at 10.30 am on 13 September 2011 at 55 King Street, Melbourne, Victoria, 3000.**

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicant

Mr J. Gray, solicitor

For the First Respondent

Mr S. Smith of counsel

For the Second Respondent

Mr R. Andrew of counsel

## REASONS

1. The Applicants are the owners of a residential property located in Richmond ('the Property'). The Property comprises a number of apartments together with common property. The apartments were constructed by the First Respondent ('**the Works**'). The Second Respondent is or was the insurer of the plumbing contractor, responsible for undertaking the roof plumbing works ('**the Roof Plumbing Works**'). The plumbing contractor went into liquidation in March 2007 and was de-registered in November 2008.
2. The Applicants allege that the Works suffer from defects which include *a leaking roof, gutter and downpipes system*. Consequently, they lodged a claim against the Second Respondent by letter dated 14 December 2010 ('**the Plumbers Insurance Claim**'). They allege that they are entitled to claim directly against the Second Respondent in respect of the loss and damage said to be suffered as a result of the roof plumbing undertaken by the plumbing contractor.
3. The Second Respondent denied the Plumbers Insurance Claim by letter dated 11 March 2011. Consequently, the Applicants contend that the Tribunal has jurisdiction under s.59A(1) of the *Domestic Building Contracts Act 1995* ('**the DBC Act**') to hear and determine the dispute between them and the Second Respondent. Further, the Applicants allege that the Tribunal has jurisdiction to review the Second Respondent's decision to reject the Plumbers Insurance Claim under s.60 of the DBC Act.
4. The Second Respondent denies that the Tribunal has jurisdiction to hear and determine the claim made against it. It seeks an order pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('**the VCAT Act**') dismissing the claim against it for want of jurisdiction.

### **The Second Respondent's submission**

5. Mr Andrew of counsel appeared on behalf of the Second Respondent. He submitted that there is no jurisdiction for the Tribunal to hear and determine the claim against the Second Respondent because the claim related to plumbing work and plumbing work was expressly excluded from the operation of the DBC Act. In essence, Mr Andrew contends that the Applicants must be able to point to an enabling enactment giving the Tribunal power to hear and determine the claim against the Second Respondent. He argues that in the absence of any enabling enactment, there is no jurisdiction.<sup>1</sup>
6. Mr Andrew contends that the Applicant's claim against the Second Respondent is premised upon there being power conferred on the Tribunal under the DBC Act. He argues that that Act has no application

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<sup>1</sup> *Roads Corporation v Maclaw No 496 Pty Ltd & Ors* [2001] VSC 435.

in respect of the Roof Plumbing Works and as a result, there is no jurisdiction to hear the Applicant's claim against the Second Respondent.

7. The relevant sections of the DBC Act upon which the Applicants rely are:

**59A. Disputes concerning insurance claims**

- (1) The Tribunal has jurisdiction to hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim

**60. Tribunal may review and change an insurer's decision**

- (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**.

8. Mr Andrew submits that plumbing work, as a single trade, is not covered by the DBC Act. He makes that submission on a number of grounds. First, he contends that the definition of *domestic building work*, which is contained in s.5 of the DBC Act does not make any express reference to plumbing work. Second, s.6 of the DBC Act expressly sets out the building work to which the DBC Act does not apply. It states:

This Act does not apply to the following work –

- (a) any work that the regulations state is not building work to which this Act applies;...

9. Regulation 6 of the *Domestic Building Contracts Regulations 2007* states:

**6. Building work to which Act does not apply - work to be carried out under a contract for one type of work only**

For the purposes of section 6(a) of the Act, work is not building work to which the Act applies if the work is to be carried out under a contract in relation to one only of the following types of work –

- (h) plumbing work as defined in section 221C of the **Building Act 1993**;

10. It is not in dispute that the Roof Plumbing Works fall within the definition of plumbing work as defined in s.221C of the *Building Act 1993*.

11. Consequently, Mr Andrew submits that the Roof Plumbing Works are not *domestic building work*; and accordingly, the Plumbers Insurance Claim does not constitute a dispute concerning an insurance claim concerning *domestic building work* or an insurer's decision on such a claim, such as to fall within the jurisdiction created by s.59A or s.60 of the DBC Act.

### **Applicant's submissions**

12. The Applicants were represented by Mr Gray, solicitor. He argued that the interpretation given to Regulation 6 of the *Domestic Building Contracts Regulations 2007* by the Second Respondent is too narrow. In particular, he submits that Regulation 6 only applies to situations where there is a single trade performing the whole of the work and not to situations where other domestic building work is being undertaken concurrently.
13. Mr Gray submitted that the interpretation advanced by Mr Andrew would lead to an absurdity because it would mean that all of the trades identified under Regulation 6 would be excluded from the operation of the DBC Act unless the relevant contractor had performed more than one type of work. Therefore, all electrical work, glazing, insulating, installation of floorcoverings, painting, plastering, plumbing, tiling and other works referred to under Regulation 6 would be excluded from the operation of the DBC Act, where the relevant contractor was confined to only that type of work.
14. Mr Gray referred to the decision of Byrne J in *Greenhill Homes v Domestic Building Tribunal*.<sup>2</sup> He argued that that decision stood for the proposition that Parliament intended to create in the Tribunal a "one-stop shop" for determining *domestic building disputes*. He submitted that a narrow interpretation of Regulation 6 would be against the evident purpose of the DBC Act.

### **The First Respondent's submissions**

15. Mr Smith, of counsel, appeared on behalf of the First Respondent. He adopted the submissions made by Mr Gray. He further submitted that the onus lay on the Second Respondent to satisfy the Tribunal that the Applicant's claim was beyond jurisdiction and that there was no triable issue. He referred to the often cited decision of Dixon J in *Dey v Victorian Railway Commissioners*,<sup>3</sup> where his Honour stated, in relation to the exercise of a power of summary judgement that it should be *reserved for exercise as to actions that are absolutely hopeless*.
16. Mr Smith contended that the Second Respondent failed to discharge the burden of proof imposed upon it because it provided no evidence that the work undertaken by the relevant plumber was confined to just plumbing work. He referred to paragraph 23.03.5 in *Williams Civil Procedure Victoria* where the learned author states:

An order would not be made [summarily dismissing the proceeding] if the action raised for determination an important and difficult question of law or an issue of fact: *Bayne v Bailiue* (1908) 6 CLR 382; *Goodson v Grierson* [1908] 1 KB 761.

With respect to disputed facts the court was bound to assume that the plaintiff

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<sup>2</sup> [1998] VSC 34

<sup>3</sup> (1948) 78 CLR 62 at 90

would be able to establish at trial the case put forward by him or her, unless there was something in the evidence to show that that was impossible: *Bayne v Bailiue*, above at 399. Where the facts were in dispute or where it was clear that all the evidence was not before the court because all the facts were not available, the proper course was to take the facts before the court most favourable to the plaintiff and decide on those facts whether the action was hopeless: *PJ Constructions (Vic) v Nyko* (VSC, 28 October 1981, unreported).

## Finding

17. During the course of this interlocutory proceeding, I raised a question as to whether the Applicants had a right to make a direct claim against the Second Respondent. At the close of the parties' submissions, I queried whether I should consider that question in my determination of the Applicant's application for summary dismissal. Mr Andrew advised me that it was unnecessary for me to consider that question and that I should determine the Second Respondent's application solely on the question of jurisdiction. Accordingly, I say nothing further as to whether the Applicants have a right to make a direct claim against the Second Respondent. Therefore, I confine my determination to the question of jurisdiction only and on the assumption that the Applicants have a right to directly claim against the Second Respondent.

18. In my view, the interpretation placed on Regulation 6 by the Second Respondent is too narrow. I agree with Mr Gray that such an interpretation would lead to difficulties in the application of the DBC Act. Indeed, a significant part of the work comprising the construction of a home would be excluded from the operation of the DBC Act. Clearly that could not have been the intention of the legislature. In my view such interpretation would not promote the purpose or object underlying the DBC Act; and would be contrary to s.35 (a) of the *Interpretation of Legislation Act* 1984, which states:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

19. Similarly, in *Grey v Pearson*, Lord Wensleydale stated:

I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.<sup>4</sup>

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<sup>4</sup> (1857) 10 ER 1216 at 1234

20. My approach in construing the Regulation 6 is also consistent with the approach taken by Byrne J in *Greenhill Homes*. His Honour stated:
- As they have already demonstrated, my general attitude to this legislation is that it should be construed liberally where this is necessary or convenient to ensure that all domestic building disputes and associated disputes are before the Tribunal. The indications within the Act itself would suggest that Parliament intended this result, not only in the context of the definition of "domestic building dispute". The functions of the Tribunal are not limited to hearing or resolving only those disputes.<sup>5</sup>
21. In my view, another difficulty with the proposition advanced by Mr Andrew is such an interpretation would, in practice, conflict with sections of the DBC Act. In particular, s.54 of the DBC Act defines what a *domestic building dispute* is. In s.54(1)(a) it defines a *domestic building dispute* to include a dispute or claim arising between a builder and a subcontractor in relation to a domestic building contract or the carrying out of domestic building work.
22. If I accepted Mr Andrew's interpretation of Regulation 6, it would mean that the DBC Act would not give the Tribunal jurisdiction to hear and determine a dispute between a builder and its subcontractor in relation to any of those single trades referred to in Regulation 6. In other words, a builder could not claim against its plumber, electrician, painter, plasterer, tiler, glazer and other trades described under Regulation 6, unless those sub-trades did more than one type of work. That clearly could not have been the intention of Parliament.
23. Mr Andrew submitted that any shortfall in jurisdiction was covered by the jurisdiction given to the Tribunal under s.107 of the *Fair Trading Act* 1999. That provision gives jurisdiction to the Tribunal to hear and determine a *consumer and trader dispute*. Although that may be true, it seems to me that the purpose of the DBC Act was to itself provide jurisdiction to the Tribunal to resolve practically all disputes arising out of the construction of a residential dwelling. Indeed, it could not have been the case that the legislature had in mind that the *Fair Trading Act* 1999 was to provide a form of "backup" enabling legislation, given that s.107 of the *Fair Trading Act* 1999 was enacted sometime after the DBC Act, and its predecessor, were enacted.
24. In my view, the proper construction of Regulation 6 is that it only applies to a situation where only one of the types of work referred to therein is being carried out. It does not apply to the situation where several of those types of work are being carried on the one project, even if they all operate within their own individual contracts or subcontracts. The word *work* in the first line of Regulation 6 is expressed in the singular. I find that this means that the regulation is focusing on only one type of work

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<sup>5</sup> Ibid at paragraph [34].

being undertaken, rather than where multiple trades are working on the one project.

25. In any event, even if the DBC Act did not provide jurisdiction to the Tribunal to hear the Applicant's claim, there is jurisdiction under s.107 of the *Fair Trading Act 1999* ('the FTA'). As I have already indicated above, s.107 of the FTA gives jurisdiction to the Tribunal to resolve a *consumer and trader dispute*. A *consumer and trader dispute* is defined in s.107(1) of the FTA as:

In this Part a "consumer and trade dispute" is a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services.

26. If I understand the claim made by the Applicants against the Second Respondent correctly, they are seeking to enforce rights bestowed upon them under a contract of insurance between the Second Respondent and the relevant plumber who undertook the Roof Plumbing Works. I therefore assume that the contract of insurance provides an indemnity in favour of the Applicants in respect of insurable events which may have crystallised by reason of the acts or omissions on the part of the plumber who undertook the Roof Plumbing Works.

27. Accordingly, the question arises as to whether the relationship between the Applicants and the Second Respondent falls within the operation of s.107(1) of the FTA. In my view, it does. *Services* are defined under s.3 of the FTA as:

"services" includes any rights (including rights in relation to, and interests in real or personal property), benefits privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, including the rights, benefits, privileges or facilities that are, or are to be provided, granted or conferred under a contract for or in relation to –

28. Similarly, *supply* is defined as:

"supply" includes –

(b) in relation to services - provide, grant or confer.

29. In my view, the indemnity provided under the contract of insurance provides a right supplied by the Second Respondent to the Applicants, sufficient to give rise to a *consumer and trader dispute*.
30. Mr Andrew submitted that s.3 of the FTA was repealed on 1 January 2011, with the introduction of the *Australian Competition and Consumer Act 2010*. He argued that as a consequence, there could be no claim between the Applicants, as *consumers* and the Second Respondent as *supplier*. I reject this argument. The *Australian Competition and Consumer Act 2010* came into effect on 1 January 2011. Its operation was not retrospective. Therefore, it only applies to matters and conduct

after that date. It does not apply to the matters and conduct the subject of the present proceeding.

31. Consequently, I find that the Tribunal has jurisdiction to hear the dispute as between the Applicants and the Second Respondent either under the DBC Act or alternatively, the FTA. For that reason, I dismiss the Second Respondent's Application.

**SENIOR MEMBER E. RIEGLER**