VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D578/2012

CATCHWORDS

Domestic building – sections 75 and 78 of the *Victorian Civil and Administrative Tribunal Act 1998* – whether party alleged to be a concurrent wrongdoer can apply for a defence alleging same to be dismissed – whether party will suffer presumptive prejudice if not removed as a party under s60A of the *Victorian Civil and Administrative Tribunal Act 1998* – appropriate orders where substantive proceeding stayed pursuant to s500(2) of the *Corporations Act 2001* due to first respondent being under external administration.

APPLICANTS	Jeremy Michael Parsons and Helen Janet Parsons, Sean O'Hare, Trevor Stephen Trotter, Mark Whitelock, Mark Christopher Chapman, Phillip Alexander Keed and Amy Elizabeth Keed, James Edgar Coyle and Irene Coyle, Heidi Nerissa Jesse and Lily-Anne Jesse, Power Systems Pty Ltd (ACN: 119 538 386), Olaf Aadrian de Bree and Malgorzata Jadwiga Marian, Nathan Francis Theisz and Myra-Kate Crosbie-Theisz, Christiaan Jacobus Steenkamp, Timothy Brooks Cox, Jessica Kate Strachan, Kidz'n Sport Pty Ltd (ACN: 089 774 247), Bret Richard Downey and Denielle Simone Brennan, Gregory John Faulkner and Wendy Faulkner, Stephen Corradio Paisio and Dianne Rosemarie Rogers, David William Robertson and Erin Margaret Lee Hammett, Stephen Euean Carroll and Valma Carroll, Shane Peter Costantino and Claire Harvey-Beavis, Yee Mun Ng, Nigel William Polak and Anna Bridget Murphy, Abram Johannes Joubert and Lelitia Joubert, Mark Steven Nichols and Sarah Louise Nichols, Mark Ashley Strachan and Andrea Bettina Strachan, Timothy Keith Llewellyn, Mr Andre Grayson Rhodes and Ms Nicola Jane Rhodes, Ms Natasha Panagiotopoulos and Ms Zoe Butler, Mr Tomas Acton, Mr Michael James Forbes and Ms Lisa-Marie Therese King
FIRST RESPONDENT	Stat Bay Pty Ltd (ACN: 007 277 714)
SECOND RESPONDENT	Reddo Pty Ltd (ACN: 097 559 147)

THIRD RESPONDENT	LGE Contracting Pty Ltd (ACN:121 962 294)
FOURTH RESPONDENT	Acon Fields Pty Ltd (ACN: 122 366 876)
FOURTH JOINED PARTY	Mr Peter Steel
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	26 February 2015
DATE OF ORDER	19 March 2015
CITATION	Parsons v Stat Bay Pty Ltd (Building and Property) [2015] VCAT 297

ORDER

Noting the proceeding is stayed as between the applicants and the first respondent pursuant to s500(2) of the *Corporations Act 2001,* the Tribunal orders:

The proceeding is struck out with a right to apply for reinstatement. Any application for reinstatement must be accompanied by draft Points of Claim against the party to which the application relates.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr K. Oliver of counsel
For First Respondent	No appearance
For Second Respondent	Mr T. Sedal of counsel
For Third Respondent	Mr D. Jayatilake, solicitor
For Fourth Respondent	Mr D. Jayatilake, solicitor
For Fourth Joined Party	Ms S. Metcalfe, solicitor

REASONS

1 This proceeding has had what can only be described as a tortuous history. It was commenced on 25 June 2012. The Owners Corporation and a number of individual lot owners made claims in respect of alleged defective works. By order of the Tribunal dated 13 May 2013, leave was granted to the Owners Corporation to withdraw its claim against the first respondent builder.

2 Because of the complexity of the issues, and the number of units involved, it took the owners nearly a year to finalise Scott Schedules setting out details of the alleged defects. I note the owners filed an expert report in relation to fire safety on 2 February 2015.

3 The second, third and fourth respondents ('the joined respondents') were joined as joined parties to the proceeding upon application by the builder on 19 February 2014. The builder subsequently filed Amended Points of Defence dated 24 April 2014 seeking to take advantage of the proportionate liability provisions as set out in Part IVAA of the *Wrongs Act* 1958. After the owners amended their Points of Claim to include claims against each of the joined parties, they were joined as respondents. The second respondent was the responsible building surveyor ('Reddo'), the third respondent was the plumber who carried out roof plumbing and drainage works at the property and the fourth respondent was the electrician who carried out certain electrical works at the property. The builder's claims as against each of the joined respondents is set out in its Points of Claim as against each of the First, Second and Third Joined Parties dated 7 March 2014 ('JPPOC'):

   i. Damages for breach of contract;

   ii. Alternatively damages for negligence;

   iii. An order or determination that [the joined respondent] was wholly responsible for any damage found in favour of the applicants in relation to [the defects in the work allegedly caused by each of the joined respondents]

   iv. Alternatively, pursuant to Part IVAA of the *Wrongs Act 1958*, judgement for such proportion of the total amount of damages as the Tribunal considers to be just and equitable having regard to the extent of [each joined respondent's] responsibility for the applicants' loss and damage;

   v. Further or alternatively, pursuant to Part IV of the *Wrongs Act 1958* an order for contribution and or indemnity in respect of any amounts for which [each joined respondent] may be adjudged liable to the applicants..

4 On 15 May 2014 the owners filed Further Amended Points of Claim in which they 'piggyback' on the builder's part IVAA defence and plead that they will seek an order for damages against such of the joined respondents who are found by the Tribunal to be concurrent wrongdoers *in an amount*

which reflects the responsibility of [each of the joined respondents] for the Applicants' loss and damages (as determined by the Tribunal under Part IVAA of the Wrongs Act)…

5 On 17 December 2014, the building inspector was joined as the fourth joined party to the proceeding, upon application by Reddo. Reddo's claims indemnity or contribution from the inspector under Part IV of the *Wrongs Act*.

6 On 16 January 2015 Reddo filed an Application for Directions Hearing or Orders seeking an order that the builder provide security for its costs of the proceeding in the sum of $338,000; in default that the builder's claims against it be dismissed. A directions hearing was scheduled for 12 February for the hearing of this application.

7 On 6 February Reddo filed a further Application for Directions Hearing or Orders seeking the following orders, and requesting the application be heard at the directions hearing scheduled for 12 February:

1. Pursuant to section 76 and/or section 78 of the *Victorian Civil and Administrative Tribunal Act* 1998:
   (a) the First Respondent's [the builders] claims against the Second Respondent [Reddo] are dismissed; and
   (b) the First Respondent's allegation that the Second Respondent is a concurrent wrongdoer pursuant to Part IVAA of the Wrongs Act 1958 is dismissed.
2. Pursuant to section 60A of the *Victorian Civil and Administrative Tribunal Act* 1998 the Second Respondent ceases to be a party to the proceeding.
3. The First Respondent pay the Second Respondent's costs of the proceeding including the costs of and incidental to this application.
4. Such further or other orders as the Tribunal deems fit.

8 All parties except the builder appeared at the directions hearing on 12 February. Mr Oliver of counsel who appeared on behalf of the owners sought an adjournment of the hearing of Reddo's application. An adjournment was granted until 26 February, as I was satisfied that they had not had sufficient time to consider the application, and to allow the owners to notify the warranty insurer of the application as they were concerned to ensure that their rights to indemnity under the policy of warranty insurance were not prejudiced.

9 At the directions hearing on 26 February, Mr Oliver appeared on behalf of the owners. Reddo was represented by Mr Sedal of counsel. Mr Jayatilake, solicitor appeared on behalf of the electrician and the plumber and Ms Metcalfe, solicitor appeared on behalf of the inspector. At the commencement of the directions hearing affidavits by Karolina Juric, solicitor for Reddo affirmed 26 February, and Emilia Butera, solicitor for the owners, affirmed 25 February, were handed up.

10 In her affidavit Ms Juric deposes to having become aware that the builder had been placed under external administration on 23 February 2015 including that Joseph Loebenstein of Loebenstein Insolvency Services had been appointed as liquidator of a creditors' voluntary liquidation of the builder. Further, that she had telephoned Mr Loebenstein to advise him of Reddo's applications and that despite emailing copies to him at 10:55am and 10:57am on 25 February, and ringing his office again at 3:04pm on the same day, when she was advised by the receptionist that he was unavailable, he had not responded to indicate whether he sought an adjournment of the hearing of the application, or wished to be heard in relation to it. I note that as at the date of these Orders and Reasons the Tribunal has not received any correspondence from Mr Loebenstein in relation to this proceeding.

11 At the commencement of the directions hearing, Mr Oliver, noting that the owners' claims against the builder are now stayed pursuant to s500(2) of the *Corporations Act 2001*, sought an adjournment of the hearing of Reddo's application under ss76 and/or 78 for the reasons discussed below. Further, Mr Oliver submitted that Reddo should not be removed as a party to this proceeding, as if they were removed, the insurer's rights of subrogation in this proceeding, and any claim the owners might wish to bring against Reddo either in this proceeding or a further proceeding could be prejudiced. Mr Sedal opposed the application for an adjournment.

12 As it seemed to me that the application for an adjournment and Reddo's application under ss76 and/or 78 were inextricably linked, I heard both applications together and reserved my decision.

SHOULD THE HEARING OF REDDO'S APPLICATION BE ADJOURNED?

13 The owners seek an adjournment of the hearing of Reddo's application until after the determination of their claims on the warranty insurer (which had not been made as at the date of the directions hearing) following the builder having been placed under external administration. Alternatively, they seek an adjournment for a short time whilst they decide whether to bring a separate claim against Reddo.

14 In this regard, Mr Sedal referred me to the indication in the letter from the owners' solicitor to Reddo's solicitors dated 16 February 7 exhibited to Ms Butera's affidavit where they indicated:

> Although we do not have final instructions, we expect that most, if not all, of the Owners will not wish to amend their claim [to include a claim against Reddo] and will be content for the Building Surveyor to be removed as a party to the VCAT proceeding.

15 I note this letter was written shortly after the last directions hearing, and before the builder was placed under external administration.

16 In her affidavit, Ms Butera states at [7]:

> The Owners have obtained preliminary expert advice on the liability of Reddo, but will require a full report in order to decide whether to commence an independent claim against Reddo (i.e. a claim not dependent on a finding of proportionate liability under Part IVAA of the Wrongs Act). The decision of Vero in response to the Owners' insurance claims may also be relevant to their decision.

17 I am not persuaded there is any reason for the determination of Reddo's application to be delayed. My decision will not be informed by, nor impacted upon by any decision the warranty insurer might make, or the owners' decision as to whether they wish to make a separate claim against Reddo. It is desirable for all parties that the application be determined expeditiously without them incurring any further, unnecessary costs.

WHAT ORDERS SHOULD BE MADE?

18 As I have determined not to the dismiss builder's claims against Reddo for the reasons which follow, and noting this proceeding has been on foot for nearly three years, in my view, the appropriate order is that the proceeding be struck out with a right to apply for reinstatement. There can be no prejudice to the owners by this order being made. If they decide to make a direct claim against any of the joined respondents they can either apply to do so in this proceeding, or commence a new proceeding.

19 As Judge Macnamara recently said in *Luck v Victoria Police*[1] at [10]

> An order of strike out does not terminate a proceeding, it merely removes it from the list of active matters, leaving open the possibility of reinstatement should justice require…

20 If the owners apply to reinstate the proceeding against any of the joined respondents, any such application should be accompanied by proposed Points of Claim against such respondent.

THE BUILDER'S CLAIMS AGAINST REDDO

21 In JPPOC the builder claims against Reddo that:

(i) it breached the terms and warranties of the Building Surveying Agreement,

(ii) it owed a statutory duty of care to the builder;

(iii) it owed a duty of care to the builder and to prospective owners of the property including the applicants; and

(iv) that it issued certificates and performed inspections of the Works negligently and in breach of its statutory duty.[2]

22 The loss and damage the builder claims against Reddo (which is limited to the alleged fire separation and cladding defects) is referenced to the quantification set out in the Scott Schedules filed by the owners. It does not

[1] [2015] VCAT 71
[2] Paragraph 17

claim that it has suffered any loss and damage independent of the claims made by the owners.

23 In its Amended Defence dated 24 April 2014 the builder alleges Reddo is a concurrent wrongdoer because, in approving the architectural and engineering drawings submitted as part of the building permit application, performing the mandatory inspections and the final inspection and issuing the certificates of final inspection and the certificates of occupancy:

> 22. Reddo breached the terms and warranties of the Building Surveyor Agreement in that it did not:
>
> (a) use due care, skill and diligence in carrying out the Building Surveying Services; and/or
>
> (b) carry out the Building Surveying Services in a competent manner and to a professional standards; and /or
>
> (c) comply with their statutory duties and obligations pursuant to the *Building Act* 1993 and the *Building Regulations* 1994.

24 Further and in the alternative, the builder claims it is entitled to recover contribution from Reddo and each of the joined respondents pursuant to s23B of the Wrongs Act *in respect of any such loss or damage for which that party may be found liable.*

REDDO'S APPLICATION UNDER SECTIONS 76 AND/OR 78

Section 76

25 Section 76 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('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 for want of prosecution.
>
> (2) The Tribunal's power to dismiss or strike out a proceeding under this section is exercisable by—
>
> (a) the Tribunal as constituted for the proceeding; or
>
> (b) a presidential member.
>
> (3) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.

Section 78

26 Section 78 of the VCAT Act provides:

> (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.

27 Reddo relies on an affidavit by Ms Juric dated 5 February in which she sets out the history of the proceeding including the builder's repeated failures to comply with the Tribunal's orders. Insofar as her affidavit refers to matters which occurred before Reddo was joined as a party to this proceeding, I do not consider those matters to be relevant to Reddo's application. Not only was Reddo not privy to the reasons for the various extensions of time for both the owners and the builder to comply with the orders, the builder's failure to comply with orders prior to Reddo being joined to the proceeding cannot be said constitute a want of prosecution of its claims against Reddo, or to have unfairly disadvantaged Reddo.

28 As I understand its position, Reddo submits that the failure of the builder to file any expert report as to its responsibility for the owners' loss and damage amounts to a want of prosecution, and further that it has been unfairly disadvantaged by this conduct. I reject this. It cannot be said that the builder has done nothing at all in support of its Part IVAA defence, or in pursuit of its s23B claims against Reddo.

29 The preparation of the builder's primary expert building consultant reports was delayed due to a dispute with its building consultant expert, which was not resolved for some months. The details of the circumstances giving rise to the dispute and the exact nature of the dispute are not known to the Tribunal, suffice to say it was resolved in or about June 2014 with the services of the expert being terminated. At a directions hearing on 13 August 2014 I made orders adjourning the compulsory conference listed for 1 September to 15 September. I also ordered that by 8 September, the

builder file and serve the preliminary reports it had obtained from Dr Eilenberg, the expert it had subsequently retained.

30 Dr Eilenberg's preliminary report was filed on 9 September and includes an estimate of the cost of rectifying the external cladding which he agrees has been poorly installed.

31 In August 2014 the builder filed an expert report prepared by Per Olssen of Olssen Fire & Risk Consulting Engineers in relation to the alleged fire separation defects.

32 I note in passing that Reddo successfully applied to join the building inspector as a party to the proceeding, who was joined by order of the Tribunal dated 17 December 2015.

33 Until recently the builder was legally represented, with counsel appearing on its behalf at most directions hearings and at a compulsory conference held on 15 September 2014. It did not appear at a directions hearing on 17 December 2014 when the Tribunal noted that its former solicitor appeared as a courtesy to the Tribunal to advise that they had ceased acting for the builder the previous day. The Tribunal then made the following order:

> 5. The Tribunal notes with concern that the first respondent did not appear at today's directions hearing. By 16 January 2015 it must file and serve any new address for service and write to the Tribunal and other parties to confirm that it will actively prosecute its defence and its claims against other parties.

34 The builder did not comply with this order, and as noted above did not attend the directions hearing on 12 February, despite its director having apparently advised Ms Juric when she rang him on 20 January that the builder would be appointing new lawyers by 24 January.

35 Despite the failure of the builder to comply with various orders of the Tribunal, I am not satisfied that this non-compliance is sufficient to warrant an order under s76 or 78 of the VCAT Act.

Should the builder's claims that Reddo is a concurrent wrongdoer be dismissed?

36 In circumstances where the substantive proceeding is stayed by virtue of s500(2) of the *Corporations Act 2001* the builder's defence, including its Part IVAA defence, effectively falls away. I consider that I am unable to make any orders in relation to the defence, including the allegations under Part IVAA of the *Wrongs Act* as to do so would be to take a further step in the proceeding which is expressly prohibited by s500(2) of the *Corporations Act*.

37 Even if this were not the case, in my view it is not for a party alleged to be a concurrent wrongdoer to bring an application that allegations to that effect in Points of Defence of the respondent alleging it is a concurrent wrongdoer, be dismissed or struck out because of the manner in which that

respondent has been conducting its defence. In relying on the apportionment defence contemplated by Part IVAA, it is the responsibility of such respondent to plead out and prove the 'owners' case against the joined respondents. When joining Reddo as a party to the proceeding in February 2014 I was satisfied that the allegations that the joined respondents, including Reddo, are concurrent wrongdoers was arguable.

38 In any event, even if I was satisfied that I had the power to dismiss the builder's defence insofar as it contains allegations that Reddo is a concurrent wrongdoer I would decline to do so. As I said in *Brady Constructions Pty Ltd v Andrew Lingard & Associates Pty Ltd and Ors*[3] at [19]:

> Part IVAA enables a respondent to take steps to reduce its potential liability to an applicant. It would, in my view, add unnecessarily to the complexity of proceedings if an applicant was required to do anything more than seek relief in the event that a respondent satisfied the tribunal that responsibility should be apportioned and its liability thereby reduced. Why, I ask myself, should an applicant be put to the cost and expense of preparing a case against a party which it had no part in taking proceedings against? It might be said that if it wants the benefit of that party being joined to the proceeding it should plead out its case, but that seems to me to be grossly unfair in relation to a situation it finds itself in because of legislation which is there for the benefit of respondents. Let the respondent who wishes to minimise its potential liability incur the costs of pleading and proving the case against the joined respondents.

39 Whether the builder could have proved its claims against Reddo are matters which would have been properly considered at the final hearing which was scheduled to commence on 11 May 2015 with 20 days allocated when the Tribunal would have had the opportunity to consider the expert evidence, and the legal submissions made on behalf of each of the parties. The issues involved would seemingly have required a consideration of statutory interpretation and other legal questions.

40 As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority*[4] at [16] when considering an application under s75 of the VCAT Act, but which comments I consider to be equally apt in this circumstance:

> There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. <u>There should not be a trial before a trial</u>.

41 Mr Sedal further submitted that if the builder's claims against it, and the allegations that Reddo is a concurrent wrongdoer were not dismissed, this would leave open the opportunity for the owners to make a separate claim against it in the future, should they wish to do so. He submitted that having failed to make separate claim before now, they should not be given an

[3] [2008] VCAT 851
[4] [2008] VCAT 402

opportunity to do so in the future and that if the proceeding against Reddo was not dismissed and it was not removed as a party to this proceeding, it would suffer presumptive prejudice.

42 I reject this. In *Pacanowski v Simon Wakerman & Associates*[5] to which I was referred by Mr Sedal, Tobias and Basten JJA in a joint judgement said at [15]:

> Presumptive prejudice has always been a matter to be considered in other similar areas of discourse such as when an application is made for an extension of time under statutes of limitation and where a stay of proceedings is sought upon the basis of unreasonable delay. I see no reason, as a matter of principles, why presumptive prejudice cannot be relevant in a context such as the present where, in particular, the litigation has been on foot for nearly four years with little, if any, real progress towards a resolution.

43 In this proceeding, I am not satisfied that the failure of the owners to make a direct claim against Reddo before now, and wishing to reserve their rights to do so in the future, can properly be considered as causing it presumptive prejudice. The owners have made a 'piggyback' claim on the builder's Part IVAA defence as they are entitled to do. There was no reason for them to elect at that time to make a separate discrete claim against Reddo, as if the builder had succeeded in establishing that Reddo was a concurrent wrongdoer, they would have had the benefit of that decision. That is simply a function of the legislation.

Should the builder's other claims against Reddo be dismissed?

44 As noted above, the builder has also made a claim for indemnity and contribution against Reddo which Reddo submits should be dismissed. However, where the substantive claim is stayed by reason of the builder having been placed under external administration, this claim also falls away.

45 The builder's claim against Reddo, although a separate claim, is not independent of the owners' claims against the builder. Although in the Prayer for Relief in the JPPOC the builder claims damages for breach of contract, or alternatively damages for negligence, it is clear when read as a whole, in the context of the JPPOC that the builder is seeking to recover from Reddo, and the other joined respondents, any amount it is ordered to pay to the owners. No separate, independent claim is articulated in the JPPOC. Accordingly, as the substantive proceeding is stayed, and I have determined to order that it be struck out with a right to apply for reinstatement, I am not persuaded that any specific order is necessary or appropriate in relation to the builder's claims against the joined respondents.

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[5] [2009] NSWCA 402

Should Reddo be removed as a party to the proceeding

46 Reddo also applies to be removed as a party to the proceeding. Section 60A of the VCAT Act provides:

> (1) The Tribunal may order that a person cease to be a party to a proceeding if the Tribunal considers that—
>
> (a) the person's interests are not, or are no longer, affected by the proceeding; or
>
> (b) the person is not a proper or necessary party to the proceeding, whether or not the person was one originally.
>
> (2) An order under subsection (1) may include any other matters of a consequential or ancillary nature that the Tribunal considers appropriate.
>
> (3) The Tribunal may make an order under subsection (1) on its own initiative or on the application of a party.

47 In circumstances where I have refused Reddo's applications under s76 and/or s78 of the VCAT Act, it is not appropriate to order that it be removed as a party to the proceeding. Even if I had acceded to the application, I would not have been minded to make an order under s60A. It is clear that the owners may wish to make a separate claim against Reddo and, having regard to the Tribunal's obligations under ss97 and 98 of the VCAT Act, it would be inappropriate for the Tribunal to make any orders which might prejudice any claim the owners might have by making an order under s60A.

REDDO'S APPLICATION FOR COSTS

48 Reddo applies for its costs of this application. Whilst the builder's claims against the joined respondents are not stayed by virtue of s500(2), in my view an application for costs against the company is a new application which I am unable to consider. As I said in *Silvagni v DEE RR Pty Ltd* [2013] VCAT 642 at [20] when rejecting a submission that an order for costs was a procedural order:

> In my view, the making of an order for costs…is to make a final determination in relation to an application for costs…The making of such an order is a step in the proceeding as prohibited by s500(2).

CONCLUSION

49 For the reasons set out above I decline to dismiss either the builder's claims against Reddo or its allegations that Reddo is a concurrent wrongdoer pursuant to Part IVAA of the *Wrongs Act*.

50 At the directions hearing, Mr Jayatilake on behalf of the electrician and the plumber, and Ms Metcalfe on behalf of the inspector both made oral applications that the proceeding be dismissed against their respective clients with costs. For the reasons set out above, I am not persuaded that these

orders are necessary or appropriate in the circumstances, or in the case of the applications for costs, within power.

51 Accordingly, I will order that the proceeding be struck out with a right to apply for reinstatement.

DEPUTY PRESIDENT C AIRD