

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP430/2018

CATCHWORDS

Domestic building - domestic building work dispute – proceedings initially commenced in Magistrates Court and subsequently stayed under s57 of the *Domestic Building Contracts Act 1995* - application commenced without certificate of conciliation issued by DBDRV –sections 45(5), 45C, 56 and 57A of the *Domestic Building Contracts Act 1995* – whether compliance with the requirement for a certificate of conciliation can be waived by the Tribunal –proceeding stayed.

APPLICANT	Ashwani Sharma t/as Meridian Homes (ABN: 35 692 739 819)
RESPONDENT	Lantrak Pty Ltd (ACN: 163 639 727)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	In Chambers
DATE OF ORDER AND REASONS	14 June 2018
CITATION	Sharma v Lantrak Pty Ltd (Building and Property) [2018] VCAT 911

ORDER

- 1 This proceeding is stayed until the applicant files a certificate of conciliation issued by Domestic Building Dispute Resolution Victoria ('DBDRV'). If a certificate of conciliation is not filed by 20 July 2018 the proceeding will be struck out with a right of reinstatement upon the filing of a certificate of conciliation.
- 2 Costs reserved.

DEPUTY PRESIDENT C AIRD

REASONS

- 1 The applicant owner is an owner-builder who engaged the respondent builder to carry out excavation works for a house he was building. The owner was unhappy with the excavation works which he did not pay for. In July 2017 the builder commenced proceedings in the Magistrates Court seeking payment of his outstanding account. On 6 April 2018 orders were made by consent of the parties staying the Magistrates Court action under s57(2) of the *Domestic Building Contracts Act 1995* ('the DBCA').
- 2 This proceeding was commenced by the owner on 26 March 2018 seeking damages of \$438,888.18 for additional costs and expenses which, he says, he incurred as a result of the builder's failure to complete works in accordance with the plans.
- 3 As the dispute is clearly a 'domestic building work dispute' as defined in s44 of the DBCA, after reviewing the application, I directed registry to send a letter to the owner confirming that a certificate of conciliation issued by Domestic Building Dispute Resolution Victoria ('DBDRV') was required for the application to proceed in the Tribunal. This letter was emailed to the owner's solicitor, Ryan Solicitors, on 28 March 2018. On the same day, they replied:

Thank you for your letter sent by email earlier today.

The reference to DBDRV cannot be complied with because it will not accept matters which have been already taken to a Court.

I attach a copy of a partially completed reference of this action to DBDRV with the refusal highlighted.

The action was commenced in the Magistrates Court at Melbourne...

I am making an urgent application for a stay of proceedings in the Magistrates Court. I shall communicate with you further once the result of that application is known.¹

- 4 Upon receipt of this correspondence I directed the proceeding be listed before me for a directions hearing. At the directions hearing on 8 May 2018 the owner was represented by Mr Ryan, solicitor and the builder was represented by Mr Fah, solicitor. At the commencement of the directions hearing I raised my concerns about the failure of the owner to file a certificate of conciliation when commencing this proceeding, and made the following orders:

¹ The proceeding was subsequently stayed by the Magistrates Court at Melbourne under s57 of the DBCA which provides that the Tribunal is chiefly responsible for resolving domestic building disputes, and that any party can apply to the Magistrates Court for a stay of a proceeding concerning a domestic building dispute which, subject to certain pre-requisites which are satisfied here, must stay the proceeding.

OTHER MATTERS

1. The respondent commenced proceedings in the Magistrates Court which were adjourned by order dated 6 April 2018 after the parties consented to the proceeding being stayed having regard to s 57 of the *Domestic Building Contracts Act 1995*.
2. The applicant then commenced proceedings in this tribunal.
3. Neither party has obtained a certificate of conciliation from DBDRV and the respondent has seemingly not obtained leave from the Magistrates Court to commence proceedings there, having regard to s 57A of the *Domestic Building Contracts Act 1995*.
4. The question arises as to whether the proceeding in the Magistrates Court or at VCAT have been validly commenced, and whether this proceeding should be stayed to allow the parties to refer their dispute to DBDRV.

ORDERS

1. This proceeding is referred to an administrative mention before Deputy President C. Aird on **4 June 2018** at which time the parties must make recommendations for its further conduct.
 2. If the parties or either of them contends that a certificate of conciliation from DBDRV is not required, and this proceeding has been validly commenced they should file written submissions in support of their position and the question will be determined by Deputy President C. Aird in chambers.
 3. Liberty to apply.
 4. Costs reserved.
- 5 The owner filed Submissions on 29 May 2018 contending that whilst ordinarily a certificate of conciliation is required to commence a proceeding in the Tribunal, this is a procedural requirement that the Tribunal can waive compliance with under s126 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). The builder's solicitor confirmed by email on 4 June 2018 they agreed with the owner's Submissions and had nothing to add.

IS A CERTIFICATE OF CONCILIATION REQUIRED?

- 6 From 26 April 2017 all applications concerning domestic building work where one of the parties is an owner must be referred to Domestic Building Dispute Resolution ('DBDRV'). Proceedings concerning domestic building work disputes, where one of the parties is an owner, commenced in this Tribunal must be accompanied by a certificate of conciliation issued by DBDRV.²

² Section 56, DBCA

7 Section 56 of the DBCA provides:

56 Certificate of conciliation required to bring proceeding in VCAT to resolve domestic building work dispute

- (1) A party to a domestic building work dispute must not make an application to VCAT in relation to the dispute unless the chief dispute resolution officer has issued a certificate of conciliation to the party certifying that the dispute—
 - (a) was not suitable for conciliation; or
 - (b) was not resolved by conciliation.
- (2) An application to VCAT to commence proceedings in relation to a domestic building work dispute must be accompanied by a copy of the certificate of conciliation.
- (3) This section does not apply to proceedings for an order in the nature of an injunction.

8 Mr Ryan contends that as proceedings were commenced in the Magistrates Court, the parties are now unable to refer the dispute to DBDRV, and that if a certificate of conciliation is required, the parties will be prevented from having their dispute resolved. Further, as the application has been rejected by DBDRV³ this means it will not accept the application, and that, in fact, an application cannot be made to DBDRV. In this regard he relies on s45(5) of the DBCA which provides:

A party may not refer a domestic building work dispute under this section if proceedings in relation to the matter in dispute have commenced in VCAT or in a court.

9 I have previously considered a similar submission, also by Mr Ryan, in *Warren's Plumbing and Drainage Services Pty Ltd v Sharma*⁴ ('*Warren's Plumbing*') where at [14] I said:

... However, it is important to note that s45(5) does not say that DBDRV cannot accept a referral if a proceeding has commenced in VCAT. In my view, the clear intention of s45(5) is that once proceedings have been commenced at VCAT in accordance with the requirements of the DBCA, noting there are exceptions to the requirement for a certificate of conciliation issued by DBDRV before

³ Accompanying Mr Ryan's email of 28 March 2018 was one page of the owner's partially completed online application form to DBDRV. The page is headed 'Eligibility – Application for domestic building dispute resolution – Domestic Building Dispute Resolution Victoria'. It shows that 'Court' was selected, although the full question was not included with the extract provided and the 'Note' *We cannot resolve disputes that have been taken to VCAT or to a Court.*

⁴ [2018] VCAT 883

commencement of the proceedings, that a party cannot simultaneously refer the dispute to DBDRV – it is to be dealt with in one forum and not two.

And at [18]

It must be remembered that this is consumer protection legislation. It is designed to give parties access to a less formal forum for the resolution of domestic building work disputes. It is not intended to actively prevent persons with genuine disputes from being able to litigate them. It is intended to enhance not hinder access to justice for parties with domestic building work disputes, where one of the parties is an owner.

10 I note that s45C(3)(e) of the DBCA provides that DBDRV must issue a certificate of conciliation if *all issues arising out of the dispute have been or are the subject of proceedings before VCAT or a court*. This section reinforces my view that there is no impediment to DBDRV accepting a referral if a matter is before the Tribunal or a court. However, if a referral is accepted, the referral may be assessed as not suitable, and a certificate of conciliation issued.

11 It is also important to note the requirements of s57A of the DBCA in relation to actions commenced in a court, as opposed to s56 which deals solely with proceedings commenced in the Tribunal.

12 Section 57A of the DBCA provides:

57A Certain actions not to proceed in a court without certificate of conciliation or leave

(1) A party to a domestic building work dispute may not commence an action in a court arising wholly or predominantly from the dispute unless –

(a) the chief dispute resolution office has issued a certificate of conciliation to the party certifying that the dispute –

(i) was not suitable for conciliation; or

(ii) was not resolved by conciliation; or

(b) the party has been granted leave by the court to bring the proceedings. [underlining added]

(2) This section does not apply to proceedings for an order in the nature of an injunction.

13 The parties confirmed at the directions hearing that leave had not been obtained from the Magistrates Court to commence the action there.

14 In my view, ss 45(5) and 45C(3)(e) can only refer to proceedings which were commenced in the Tribunal or a court prior to 26 April 2017, or where leave of the court was obtained for actions commenced after that date. Any proceeding commenced without a certificate of conciliation or leave would

need to be stayed by the court pending the filing of a certificate of conciliation or the hearing of any leave application.

- 15 I am therefore satisfied that a certificate of compliance is required for this matter to proceed in the Tribunal.
- 16 Although not argued by either party in this proceeding, my preliminary view is that if leave had been granted by the Magistrates Court to commence the action, and such action was subsequently stayed under s57 of the DBCA so that the application could be made to the Tribunal, s45(5) would in my view apply, and it would be unnecessary for a party to apply to DBDRV before commencing a proceeding in the Tribunal.

CAN THE TRIBUNAL WAIVE COMPLIANCE WITH THE REQUIREMENT FOR A CERTIFICATE OF CONCILIATION?

- 17 Mr Ryan submitted that the requirement for a certificate of conciliation is a procedural requirement which can be waived by the Tribunal under s126 of the VCAT Act. Section 126(2) relevantly provides:

126 (2) If the rules permit, the Tribunal, on application by a party or on its own initiative, may –

- (a) extend, or abridge any time limit fixed by or under this Act, the regulations, the rules or a relevant enactment for the doing of any act in a proceeding; or
- (b) waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge.

- 18 Mr Ryan referred me to my decision in *Owners Corporation PS 447493 v Burbank Australia Pty Ltd*⁵ where I determined that under s126 of the VCAT Act I could waive strict compliance with a requirement of the *Owners Corporation Act 2006* to obtain a special resolution before commencing a proceeding in the Tribunal. However, on appeal, Justice McDonald held that the appropriate course was to stay the proceeding pending the obtaining of the necessary special resolution.⁶ As discussed in *Warren's Plumbing* my view is that staying the proceeding pending the filing of a certificate of conciliation is consistent with his Honour's decision, and is the appropriate order to be made.

- 19 In any event, even though s126 may allow the Tribunal to waive compliance with a procedural requirement, the requirement to obtain a certificate of conciliation could not be waived. Section 57A is quite explicit – it contemplates leave being granted by a court to commence an action without a certificate of conciliation. A power to grant such leave is not given to the Tribunal.

⁵ [2013] VCAT 1911

⁶ [2015] VSC 160

- 20 In *Warren's Plumbing* I found that a requirement to obtain a certificate of conciliation before commencing a proceeding in the Tribunal was a procedural requirement which could be cured, and that the appropriate order was for the proceeding to be stayed pending the obtaining of a certificate of conciliation. A similar order will be made in this proceeding.

DEPUTY PRESIDENT C AIRD