VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D894/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998, whether this proceeding an abuse of process or otherwise vexatious, whether matters could be conveniently dealt with in a 'related' proceeding

APPLICANT	Victorian Managed Insurance Authority
RESPONDENT	Dura (Australia) Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions hearing
DATE OF DIRECTIONS HEARING	26 February 2009
DATE OF ORDER	4 March 2009
CITATION	Victorian Managed Insurance Authority v Dura (Australia) Constructions Pty Ltd (Domestic Building) [2009] VCAT 359

ORDER

1. The respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 or alternatively for a stay of this proceeding pending the outcome of the appeal to the Court of Appeal in proceeding 3883/2008 is dismissed.

2. This proceeding is referred to a directions hearing before Deputy President Aird on 20 March 2009 at 9.30 a.m. at 55 King Street Melbourne - allow 1 hour - when directions will be made for the further conduct of the proceeding.

2. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr S Stuckey of Counsel
For the Respondent	Mr R Andrew of Counsel

REASONS

1 In 1998 the respondent ('Dura') was engaged by a developer, Cromwell Developments Pty Ltd, to construct a five storey apartment building, and basement carpark in South Yarra. Warranty insurance was provided by FAI General Insurance Limited. Following the collapse of HIH, the State of Victoria assumed responsibility to indemnify owners entitled to indemnity under an HIH/FAI policy. The scheme is administered by the applicant ('VMIA').

2 In 2005 and 2006 the Owners Corporation and the owners of 23 units ('the owners') lodged claims with VMIA claiming indemnity under the relevant policies in respect of certain defective works. On 9 October 2006 VMIA advised the owners that it accepted liability for its claims relating to the common property (except for one item claimed by the Owners Corporation) and further that it would direct the builder, Dura, to carry out the necessary rectification works.

3 Dura did not apply to this tribunal seeking a review of VMIA's decision. The works were not rectified, and in March 2007 VMIA requested the owners to obtain at least two quotations for the carrying out of the rectification works. These were obtained and provided to VMIA in September 2007. In May 2008 the owners commenced proceedings in this tribunal in D330/2008 alleging that VMIA had failed to assess the amount payable to them and that it had failed to pay them the amount assessed by VMIA. The owners sought orders that VMIA assess the amount payable, and pay them $921,164.75 out of the Domestic Building (HIH) Indemnity Fund being the amount they contend is the cost of rectification works.

4 Subsequently, on 24 June 2008, upon application made by VMIA, Dura was joined as a party to D330/2008. The owners have not made a claim against Dura. Dura's application for leave to appeal its joinder was dismissed by Master Daly (as her Honour then was). Dura's appeal against the Master's decision was dismissed by Justice Byrne on 23 October 2008. That decision is now the subject of an appeal to the Court of Appeal which I am told by counsel for Dura may be heard in July this year.

5 On 25 November 2008, VMIA commenced these proceedings. On the application form, the following appears next to the words 'Amount Claimed' – *'Unknown at this stage, but reference is made to related VCAT proceeding No D330/08'*. In the Points of Claim, accompanying the application, VMIA sets out the terms and conditions of what, it says, is the relevant contract of warranty insurance viz: the Certificate of Registration of Builder dated 17 May 1999, and the Builders Annual Blanket Extra Policy Terms dated 29 December 1998[1]. The following paragraphs of the Points of Claim are relevant, omitting the Particulars:

[1] para 6

15. On 9 October 2006 the Applicant accepted the claims in respect of the defects contained in Schedule A to these Points of Claim…

…

17. The Respondent has:

    (a) refused to rectify the defects;

    (b) denied that it is bound by the contract of insurance;

    (c) denied that the defects were matters which were its responsibility under the building contract.

18. In the premises the Applicant is:

    (a) entitled to exercise the claimants' rights against the Respondent;

    (b) entitled to require the Respondent to pay to the Domestic Building (HIH) Indemnity Fund the cost of rectifying the defects;

    (c) subrogated to the rights of the claimants to require the Respondents to pay the loss and damage arising from the breach of the building contract.

AND THE APPLICANT CLAIMS:

A. A declaration that the Respondent is a party to and bound by the terms of the contract of insurance;

B. A declaration that the building works performed under the building contract contained the defects;

C. A declaration that the defects constitute a prescribed cause within the meaning of the contract of insurance;

D. An order that the Respondent pay to the Applicant the cost of rectifying the defects;

E. Interest;

F. Costs

G. Such other or further orders as to the Tribunal seem fit.

6 On 12 February 2009 Dura lodged an Application for Directions/Orders seeking:

1. An order that this proceeding be dismissed pursuant to s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the *VCAT Act*').

2. Alternatively, an order that this proceeding be stayed pending the determination of the Respondent's appeal to the Court of Appeal in proceeding 3883/2008 [arising from its joinder as a party in D330/2008].

3. Such further orders as the Tribunal deems appropriate.

7 Each party relies on affidavit material sworn by their respective solicitors. Mr Andrew of Counsel appeared on behalf of Dura, and Mr Stuckey of Counsel appeared on behalf of VMIA.

8 Dura applies to have this proceeding struck out pursuant to s75 of the *VCAT Act* contending that it is an abuse of process, vexatious and unduly burdensome or oppressive. Counsel for Dura provided a written outline of his submissions and it is convenient to consider each of the grounds, in turn.

9 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.

10 I was not referred to any authorities by the parties, although counsel for Dura did refer me to 'Williams, Civil Procedure – Victoria' paragraphs I23.01.47, generally in support of each of the matters considered below.

11 The power under s75 is discretionary, and it is well established that any exercise of this discretion must be approached with caution. As McKenzie DP said in *Norman v Australian Red Cross Society* 1998 14 VAR 243, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. p.102

> …
>
> (d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.

(e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding. (emphasis added)

12 For the reasons discussed below, I am not satisfied that the commencement of this proceeding by VMIA is an abuse of process or otherwise vexatious or misconceived.

Abuse of process

VMIA's claims could be agitated in D330/2008

13 After noting that VMIA made a conscious decision to join Dura as a party in D330/2008 Dura contends that any claim against it should have been made in that proceeding. D330/2008 is stayed pending the outcome of Dura's appeal to the Court of Appeal.

14 As I raised with counsel during the directions hearing, this seems to me to be a circuitous argument. On the way hand, Dura contends it should not be a party to D330/2008, and having been unsuccessful in obtaining leave to appeal before Master Daly and Justice Byrne, is waiting to have its appeal heard by the Court of Appeal. Dura claims that there can be no prejudice to VMIA if this matter is dismissed. However, if the appeal to the Court of Appeal is successful, where would it leave this claim by VMIA if I dismiss this proceeding? Speculation is inappropriate and unhelpful and I am unable to determine what, if any prejudice might be suffered by VMIA is this application is dismissed, and the appeal is successful.

VMIA seeking to secure an advantage

15 Counsel for VMIA submitted that VMIA was seeking to secure an advantage in issuing this proceeding, and that it is vexations, and unduly burdensome or oppressive to cause Dura to *'defend attacks on two fronts'*.[2]

16 When pressed by me, counsel was unable to enlighten me as to what advantage VMIA could possibly obtain in issuing this proceeding. Rather, he indicated that I should infer it was seeking some advantage because this proceeding is unnecessary. This is an astonishing proposition. It would be entirely inappropriate for me to speculate as to the reasons why this proceeding has been commenced. Further, there is simply nothing before me which persuades me that this proceeding is unnecessary. Although Dura was joined to D330/2008 upon application by VMIA, it is unclear whether VMIA proposes to make any claims against Dura in that

[2] Respondent's submissions, para 5

proceeding, or whether it simply applied to join it so that it would be bound by the tribunal's assessment and determination of the quantum payable to the owners. No orders were made at the time Dura was joined as a party to that proceeding for the filing of any claim against Dura, or a defence by Dura. The proceeding was referred to a compulsory conference which has been adjourned pending determination of Dura's appeal.

17 I am not persuaded there is anything vexatious or unduly burdensome or oppressive in requiring Dura to defend this claim. If the appeal is successful then, with the benefit of hindsight, it might well have been prudent for VMIA to have commenced this proceeding. If the appeal is unsuccessful, as noted above, it is unclear at this stage, what if any claims will be made by VMIA against Dura in D330/2008. If similar claims are made to those made in this proceeding, then, and only then, might Dura have some basis for saying that it was vexatious, unduly burdensome and oppressive to require it to defend the same or similar claims in two proceedings.

VMIA was secretive in issuing this proceeding

18 Dura contends that VMIA has been secretive in issuing this proceeding without advising Dura of its intention to do so. In particular, it is critical of VMIA's failure to mention it at a directions hearing before Master Lansdowne (as her Honour then was) on 4 December 2008. However, it is difficult to understand why VMIA should have mentioned this application in a directions hearing in the Supreme Court concerning an appeal in a different, albeit one might argue, related proceeding.

19 It is submitted by Dura that the owners are clearly affected by this proceeding because it will be necessary for the tribunal to hear and determine whether the defective items are its responsibility as the builder. It submits that if the tribunal were to find they are not Dura's responsibility then the insurer could well review its decision to accept liability to indemnify the owners in respect of those items. Accordingly, it will be necessary to hear and determine the two proceedings together unless VMIA confirms to the owners that it is content for quantum to be assessed in D300/2008 and will not change its decision on liability.

20 VMIA contends that this proceeding does not concern the owners, and that their interests are not affected, primarily because in this proceeding it is seeking a declaration that VMIA is bound to reimburse it for any amount it is required to pay to the owners. I note, in passing, that the solicitor and counsel who represent the owners in D330/2008 were interested observers at the directions hearing at which this application was heard.

21 Until such time as Dura files its defence, and the issues in dispute between it and VMIA are clearly on the record, it is impossible to decide whether the two proceedings should be heard and determined at the same time.

Dura should not be forced to defend this claim

22 Counsel submitted that Dura should not be forced to defend this claim whilst D330/2008 is stayed pending the outcome of the appeal to the Court of Appeal. This is a curious submission, and I repeat my comments in paragraph 17.

The undesirability of a multiplicity of proceedings

23 It is true that a multiplicity of proceedings is to be discouraged, where the issues can conveniently be dealt with in the one proceeding. However, as considered above, until such time as Dura files its defence, the issues in this proceeding will not be clearly on the record, and it will be impossible to consider how this matter should proceed. Further, as things currently stand, D330/2008 is concerned with an assessment of quantum for rectification works in respect of which VMIA has accepted liability to indemnify the owners. Whether those works are the responsibility of Dura, as the builder, is not a matter which is presently an issue in that proceeding. VMIA has sought a declaration in this proceeding that the defective works arise out of the works carried out by Dura under the building contract. It is too early to decide whether it will be necessary and/or appropriate to determine that issue before quantum is assessed in D330/2008 and this is something about which the owners may wish to be heard.

24 Although D330/2008 is presently stayed, that is not an impediment to the progression of the interlocutory steps in this proceeding. Rather, it seems to me, that it is entirely appropriate that directions be made for the interlocutory steps in this proceeding to advance during the period D330/2008 is stayed, so that the issues between VMIA and Dura are clarified, and there is no undue delay in the hearing and determination in D330/2008 when the appeal is finally determined and the stay lifted. Whilst it is true that the tribunal would be unable to order payment of a particular amount by Dura to VMIA until quantum has been determined in D330/2008, this is not an impediment to significant progress being made in the interlocutory phase of this proceeding, and even perhaps, subject to considering any submissions from the parties, the hearing and determination of VMIA's application for the declarations sought in A, B and C of the prayer for relief. If any orders are to be made under D, they could be made following the assessment and determination of quantum in the D330/2008.

VMIA has failed to conduct itself as a Model Litigant

25 Dura contends that VMIA has failed to conduct itself as a Model Litigant in accordance with the 'Guidelines on the State of Victoria's obligation to act as a Model Litigant', a copy of which I was provided with. However, apart from listing VMIA's obligations under the Guidelines there is nothing before me to demonstrate VMIA has breached those obligations, and even

if it had, it is not clear to me how it could be said that such a breach fell within the provisions of s75 of the *VCAT Act.*

Should this proceeding be stayed?

26 Counsel for Dura confirmed that the alternative application that this proceeding be stayed was predicated on the same grounds and argument as those proffered in support of the s75 application.

Conclusion

27 I am not persuaded there is any reason why the proceeding should be dismissed pursuant to the provisions of s75, or otherwise stayed, and Dura's application is dismissed. I will reserve the question of costs with liberty to apply, and list the proceeding for a directions hearing so that directions can be made for its further conduct without unnecessary delay.

DEPUTY PRESIDENT C. AIRD