VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO: BP546/2019

CATCHWORDS

Domestic building – *Victorian Civil and Administrative Tribunal Act 1998* – s75 – relevant principles - whether application to Domestic Building Dispute Resolution Victoria ('DBDRV') the commencement of a 'building action' – *Building Act 1993* – sections 129 and 134

APPLICANTS:	Owners Corporation 1 Plan No PS543073S, David Couzin, Lorraine Couzin, Susan Fajnkind, Lorraine Raskin, Dory Pekelman, Marion Pekelman, Pola Hoppe, Shirley Sekler, Millie Shnider, Jack Hoppe, Phillip Grossman, Pauline Grossman
RESPONDENT:	Eastrise Constructions Proprietary Limited (ACN 005 390 867)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	30 August 2019
DATE OF ORDER	18 October 2019 (revised 21 October 2019, paragraph 39)
CITATION	Owners Corporation 1 Plan No PS543073S v Eastrise Constructions Proprietary Limited (Building and Property) [2019] VCAT 1639

ORDERS

1. The proceeding is dismissed.

2. Costs reserved with liberty to apply. **I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for 2 hours.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants:	Mr J M Forrest of Counsel
For Respondent:	Mr T Mitchell of Counsel

REASONS

1 This proceeding was commenced by the applicant owners corporations and individual lot owners ('the Owners) on 27 March 2019. The respondent builder ('the Builder') contends the Owners' proceeding is statute barred, as the application was lodged with the Tribunal more than 10 years after the date the occupancy permit was issued. On 3 June 2019 the Builder filed an Application for Directions Hearing or Orders seeking orders under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') that 'the proceeding be summarily dismissed as misconceived' and that the Owners pay its costs of the proceeding.

2 At a directions hearing on 25 June 2019 orders were made for the filing of affidavit material and outlines of submissions and reply material and reply submissions. The Builder relies on an affidavit by its director, Michael Garfield, and Outline of Submissions, both dated 26 July 2019 and Reply Submissions dated 16 August 2019. The Owners rely on an affidavit by their solicitor Najihah Idris and Outline of Submissions dated 31 July 2019.

BACKGROUND

3 The Builder constructed an apartment building in Caulfield North. The occupancy permits in respect of the common property and the individual apartments were issued on 3 June 2008.

4 On 29 May 2018 an application was made to Domestic Building Dispute Resolution Victoria ('DBDRV') for dispute resolution. Further applications for dispute resolution, by each individual lot owner, were made to DBDRV on 22 August 2018. The Owners contend that the application lodged with DBDRV on 29 May 2018 was made by or on behalf of all of them, although for reasons which follow this is by no means clear.

5 DBDRV issued 'certificates of conciliation – not suitable' dated 27 August 2018.

6 This proceeding was commenced on 27 March 2019 by the lodging of an application, together with Points of Claim and the certificates of conciliation. In the Points of Claim the Owners claim loss and damage arising from alleged poor and defective building work by the Builder.

7 Noting the relevant dates are not in contention, for the reasons which follow I find:

i. the application to DBDRV for dispute resolution made on 29 May 2018 was not the commencement of a 'building action' as defined in s129 of the *Building Act 1993* ('the B Act');

ii. accordingly, the proceeding was not commenced within the 10 year limitations period; and

iii. it is not clear who made the application for dispute resolution to DBDRV on 29 May 2018.

THE LIMITATION PERIOD

8 Section 134 of the B Act limits the time for the bringing of building actions to 10 years from the date of the occupancy permit, or where an occupancy permit is not issued, from the date of issue of the certificate of final inspection.

SECTION 75

9 I have previously set out the principles to be applied in considering a s75 application[1] and I restate them here.

10 Section 75 of the VCAT Act provides:

> (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.

11 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[2] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, <u>for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail</u>. This is

[1] *Owners Corporation PS No. 1 PS 519798G v May* [2016] VCAT 399; *Owners Corporation PS 542601Y v Phenix Holdings Pty Ltd* [2017] VCAT 1235; *Owners Corporation 1 PS538430Y v H Building Pty Ltd (Under external administration) and Ors* [2019] VCAT 1485

[2] [2005] VCAT 306.

consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-

> "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".

…

34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

12 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[3] considered recent authorities:

> 8. In *Forrester v AIMS Corporation*, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:
>
> (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or
>
> (b) the action must be 'so clearly untenable that it cannot possibly succeed'.
>
> Kaye J also held that:
>
> (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and
>
> (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.
>
> 9 In *Ausecon Developments Pty Ltd v Kamil*, Judge Davis noted that for a strike out application to be successful, the proceeding must:
>
> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.

[3] [2015] VCAT 1683

10 In *Fancourt v Mercantile Credits Pty Ltd* ('Fancourt'), the High Court held that:

> … the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.

11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.

[citations omitted]

THE OWNERS' POSITION

13 The Owners contend that it is arguable that the application to DBDRV for dispute resolution constituted the commencement of a 'building action', as defined in s129 of the B Act, within the 10 year limitation period set out in s134 of the B Act. Further, the Builder's allegation that their claim is statute barred is properly a defence, which does not arise until it is formally made in a defence. Moreover, that whether a claim is statute barred is a matter which should only be determined once the evidence has been heard, and after full legal argument.

14 However, as I said in *Owners Corporation PS 517029T v Hickory Group Pty Ltd*[4] ,when considering an application by owners to be joined as applicants in a proceeding, after the expiry of the 10 year limitation period, where the claims were against a builder for loss and damage arising from alleged defective work:

> 16. Generally, a contention that a claim is statute barred will be included in a defence, and determined at a later time, often when determining the substantive claims
>
> 17. In circumstances where the date for the commencement of the 10 year limitation period in building actions is clearly defined, and it is a serious matter to join a party to any proceeding,[5] to be satisfied it is desirable to join the proposed applicants as parties I must first be satisfied they have an arguable claim.

15 Although those comments were made in the context of a joinder application, I consider them apt in considering a s75 application where the time limits are clear. There can be no doubt that the 10 year limitation period had expired as at the date of the commencement of the proceeding in this Tribunal. The question as to whether the application to DBDRV constituted the commencement of a 'building action' within the 10 year limitation period is a discrete question which has been comprehensively addressed by both parties in this hearing. Further, following the introduction of, what I will call, the 'DBDRV process' this is an important question to be determined.

---

[4] [2016] VCAT 731
[5] *Snowden Developments Pty Ltd v Actpen*

16 In *Hickory*[6] I referred to *Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd*[7] where the Court of Appeal observed that one of the main purposes of s134 was:

> …to limit the periods within which building actions and plumbing actions may be brought.[8]
>
> 114. Section 134 does not contain any express limitation that confines its application to cases in contract or in tort. It does not contain any reference to some distinction between limitation periods for actions in negligence as opposed to those in contract. It does not contain any reference to patent or latent faults. It does not contain any suggestion that its operation is limited to physical loss and damage. What it does is to limit the period within which 'building actions' may be brought generally.

17 Just as it is a serious matter to join a party to a proceeding because of the possibility of them incurring unnecessary costs, it is similarly a relevant consideration when considering a s75 application when there is no dispute about the relevant dates. Senior Member Vassie's comments in *Resolution Adventures v W.G. & B.M. McColley*[9] at [16] are apt:

> A determination that the applicant's claim is statute-barred would justify the use of the Tribunal's power under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 to make an order summarily dismissing the proceeding because it is misconceived or lacking in substance. This Tribunal should exercise this power only in a clear case, where it is absolutely clear that the limitation-of-actions defence must succeed…

18 If I were to allow this proceeding to continue, I would not be acting in accordance with the Tribunal's obligations under ss97 and 98 of the VCAT Act. Not only would the Builder be put to considerable cost in defending claims to which it has a clear defence because they are statute barred, the Owners would also be put to the considerable cost of prosecuting claims which have no prospect of success.

THE REFERRAL TO DBDRV

19 An application to DBDRV for dispute resolution is made by completing an on-line application form. Ms Idris has attached a copy of a document headed 'Your lodged domestic building dispute resolution application' which I understand is a copy of the application as completed online by her. At the top of the page details of the date the application was lodged, the reference number and a brief note are recorded, followed by details of the dispute, provided when the online form was completed:

---

[6] Ibid at [19]
[7] [2014] VSCA 165
[8] Section 1(h).
[9] [2006] VCAT 797

20 The details under the heading 'Dispute Details' include: the site address; whether attempts have been made to resolve the dispute, and when contact was last made with 'them' [which I understand is a reference to the other party]; whether 'you' are aware of any other parties submitting an application about the dispute; limited details about any contract or agreement; the date of 'your' occupancy permit; the date of 'your' final' inspection; whether the dispute is about defective or incomplete building work, delayed building work, a failure by the owner or the builder to pay, access to the building site or 'other'; the total value of the contract; the value of the work in dispute; the amount of money in dispute; whether the applicant has sought legal advice; and whether 'you' are lodging the application on behalf of someone else?

21 The following details appear under the heading 'Your contact details': given and family name; business/company name; email address; daytime phone number; whether an interpreter is required, and if so, the language; postal and email address.

22 Then, although there is no heading 'applicant' or nowhere to include the 'applicant's details', there is a heading 'Co-applicant's details' which requests similar information as set out under the heading 'Your contact details'; and finally a declaration as to having signed the application for domestic building dispute resolution.

Chronology of the DBDRV applications

23 It is informative to set out the chronology of the applications to DBDRV (by reference to the matters stated by Ms Idris in her affidavit):

29 May 2018

First referral to DBDRV

3 August 2018

Ms Idris received received a telephone call from DBDRV[10] advising that they were experiencing high levels of applications and that a response could be expected within 8 to 10 weeks of lodgement (apparently this call was in response to attempts by another solicitor at her firm following up progress with the application).

13 August 2018

Ms Idris states that Mr Kalyvas, a partner at her firm received an email from DBDRV following up after leaving a message with reception the previous day, and requesting him to call back by 5pm on 15 August 2018,

[10] All references to DBDRV should be read as reference to 'a representative of DBDRV'. The representative has been named in Ms Idris' affidavit but it is not necessary to name them here.

or alternatively to email them with a time that was convenient for them to speak with him.

14 August 2018:

12 noon Ms Idris received a telephone call from DBDRV acknowledging the application in which DBDRV:

i. clarified that the application was lodged on behalf of the applicants

ii. foreshadowed separate applications being required for each lot owner

iii. acknowledged the DBDRV online application does not allow for the listing of multiple parties involved in an owners corporation.

3.32pm Ms Idris received an email from DBDRV requesting the following further information by 21 August 2019:

i. the nomination of authority by the first applicant [the owners corporation] and

ii. a copy of the occupancy permit.

3.45pm Ms Idris states that she emailed DBDRV attaching a copy of the Minutes of the Ballot for the Owners Corporation which included the special resolution authorising the commencement of legal proceedings,

3.48pm Ms Idris emailed DBDRV a copy of the Occupancy Permits

4pm Ms Idris received a telephone call from DBDRV requesting:

i. a copy of the second to thirteenth applicants' consent to her firm representing them' and

ii. an ASIC search for the respondent.

6.55pm She emailed DBDRV a copy of the signed consent to her firm representing the second to thirteenth applicants and confirming:

i. she held instructions to act on behalf of the applicants

ii. it was intended that all the applicants' applications be dealt with under the initial application to avoid additional costs being incurred by the [lot owner] applicants

iii. the format of DBDRV's online application does not allow for listing of all parties

iv. it would be uneconomical for each individual lot owner to make separate applications, to await DBDRV's response to each application and delay any future process such as an application to the Tribunal.

22 August 2018

Ms Idris received a telephone call from DBDRV advising that DBDRV required separate applications to be made by each of the individual lot owners

Between 3.45pm and 5.02pm Ms Idris lodged applications for each of the individual lot owners

5.02pm She emailed DBDRV a spreadsheet of the individual lot owners' applications and an ASIC Search for the respondent and advising that:

i. the application dated 29 May 2018 was lodged on behalf of [all of] the applicants

ii. DBDRV should consider the applications by the individual lot owners as having been made together with the OC's application *to ensure that they were within the imitation time to bring a building action, prior to the expiration of the occupancy permits dated 3 June 2018* (sic)

27 August 2018

Between 10.13am and 10.19am Ms Idris received emails from DBDRV attaching 'certificates of conciliation – not suitable' for each of the applications.

Who made the 29 May 2018 application to DBDRV?

24 Surprisingly, there is nothing on the copy of the DBDRV applications exhibited to Ms Idris' application to indicate who the applicant is in each. I note that Ms Idris has provided her name and contact details under the heading 'Your contact details' on the application lodged on 29 May 2018. Further, it seems that the person completing the application form is not required to identify who the applicant is and whether they are an 'owner', 'builder', 'architect' or 'building practitioner' as defined in s3 of the B Act, noting that the definition of a 'domestic building work dispute' in s44 of the *Domestic Building Contracts Act 1995* ('the DBCA') requires the dispute to be between an owner and a builder, architect or building practitioner. Therefore, if I were persuaded that an application to DBDRV constituted a building action, and I am not for the reasons which follow, I could not be satisfied, from the copy of the online application exhibited to Ms Idris' affidavit, who the 29 May 2018 application was made on behalf of.

25 When the further applications were made on behalf of the individual lot owners, I note that under the heading 'Your contact details' the name of each individual lot owner was included with their legal representative's email address. In the absence of any evidence about this, I anticipate it was because DBDRV insisted on separate applications being made for each individual lot owner, and this was the means of identifying on whose behalf each application was being lodged, although this is seemingly not the question asked.

26 I also note in passing that the references to the date of 'your' occupancy permit and 'your' final inspection are confusing, in circumstances where under s9 of the DBCA a subsequent owner of a property is entitled to bring a claim for a breach of the s8 warranties, as if they had been a party to the original building contract.

WAS THE REFERRAL TO DBDRV THE COMMENCEMENT OF A 'BUILDING ACTION'?

Meaning of 'action'

27 'Building action' is defined in s129 of the B Act as:

> building action means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work; [underlining added]

28 On a clear reading, a 'building action' is a *claim for damages for loss or damage.* It is difficult to conceive how an application to DBDRV for dispute resolution could be conceived as a claim for loss or damage. DBDRV's primary role is conciliation of those domestic building work disputes which it deems suitable for conciliation. It does not determine parties' legal rights. Although it has the power to issue 'dispute resolution orders' under s49 of the DBCA these are not enforceable. Section 49B sets out what can be included in a dispute resolution order including:

i. a builder can be required to carry out rectification and/or completion works; and

ii. a requirement that the owner comply with certain conditions to enable the builder to carry out the works

29 Section 49C of the DBCA provides that a dispute resolution order may require:

i. an owner pay an amount of money to the builder for completion of the contract works;

ii. an owner to pay an amount of money into the Domestic Building Dispute Resolution Victoria Trust Fund to be paid to the builder on the completion of the contract works;

iii. a builder to pay the reasonable cost of domestic building work to be carried out by another builder in certain specified circumstances.

30 A dispute resolution order may subsequently be varied or cancelled by the chief dispute resolution officer of DBDRV[11] including where a condition of a dispute resolution order has not been complied with.[12] If a party fails to comply with a dispute resolution order, the chief dispute resolution officer

[11] Section 49H DBCA
[12] Section 49I DBCA

may issue a 'breach of dispute resolution order notice'.[13] Although s49U(4) states that such a notice *in respect of the builder takes effect immediately on being served on the builder*, it is not enforceable. Rather, s49W allows the building owner to end a domestic building contract, providing certain criteria apply. Similarly, s49X allows a builder to end a domestic building contract where the owner has failed to comply with a dispute resolution order, again providing certain criteria apply.

31 Similarly, a record of agreement entered into at a conciliation, is not enforceable. Section 46H of the DBCA provides that if the chief dispute resolution officer, having been advised by a party to a domestic building work dispute that a record of agreement entered into at the conclusion of a conciliation, determines action [under the record of agreement] was not taken within the specified time, the record of agreement ceases to have effect.

32 A certificate of conciliation issued by DBDRV is required for a party to a domestic building work dispute to *make an application* to the Tribunal[14] or *commence an action* in a court.[15] There is no provision in the DBCA which indicates that it is intended that the commencement of proceedings in the Tribunal or a court, are to be regarded as a continuation of the DBDRV process. One is an application for dispute resolution; the other is an application for the determination of parties' rights and obligations, and the assessment of damages.

33 Section 49D(3) of the DBCA reinforces my view that an application to DBDRV for dispute resolution cannot be regarded as the commencement of a 'building action' It provides:

> A finding referred to in subsection (1) or (2)[16] in a dispute resolution order –
>
> (a) is evidence in any proceedings by the builder for the recovery of money from a party to the domestic building work dispute; and
>
> (b) may be taken into account in any proceedings in VCAT or a court in determining costs or damages.

Second Reading Speech

34 Counsel for the Owners referred me to the second reading speech for the *Building Legislation Amendment (Consumer Protection) Bill 2015* as supporting the contention that an application to DBDRV should be regarded as the commencement of a building action, and in particular to the following comments by Minister:

> This bill represents the first tranche of reform to Victoria's building system that will:

[13] Section 49U DBCA
[14] Section 56 DBCA
[15] Section 57A DBCA
[16] That the domestic building work is not incomplete or defective, or that the domestic building work is so defective it would be inappropriate to allow the builder to rectify or complete the work

…

ensure timeliness in all processes; and

deliver clear and accessible pathways for consumers to resolve disputes and ensure that their homes are built to the required standard.

…

This bill seeks to address what we know is a longstanding issue. It will do this by providing for earlier intervention to prevent problems or disputes arising in the first place. It also establishes a new system to respond as early, quickly and inexpensively as possible so that where a dispute does arise it will be resolved in a manner that is fair and balance for both consumers and building practitioners.

…

In its 2015 report VAGO [the Victorian Auditor-General's Office] recommended:

…

dispute resolution that ensures easy, low cost and timely access, with powers to compel participation in conciliation and enforce compliance;

…

Resolution of domestic building work disputes

Part 2 of the bill sets out new procedures for more timely and less costly resolution of domestic building work disputes.

The bill creates a new process for the conciliation and resolution of disputes to be delivered by a new service to be known as Domestic Building Dispute Resolution Victoria. It is modelled on similar bodies, such as those used in workers compensation disputes and retail tenancy disputes to resolve disputes in a quick and fair manner.

…

In line with VAGO's recommendations, conciliation at Domestic Building Dispute Resolution Victoria will be mandatory before an application can be made to VCAT or a court. Save for injunctive relief, participation in conciliation or the issue of a certificate stating that the dispute was not suitable for conciliation or could not be conciliated will be required before a party can access the more costly dispute resolution procedures associated with a full hearing before VCAT. This should significantly reduce the costs for both consumers and builders, as well as the stresses that come with formal legal proceedings.

…

In the most extreme cases, a dispute resolution order will also be able to be used to compel a builder to meet the cost of rectification by an alternative builder where the building work is so poor that it would not be reasonable to allow the original builder to attempt rectification.

…

While a party who is required to comply with a dispute resolution order will have a right to seek review of the order at VCAT, there will be a strong incentive to both parties to accept the outcomes of conciliation and the dispute resolution order, if one has been issued. VCAT will have the power to make costs orders if it finds the review application frivolous or lacking in substance, or if the party seeking review does not getting a better outcome compared to that achieved through conciliation and the dispute resolution order. As a further incentive, breach of a dispute resolution order by a builder will also be a ground for disciplinary action.

As it is intended that the new measures focus on getting building outcomes, the bill also provides that a consumer can terminate the contract with the builder if the dispute resolution order is not complied with, and seek compensation at VCAT. The builder will have a similar right.

35 Paragraphs 9 of the Builder's Submissions dated 31 July 2019 are relevant:

The effect of this new requirement [mandatory conciliation of domestic building work disputes] was commented on in the Statement of Compatibility made by the Minister for Small Business Innovation and Trade in accordance with section 28 of the Charter of Human Rights and Responsibilities Act 2006 immediately prior to the Bill's second reading in the Legislative Council.

"Right to a fair hearing (s24)

"Section 23 of the charter provides that a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The right to a fair hearing also encompasses the established common-law right that each individual has unimpeded access to the courts of a state, and extends this to tribunals. The right is limited if a person is pr4cluded from having effective access to a court or tribunal, in that they are barred from properly presenting their case.

"It is my view that the mandatory conciliation scheme does not limit the right to a fair hearing, as it only precludes a person from accessing a court or tribunal prior to engaging in conciliation. Effective access to a court or tribunal is still preserved once parties have participated in conciliation or the conciliation service decides that the dispute is not suitable for conciliation. An aggrieved party can seek a review at VCAT of any issue of a dispute resolution order or a notice of breach of such an order. Further, a court retains discretion to grant leave to a party to commence an action in a court prior to the issue of a certificate of conciliation or participation in the conciliation process. [emphasis added]

"…

"Even if it were considered that this scheme limited the right to fair hearing, it is my view the right is a reasonable limit. There is a strong

> *access to justice rational in implementing a mandatory conciliation scheme…Accordingly I am of the view that any impediment to a person's access to a court is reasonable justified and that no less restrictive alternative is reasonably available. The new mandatory conciliation scheme is therefore considered compatible with the charter.*[17]

36 Whilst I accept that the DBCA is consumer protection legislation and that where anything is unclear, the relevant provisions must be read in favour of the consumer, the same cannot be said of the B Act, and in particular, s134 and s129. The 10 year limitation period set out in s134 is for the protection of both domestic and commercial builders and other building practitioners.

37 As the Court of Appeal noted in *Brirek* the purpose of a limitation period for the bringing of a building action was to provide some finality as to when a building action could be commenced. If the Owners were correct, and a referral to DBDRV was the commencement of a building action, then, as counsel for the Builder submitted, an applicant could apply to DBDRV for dispute resolution, and if deemed unsuitable for conciliation or the dispute did not resolve, obtain a certificate of conciliation and wait for an indefinite period before making an application to the Tribunal or to a court. This cannot be in the spirit of the legislation and the intention that there be a limitation period.

38 Section 56 of the DBCA requires that applications to the Tribunal concerning 'domestic building work disputes' must be accompanied by a certificate of conciliation issued by DBDRV to the effect that the proceeding was not resolved, or was determined by DBDRV to be not suitable for conciliation. The Tribunal has taken the view, that where an application is lodged shortly prior to the expiration of the limitation period, it is appropriate to stay the proceeding pending the receipt of a certificate of conciliation, as it could not have been intended by the legislature, that parties to a 'domestic building work dispute' lose their rights to bring a claim because of the introduction of this mandatory scheme.[18] Alternatively, a party can apply to a court under s57A(1)(b) for leave to commence a proceeding in the court without a certificate of conciliation issued by DBDRV.

39 The prudent approach by the Owners would have been to have made an application to the Tribunal within the limitation period and to have sought a stay pending the lodging of certificates of conciliation issued by DBDRV, consistent with the principles enunciated by McDonald J in *Burbank Australia Pty Ltd v Owners Corporation*[19]. As I said in *Warren's Plumbing and Drainage Services Pty Ltd v Sharma*[20] at [18]:

---

[17] Hansard, Legislative Council of Victoria, Thursday 11 February 2016, page 220
[18] *Warren's Plumbing and Drainage Services Pty Ltd v Sharma* [2018] VCAT 883; *Sharma v Lantrak Pty Ltd* [2018] VCAT 911.
[19] [2015] VSC 160. See also *Warren's Plumbing and Drainage Services Pty Ltd v Sharma* ibid at [15]
[20] ibid

I am satisfied that this is a procedural requirement which can be cured by the proceeding being stayed pending the applicant obtaining a certificate of conciliation from DBDRV.

Time

40 Section 45(3) of the DBCA requires:

> A domestic building work dispute must be referred to the chief dispute resolution officer within—
>
> (a) 10 years after the date of issue under the Building Act 1993 of the occupancy permit in relation to the domestic building work (whether or not the occupancy permit is subsequently cancelled or varied); or
>
> (b) if an occupancy permit is not issued, 10 years after the date of issue under Part 4 of the Building Act 1993 of the certificate of final inspection for the domestic building work; or
>
> (c) if neither an occupancy permit nor a certificate of final inspection is issued or required in relation to the domestic building work, 10 years after the date of practical completion of the domestic building work; or
>
> (d) if neither an occupancy permit nor a certificate of final inspection is issued or required in relation to the domestic building work and a date of practical completion cannot be ascertained, 10 years after the domestic building contract was entered into.

41 The owners submit that the inclusion of a limitation period in s45(3) of the DBCA supports their contention that the making of an application to DBDRV is the commencement of a 'building action'. I reject this.

42 First, the limitation period in s45(3) is more expansive than that set out in s134 of the B Act. It is not limited to 10 years from the date of the occupancy permit or the certificate of final inspection. Rather s45(3)(c) and (d) deal specifically with situations where there was no occupancy permit, no certificate of final inspection or the date of practical completion cannot be ascertained.

43 Further, although these provisions apply to an application to DBDRV for dispute resolution, there is no similar provision for the time in which an application can be made to the Tribunal or to a court in relation to a domestic building work dispute, and therefore s134 of the B Act prevails.

DISCUSSION

44 This is an unfortunate situation, where the introduction of the process of mandatory referral of all 'domestic building work disputes' to Domestic Building Disputes Resolution Victoria ('DBDRV') before a proceeding can be commenced in this Tribunal (other than in very limited circumstances), has led to unintended consequences. Because an application was not made to the Tribunal within the 10 year limitation period, the Owners have lost their rights to make a claim against the Builder.

45 Accordingly, the proceeding is misconceived and must be dismissed, the Owners' claims having clearly been brought after the expiry of the 10 year limitation period for the bringing of a 'building action'.

46 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD