VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D894/2008

CATCHWORDS

Section 77 VCAT Act-application to transfer from VCAT Building List to Supreme Court – applicable principles.

APPLICANT	Victorian Managed Insurance Authority
RESPONDENT	Dura (Australia) Constructions Pty Ltd (ACN: 004 284 191)
WHERE HELD	Melbourne
BEFORE	Her Honour Judge Harbison Vice President
HEARING TYPE	Hearing
DATE OF HEARING	24 August 2009
DATE OF ORDER	14 September 2009
CITATION	Victorian Managed Insurance Authority v Dura (Australia) Constructions Pty Ltd (Domestic Building) [2009] VCAT 1918

ORDER

The application of Dura (Australia) Constructions Pty Ltd to transfer this proceeding to the Supreme Court of Victoria pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act* 1998 is refused.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT

APPEARANCES:

For Applicant	S Stuckey of Counsel
For Respondent	G John Digby SC with R Andrew

REASONS

INTRODUCTION

1 This is an application by the respondent to this proceeding that the proceeding be transferred to the Supreme Court of Victoria pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act* 1998. To avoid confusion I will refer to the applicant in the transfer application as Dura, and the respondent to the transfer application as VMIA.

2 Section 77 of the VCAT Act gives me the power to make an order striking out all or any part of a proceeding if I consider that the subject matter of the proceeding would be more appropriately dealt with by a Tribunal (other than this Tribunal), a Court or any other person or body. The order striking out the proceeding would ordinarily be accompanied by an order under s 77(3) that the proceeding be referred to the relevant Court if this Tribunal considers it appropriate to do so.

3 Although the wording of the section is imprecise, in effect the section allows for the transfer of a proceeding commenced at this Tribunal to another Court or Tribunal in the event that I consider that the subject matter of the proceeding would be more appropriately dealt with by that Court or Tribunal.

History of the proceeding

4 Dura is a building company. It constructed a set of multi-storey apartments in Toorak Road, South Yarra during the years 1998–2000 for a development company known as Cromwell Developments Pty Ltd.

5 Cromwell Developments Pty Ltd sold the units to individual owners. At some time after moving into their properties, various owners alleged that the apartments had been defectively constructed. Ultimately the owners and the Owners Corporation made a claim against VMIA under Part 6 of the *House Contracts Guarantee Act* 1987.

6 In October of 2006 VMIA accepted the claims and required Dura to rectify the defects.

7 Dura denied responsibility for the defects and refused to comply with the direction to rectify, although it does not appear to have applied for a review of the direction to rectify.

8 In May of 2008 the Owners Corporation and various owners issued proceedings in this Tribunal against VMIA. I will refer to this proceeding in these reasons as the "Owners Corporation proceeding". In that proceeding the owners asserted that despite accepting liability for the claims and ordering Dura to rectify the accepted items, VMIA had not assessed the amount payable to the owners out of the Domestic Building Indemnity Fund or, alternatively, had failed to pay the owners the sum which they had assessed as payable.

9 It appears to me that the Owners Corporation claim was brought to the Tribunal relying upon either of sections 59(A) or 62 of the *Domestic Building Contracts Act* 1995.

10 Section 59(A) gives this Tribunal jurisdiction to hear and determine any dispute concerning an insurance claim concerning domestic building work or an insurer's decision on such a claim.

11 Section 60 of the *Domestic Building Contracts Act* 1995 gives the Tribunal jurisdiction to review any decision of an insurer with respect to anything arising from any required insurance.

12 Thus, the Owners Corporation proceeding is properly brought to this Tribunal and is squarely within the Tribunal's jurisdiction.

13 The Owners Corporation proceeding passed through various interlocutory stages and then in June of 2008 a decision was made by VMIA to add Dura to this Owners Corporation proceeding. VMIA sought to do so relying upon s 60 of the VCAT Act, which provides that the Tribunal may order that a person be joined as a party to a proceeding if the Tribunal considers

that that person ought to be bound by or have the benefit of an order of the Tribunal in the proceeding. VMIA wished to have Dura bound to the orders made in the Owners Corporation proceeding so that it would not need to re-litigate issues of insurance or the quantum of the defective works at the conclusion of the Owners Corporation proceeding.

14 This Tribunal acceded to VMIA's request, and made an order that Dura be added to the Owners Corporation proceeding. Dura then challenged the right of the Tribunal to make such an order in the proceeding. That challenge has proceeded from a Master of the Supreme Court, to a Judge sitting the Practice Court of the Supreme Court, to the Court of Appeal, and to an application for special leave to the High Court. I am told that the special leave application has not yet been heard. Clearly therefore, the question of joinder of Dura to the Owners Corporation proceeding has not yet been finally resolved.

15 I was told by counsel for the VMIA that as a result of this challenge to the s 60 joinder in the Owners Corporation proceeding, this proceeding that I am dealing with today was issued against Dura by the VMIA.

16 The purpose of this proceeding before me is to resolve the question of whether or not Dura was bound by the terms of the contract of insurance on which the Owners Corporation relies in its claim against the VMIA. It is also to obtain orders declaring that the building works contain the defects which were the subject of the rectification direction, and a declaration that those defects were matters which were the responsibility of Dura under the building contract, and are therefore a prescribed cause within the meaning of the contract of insurance. This proceeding also seeks an order that Dura pay to VMIA the cost of rectifying the defects.

17 VMIA says that this proceeding is therefore one which is made necessary by the uncertainty surrounding the capacity of VMIA to add Dura to the Owners Corporation proceeding. It is a proceeding that may be rendered

redundant if the s 60 joinder issues in the first proceeding are finally determined in favour of VMIA.

18 This proceeding appears to have been issued in reliance upon either s 59(A) of the *Domestic Building Contracts Act* 1995 as being a dispute concerning an insurance claim concerning domestic building work or an insurers decision on such a claim or, alternatively, under s 53 of the *Domestic Building Contracts Act* 1995 which provides that a Tribunal may make any order it considers fair to resolve a domestic building dispute.

19 The present proceeding was issued on 24 November 2008. Little interlocutory action has occurred on the file, as on 12 February 2009 Dura made application for the proceeding to be dismissed under s 75 of the VCAT Act. That application was itself dismissed on 4 March 2009. This application seeking transfer under s 77 of the VCAT Act was issued on 30 April 2009. No further management of the file has occurred pending the resolution of this s 77 application.

Dura's arguments in support of its application under s 77

20 On 28 April of this year, two days before issuing the s 77 application, Dura issued its own proceedings in the Supreme Court of Victoria. There are two defendants to that proceeding.

21 The first of those is Crema Bahramis, a corporate architect who was responsible for the production of the plans and specifications for the apartments, contracting directly with the developer, Cromwell Developments Pty Ltd rather than with Dura.

22 The second is Glacier Northwest Inc, which is a company registered in the United States of America and which Dura alleges manufactured and sold a waterproofing membrane, Caltite, which was specified by the architect and used by Dura in construction of the apartments. I note here that although the statement of claim describes Glacier Northwest as the manufacturer and seller of Caltite, it is silent on the question of who it was who purchased the Caltite and who it was purchased from. The pleadings do not reveal whether

there is any sale alleged from Glacier Northwest to Dura or the precise relationship or factual nexus between Dura and Glacier Northwest.

23 The existence of the Supreme Court proceeding is the justification for this application to transfer. In a nutshell, Dura says that the causes of action which it seeks to rely on in the Supreme Court proceeding cannot be brought at VCAT. Dura says that if both this proceeding and the Supreme Court proceeding are allowed to be tried, they will cover the same essential subject matter, and that there is therefore a strong risk of inconsistent verdicts and duplication which can be avoided by the transfer of this proceeding to the Supreme Court, so that it can be heard together with the existing Supreme Court proceeding.

The factual background to the Supreme Court claim

24 Dura says that essentially the claim by the Owners Corporation, sought to be sheeted home to Dura in this proceeding, is for defects arising out of the ingress of water into the apartments and onto the common property.

25 Dura denies responsibility for the defects and by paragraph 13(c) of the statement of claim, appears to wish to put VMIA to proof that any water ingress occurred at all. However, it says that if there was water penetration, then it arose as a result of a design defect in the specifications provided by Crema Bahramis to Cromwell Developments Pty Ltd. In particular, Dura asserts that the architect specified Caltite to be applied to prevent water penetration instead of specifying a conventional waterproofing membrane. Dura suggests that this substance was ineffective in preventing water penetration and that if any such ingress of water has occurred, it has occurred because of the specification of Caltite by Crema Bahramis.

26 Further, Dura says that the American company, Glacier Northwest, manufactured and sold Caltite at the relevant time. It says that Glacier Northwest knew, or ought to have known, that Caltite on its own was not sufficient to prevent water ingress and that it failed to provide any adequate warnings about the potential for failure of Caltite, or the circumstances in

which it could be safely used in lieu of conventional waterproofing membrane.

27 Thus, in the Supreme Court proceedings, Dura denies that there are defects in the works, says that if it is found that there are defects in the works, then it is not responsible to rectify the defects, and further says that if it is found responsible to rectify the defects, then the defects are a result of water ingress into the apartments which arise as the result of a design defect by the architects or a breach of the duty of care by the manufacturer/supplier in failing to provide any or any adequate warnings about the potential for the failure of Caltite.

28 Dura says that all of these issues, and all of the issues in this proceeding before me, are clearly within the jurisdiction of the Supreme Court. It says further that there are significant elements of the Supreme Court proceeding which are not justiciable in this Tribunal.

29 Specifically, Dura says that I should make findings that –

1. the proceeding in the Supreme Court will involve the making of similar findings of fact and law as will be required in this proceeding; and
2. some of the remedies available to Dura in the Supreme Court are not available in this Tribunal, and
3. there is significant doubt as to the Tribunal's jurisdiction to grant the relief sought by VMIA in this proceeding, and that all of those findings, when considered in the light of the relatively fresh nature of this proceeding, should persuade me that it would be in the interests of justice that this proceeding be transferred to the Supreme Court.

Are the proceedings in the Supreme Court closely related to this proceeding and will they involve similar findings of fact and law?

30 As I have outlined, the Owners Corporation proceeding is concerned with the quantum payable by the VMIA to the owners out of the Domestic

Building Indemnity Fund arising out of VMIA's obligations under the HIH recovery scheme.

31 This present proceeding seeks declarations that Dura is bound by the contract of insurance, but also seeks declarations that the building works contain the defects and an order that Dura pay to VMIA the cost of rectifying the defects.

32 The Supreme Court proceeding is effectively in the nature of a third party claim and is drawn in such a way that Dura makes no independent claims against either of the defendants, but seeks to rely upon an indemnity from those defendants if the declarations sought in this proceeding are made against it. It is not a "stand-alone" claim –it cannot be pressed except at the conclusion of this proceeding, or if heard together with or consolidated into these proceedings.

33 Dura says that the defects from which liability is said to arise in the Owners Corporation proceeding and in this proceeding have occurred as a result of water ingress into the building. Counsel for Dura invites me to consider the description of the defects in the documents entitled "Schedule A" to the Statement of Claim in the Owners Corporation proceeding.

34 Counsel for VMIA contests that the defects on which the Owners Corporation relies and on which VMIA relies can all be characterised as defects arising from water penetration.

35 I have formed the view, from the description of the defects in the schedule, that water damage is a significant focus in the description of the defects and will be a substantial factual issue to be determined in the trial of each proceeding, although bad workmanship in applying the membrane and in other aspects of the works appears also to be raised as an issue in this proceeding.

36 There is a potential overlap between the issues in this proceeding and the facts alleged by Dura against the architect in the Supreme Court

proceeding. Although the architect's role has not been raised in this proceeding, the question of whether the builder followed the architect's specifications may well be an issue in determining whether or not the works are defective, or whether those defective works are the responsibility of the builder under the insurance contract. I suspect that VMIA may wish to argue in this proceeding that it was sub-standard workmanship, rather than defective specifications, which caused the water damage, but clearly this will be a factual issue to be determined in both proceedings.

37 There are other factual issues in this proceeding which will not arise in the Supreme Court proceeding. The existence of the policy of insurance, the obligations of the parties arising under the policy, and the interpretation of the various statutory provisions governing the provision of warranty insurance are raised in the two proceedings which are presently before this Tribunal, but will not be issues at all in the Supreme Court proceeding.

38 Further, the issues raised by Dura against Glacier Northwest appear to me to be unlikely to be relevant issues in either this proceeding or the Owners Corporation proceeding (unless, as I explore later in these reasons, by way of a contribution claim).

39 Therefore the factual overlap between this proceeding and the Supreme Court proceeding appears to be the circumstances surrounding the specification of Caltite by the architect and whether it was the inadequacy of the Caltite which caused those defects which were said to have arisen by reason of water penetration, or whether the water penetration was caused by the bad workmanship of the builder.

Does this Tribunal lack jurisdiction to entertain the causes of action set out in the Supreme Court proceeding?

40 There are three broad categories of claim in the Supreme Court proceeding. The first is a claim against both the architect and the manufacturer under the *Trade Practices Act (Cth)*. The second is a claim for contribution under the *Wrongs Act* 1958 against the architect and the manufacturer. The third is a

claim at Common Law in negligence against the architect, and possibly also the manufacturer.

The Trade Practices Act claim

41 Each of the *Trade Practices Act* claims is made relying upon s 52 of the *Trade Practices Act* 1974. This is Commonwealth legislation and therefore legislation in relation to which this Tribunal clearly has no jurisdiction, for this Tribunal, being a creature of statute, has jurisdiction only in relation to those statutory causes of action which are given to it by various Acts of Parliament.

42 However, s 52 of the *Trade Practices Act* is mirrored in Victoria in s 9 of the *Fair Trading Act* 1999. It would be inappropriate, in my view, for this Tribunal to exercise its discretion to transfer a proceeding on the grounds of lack of jurisdiction under the *Trade Practices Act* where equivalent jurisdiction is available under which this Tribunal has not only jurisdiction but clear expertise.

43 In *Vamot v Tempacoe Pty Ltd & Anor* [2000] VSC 251 Justice Beach, dealing with an application to transfer a matter from the Domestic Building List at VCAT to the Federal Court under cross-vesting legislation, said this:

"To bring what is in reality nothing more than a building dispute within the jurisdiction of the Federal Court it was necessary for Vamot to come up with a cause of action which would fall within that Court's jurisdiction. As one has seen in so many cases over recent years, it resolved the problem by alleging breaches of the Commonwealth Trade Practices Act.

I have a suspicion that Vamot's action in that regard was designed to wrest the initiative in relation to this dispute from the control of Tempacoe and place control of it into its own hands.

The fact of the matter is that, having regard to the provisions of the Fair Trading Act 1999 as they now stand, in particular the provisions of s 108, which provision I consider to be retrospective and which would apply

therefore to the present dispute between the parties, VCAT now has the power to give Vamot virtually all the relief it is seeking in the Federal Court proceeding."

44 This application raises similar issues to those referred to in the extract from Justice Beach that I have just quoted. The proceeding is fundamentally a dispute about building work alleged to be defective and the liability of the various parties involved to pay the costs of rectification. As Justice Beach did in *Vamot,* I take the view that the existence of the Fair Trading remedies, an area of law in which members of this Tribunal have daily expertise, prevents reliance being placed on the existence of the potential trade practices claim in a s 77 application.

45 However, Dura submitted that the *Fair Trading Act* 1999 could not apply to its claim against either the architect or the manufacturer because there was no consumer-trader relationship between Dura and either the architect or manufacturer sufficient to found jurisdiction in the Tribunal.

46 Dura says that this is because Dura did not itself engage the architect – the architect was engaged by Cromwell Developments Pty Ltd – and so even if there is a consumer-trader relationship between Cromwell Developments Pty Ltd and the architect, there is no such relationship between Dura itself and the architect.

47 Similarly, Dura says there is no consumer-trader relationship between itself and the manufacturer because a dispute between a builder and a manufacturer cannot be categorised as a consumer-trader dispute.

48 In my view this argument is misconceived. The necessity for a party to establish that its claim arises out of a consumer and trader dispute is confined to a claim for remedies under Part 9 of the *Fair Trading Act* 1999. It is not required in respect of claims under other parts of the *Fair Trading Act*. As I have outlined, the *Fair Trading Act* jurisdiction in this case would be under s 9 of the Act which provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to

mislead or deceive. A person making a claim under s 9 does not need to establish the existence of a consumer and trader dispute.

49 Indeed, sections 158 and 159 of the *Fair Trading Act* provide that this Tribunal may make an identical range of orders to a Court in respect of the contravention of any provision of this Act. Proceedings are commonly brought in the Civil Claims list of this Tribunal under s 9 of the *Fair Trading Act* relying upon the powers contained in ss 158 and 159.

50 Accordingly, as there appears to me to be no impediment to bringing proceedings under the *Fair Trading Act* regardless of whether the relationship between Dura and either the architect or manufacturer can be described as a consumer-trader dispute, I do not regard the existence of the trade practices pleading in the Supreme Court as sufficient reason to justify to transfer pursuant to s 77.

Can Dura bring its claim for apportionment under the Wrongs Act 1958 against the architect and the manufacturer to this Tribunal?

51 I have previously outlined that both the Owners Corporation claim and the claim presently before this Tribunal have been brought pursuant to the *Domestic Building Contracts Act* 1995. I have indicated that I am unclear as to whether or not the Owners Corporation dispute has been brought pursuant to s 59(a) or s 62 of the Act. This proceeding by VMIA against Dura appears also to have its foundation in either s 59(a) or s 53 of that Act.

52 Dura says that it cannot apply for relief by way of apportionment against either the architect or the manufacturer in this proceeding because in order to do so its claim must be able to be characterised as a domestic building dispute. It says that this is because s 53 (1) of the *Domestic Building Contracts Act* provides that the Tribunal may make any order it considers fair to resolve a domestic building dispute. A domestic building dispute is defined in s 54.

53 Dura says that the manufacturer cannot be described as any of the classes of persons in that definition. It is not a sub-contractor. It is not an architect.

It is not a building practitioner registered under the Building Act 1993, and it is not an insurer. Thus, Dura says, this Tribunal has no jurisdiction to deal with the apportionment claim against the manufacturer.

54 In respect of the architect, Dura points out that the architect is a corporate entity. It concedes that the class of persons in the s 54 definition includes an architect. However, Dura says that the words "an architect" where used in s 54 refer only to an architect who is a natural person, rather than a corporate architect. This is because the word "architect" in the *Domestic Building Contracts Act* is defined in s 3 as meaning "a person who is registered as an architect under the *Architects Act* 1991". Dura points out that when one looks at the *Architects Act* 1991, it is plain that only a natural person can be registered as an architect. This is because the definition of architect in s 3 is as follows:

"*Architect except in Part 2, (this part is not relevant to my determination) means a natural person who is registered as an architect under s 11.*"

55 Dura points out that the *Architects Act* provides for a different system of accreditation for corporate architects. They are not registered, but instead are approved. In this case the architect is a corporate entity and thus Dura says it is not capable of bringing a claim against the corporate architect in the proceedings presently at the Tribunal.

56 VMIA suggests that this analysis of the different status to be given to a corporate, as opposed to a natural, architect under the *Domestic Building Contracts Act* is inconsistent with general practice at the Tribunal and conflicts with the aims and objectives of the Act, the purpose of which was to ensure that disputes between builders, architects and insurers were able to be dealt with in the same forum. However, Dura says that even if that position were arguable, Dura should not have to run the risk of issuing proceedings against a corporate architect in this Tribunal and having them ultimately dismissed for want of jurisdiction.

57 However, once again it seems to me that Dura's arguments are misconceived. The claim it wishes to bring against the manufacturer and the architect is a claim for apportionment under the *Wrongs Act* and the jurisdiction of this Tribunal to entertain the claim is contained in the *Wrongs Act* itself, not in the *Domestic Building Contracts Act*.

58 Part IVAA of the *Wrongs Act* contains a legislative scheme to enable claims to be apportioned between concurrent wrongdoers. It appears to me that the way in which the claims have been pleaded in the Supreme Court proceedings make it plain that Dura wishes to take advantage of these Part 4AA proportionate liability remedies.

59 The jurisdiction arises under s 24AF of the *Wrongs Act,* which sets out the circumstances in which a concurrent liability claim can be made. The proceeding before me, being a claim for economic loss or damage to property arising under statute, is a claim described in s 24AF and therefore a claim to which Part 4AA applies. Reference to the Court in Part 24AE includes 'tribunal'

60 Any claim for apportionment of responsibility in this proceeding under the *Wrongs Act* can therefore be brought in this Tribunal under s 24AL of the Act.

61 Clearly then, the claims contained in the Supreme Court pleadings could be just as well brought in this Tribunal. The Domestic Building list is often called upon to make an apportionment of liability claims pursuant to the Wrongs act provisions. Such claims are often brought against both natural and corporate architects, engineers, manufacturers and all varieties of concurrent wrongdoers. The list has acknowledged expertise in the determination of multifaceted building disputes and its members experience and expertise has been acknowledged in the higher Courts.

62 It does not appear to me from the Supreme Court pleadings that Dura wishes to bring its own independent claim against the manufacturer or the architect (save for the possible claims in negligence which I deal with

below). It makes no claim against either defendant except in the nature of a third party claim or an apportionment claim arising out of its potential liability to VMIA as I have outlined. As I have pointed out, its right to bring a claim for apportionment is not contingent upon the contribution claim being in respect of domestic building work. Such a claim appears to me to be capable of being brought to this Tribunal in any proceeding which is otherwise within the jurisdiction of the Tribunal.

Does this Tribunal have jurisdiction over Dura's claim in negligence against the architect?

63 In the Supreme Court proceedings, under the heading "Claim in Negligence" Dura makes a further claim against the architect. Dura says that in providing its services to Cromwell Developments Pty Ltd, the architect owed a duty of care to Dura to prepare the construction documents in an appropriate manner, and that in breach of the duty of care, the architect negligently provided inappropriate construction documents by failing to specify a waterproofing membrane. Dura says further that by reason of the breach of the duty of care, Dura, if found liable to VMIA in this proceeding, will have suffered loss and damage.

64 I note that although Dura pleads the existence of a duty of care, and a breach of that duty, the cause of action against the architect in negligence appears incomplete as Dura cannot not plead any damage until the outcome of the proceeding before me .

65 Although the pleadings do not contain a similar pleading in negligence against the manufacturer, counsel for Dura submitted that Dura also wished to bring a claim in negligence against it. I presume that this claim also is incomplete at this stage as no damage can presently be pleaded as against the manufacturer.

66 A claim in negligence can, in some circumstances, be dealt with by this Tribunal. Section 107 of the *Fair Trading Act* provides that where a claim is brought under Part 9 of the Act, the definition of a consumer-trader

dispute (which as I have already outlined is the foundation for jurisdiction under Part 9) includes any dispute or claim in negligence, nuisance or trespass that relates to the supply or possible supply of goods and services, although this definition specifically excludes a claim for negligence causing personal injury.

67 However, as I have outlined, it is arguable that neither Dura's claim against the architect nor its claim against the manufacturer can be described as a consumer-trader dispute, as there is no relationship of supplier and purchaser between Dura and either of those two parties. As I have said, this Tribunal can only exercise that jurisdiction which is granted to it by statute. I have not been able to identify any other statutory jurisdiction given to this Tribunal which would comprehend the claim in negligence by Dura against the architect.

68 It is relevant that all of the matters on which Dura seeks to rely in the Supreme Court proceeding as establishing negligence against the architect and any possible claim in negligence against the manufacturer appear to be identical with those to be relied upon in the *Wrongs Act* contribution claim. It is difficult to discern any real advantage to Dura in bringing a separate negligence claim at common law against either of those parties, and it appears to me that the outcome of the decision made by either this Tribunal or the Supreme Court as to the contribution claim will determine the result of the negligence claim.

Does the Tribunal have jurisdiction over the manufacturer, it being a company registered in the United States of America?

69 Dura asserts that the manufacturer is a company incorporated in the United States of America and that this Tribunal has no jurisdiction over a company incorporated overseas. Dura points out that there is no power in the VCAT Act enabling service upon an overseas company. Dura relies upon this as a further reason for me to exercise my discretion to transfer the proceedings to the Supreme Court of Victoria which clearly has jurisdiction.

70 In response to this assertion, VMIA has filed an affidavit of Ian Eilenberg. He has conducted an investigation and the result of his investigation is that he believes it is more probable that the substance Caltite was, at the time of construction of the apartments, manufactured by an Australian company in Box Hill, a suburb of Melbourne, and supplied by a Victorian supplier. His investigation has been detailed and the results of the investigation are attached to his affidavit.

71 Counsel for Dura invites me to disregard the evidence of Dr Eilenberg. He suggests that his evidence is inconclusive and invites me to give it no weight when compared to the clear assertion by Dura in the Supreme Court proceedings and in submissions before me, that Glacier Northwest is the appropriate entity to be sued as manufacturer and supplier of the Caltite.

72 However, Dura has not filed any material dealing with the factual matters canvassed in the affidavit of Eilenberg. Dura has not presented any evidence to contradict Eilenberg's assertion that Caltite was manufactured in Melbourne at the time of these events. In its Supreme Court pleadings, and in its submissions, it has not clearly identified its relationship with Glacier Northwest Inc, or the relationship between Glacier Northwest and any of the other parties involved in the building works.

73 It appears strange to me that Dura has not considered the material of Eilenberg and provided a response to it. His research calls for a response. I would have thought that Dura would itself be concerned to ensure that it had correctly identified the manufacturer before continuing with the Supreme Court proceeding. In the absence of any response to what appears well researched and credible evidence that the substance was manufactured locally, I do not treat Dura's assertion that the manufacturer is an overseas company and therefore out of the reach of this Tribunal as proven.

74 I also note that Dura has served the manufacturer with the Supreme Court Writ and that it has not filed a defence. In those circumstances I am not persuaded that the Supreme Court claim against the manufacturer will need

to proceed to trial. Dura appears to be in a position to enter a default judgment. This makes it less likely that unless this proceeding was transferred, Dura would be placed in the position of needing to prepare for two different sets of contested litigation.

Does the Tribunal have jurisdiction to give the relief sought by the VMIA in this proceeding?

75 Dura asserts that the Tribunal does not have jurisdiction over some of the claims brought by the VMIA in this proceeding insofar as those claims rely on s 44(5) of the *House Contracts Guarantee Act* 1987. That section provides that VMIA may direct a builder to complete or rectify defective building work, or to pay to the Domestic Building Indemnity Fund any money paid out of the Fund on that claim.

76 However, Dura says that a claim under this section cannot be brought before this Tribunal. It says that this is so because sub-section 5 provides that the VMIA may recover an amount to be paid by the builder under this section in any Court of competent jurisdiction as a debt due to the state.

77 Dura says that the Tribunal is not a Court of competent jurisdiction within the meaning of that section and therefore does not have jurisdiction to make an order to require Dura to make a payment to the Fund.

78 I note, however, that VMIA is content to argue this jurisdictional point before the Tribunal. In my view the appropriate course in relation to this issue is for it to be argued fully before the Tribunal at trial. I do not treat it as a matter of great weight in determining this transfer application.

Conclusion

79 Having set out my conclusions on the particular jurisdictional issues which were relied upon by Dura in this application, I now turn to the principles which I must apply in deciding whether or not this proceeding would be more appropriately dealt with by the Supreme Court than by this Tribunal.

80 Dura submitted that in deciding an application such as this, there was no onus of proof on the respondent. It pointed out that s 77 allowed for such

applications to be made not only by a party but on the Tribunal's own initiative. It submitted that the nature of the application meant that it was not appropriate to place on any applicant a responsibility to prove that the transfer should be effected.

81 Previous authorities on s 77, predominantly those of His Honour Judge Bowman, have suggested that although it may not be appropriate to speak of either party having an onus of proof, it must be a clear case in which s 77 should be used to remove a claim from the Tribunal which is otherwise clearly within its jurisdiction.

82 I agree with this approach and suggest that this is even clearer in a case such as this where the proceeding is presently in a specialist list of this Tribunal.

83 In particular, I adopt the reasoning of His Honour Justice Byrne who considered the role of what was then the Domestic Building Tribunal, the predecessor to the Domestic Building List of this Tribunal, and the role which Parliament intended that Tribunal to have.

84 At page 363 of his decision in *Greenhill Homes Pty Ltd v Domestic Building Tribunal* [1998] 13 VAR 353 he said this:

"As I 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. There are indications within the Act itself which suggest that parliament intended this result, not only in the context of the definition of a 'domestic building dispute'. The functions of the Tribunal are not limited to hearing and resolving only those disputes. Section 52 of the Act certainly includes this function, but it provides that the Tribunal is to hear and determine matters referred to it under the Act, including domestic building disputes."

85 Dura correctly submits to me that my overriding consideration should be whether or not the transfer is in the interests of justice. This was the principle dealt with at some length by the Federal Court in *BHB Billiton Ltd v Schultz* [2004] 221 CLR 400, especially at page 421 where the decision of the trial judge below to deal with the issues raised in an application to transfer under the cross-vesting legislation in a "*practical nuts and bolts way*" was approved.

86 I also agree with counsel for Dura that in this case, no particular emphasis should be placed on the fact that this proceeding has been issued before the Supreme Court proceeding. There are cases in which the extent of preparation for trial, and the potential inconvenience to a party of losing the benefit of that preparation, should be taken into account, but this is not one of them.

87 In my view, however, the matters relied upon in this application have not been made out. I am particularly concerned that this Tribunal has not just one proceeding in respect of the disputed facts with which it is presently dealing in its specialist list, but two – this proceeding and the Owners Corporation proceeding.

88 No application has been made to transfer the Owners Corporation proceeding. I doubt whether Dura presently has standing to apply for that proceeding to be transferred to the Supreme Court. If Dura does have standing to make that application, it could not be determined without ascertaining whether the various applicants in the Owners Corporation proceeding agree, or would wish to object to the transfer. If I was to transfer this proceeding to the Supreme Court, then there is a risk that the owners' capacity to object to the transfer of the Owners Corporation proceeding would be effectively extinguished.

89 I have outlined my view that the bulk of the claim made by Dura in its Supreme Court proceedings is capable of being litigated in this Tribunal. If there is any uncertainty at all, it relates only to a very small aspect of Dura's

claim – a presently doubtful claim in negligence against the architect and the manufacturer–the viability of which will be largely determined by the outcome of the proportionate liability claims which can clearly be brought at this Tribunal.

90 The claims Dura makes in the Supreme Court proceedings are clearly contingent third party claims. The VMIA suggests that they have been issued as an abuse of process akin to the reasoning set out in a judgment of Justice Beach in *Burbank Australia Pty Ltd v Luzinat & ors* [2000] VSC 128. In that case His Honour said this:

"Where a party to a proceeding institutes a second proceeding in a different form in relation to the same subject matter as the first proceeding, prima facie the second proceeding is vexatious and will be stayed…In such a situation the Courts have for many years taken the view that a litigant already deeply involved in one piece of litigation would be unduly harassed if a second piece of litigation was to proceed at the same time as the first. And such a principle applies to proceedings whether they be before a Court, a Board or a Tribunal.

All the more so where there is a significant risk, as there is in the present case, that VCAT's findings and the Board's findings may be in conflict with the other."

91 I am not persuaded that the issue of the Supreme Court proceedings is an abuse of process. However, I am persuaded that this proceeding, being the principal proceeding, should be heard in its natural jurisdiction, which is the Domestic Building List of this Tribunal, and should not follow Dura's ancillary proceedings to the jurisdiction in which it has chosen to issue those proceedings.

92 Accordingly, the application under s 77 of the VCAT Act is dismissed.

HER HONOUR JUDGE HARBISON
VICE PRESIDENT