

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1453/2017

CATCHWORDS

Domestic building – domestic building work dispute – application commenced without certificate of conciliation issued by DBDRV – whether procedural or substantive – sections 45(5), 45C and 56 of the *Domestic Building Contracts Act 1995* – whether the proceeding should be dismissed or stayed.

APPLICANT	Warren's Plumbing & Drainage Services Pty Ltd (ACN 100 319 195)
RESPONDENT	Ashwani Sharma t/as Meridien Homes (ABN 35 692 739 819)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	1 June 2018
DATE OF ORDER	1 June 2018
DATE OF REASONS	8 June 2018
CITATION	Warren's Plumbing and Drainage Services Pty Ltd v Sharma (Building and Property) [2018] VCAT 883

ORDERS

1. The proceeding is stayed until the applicant files a certificate of conciliation issues by Domestic Building Dispute Resolution Victoria ('DBDRV').
2. The respondent's application that this proceeding be heard and determined at the same time as BP430/2018 is refused.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant

Mr N Phillpott of Counsel

For Respondent

Mr V Ryan, solicitor

REASONS

- 1 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 This proceeding was commenced on 8 November 2017. The applicant ('Warren's Plumbing') is an excavator who claims payment of \$31,317 plus interest and costs for excavation, soil removal and other related services carried out at the request of the respondent ('Mr Sharma'). Warren's Plumbing is identified on the application form as a sub-contractor and Mr Sharma as a builder. On 23 March 2018 Mr Sharma filed Points of Defence and a Counterclaim. In the application form for the counterclaim Mr Sharma is identified as an owner-builder. As the counterclaim was filed in accordance with directions made by the Tribunal on 6 March 2018, the application form was not reviewed by a Member.
- 3 It was only when another proceeding concerning Mr Sharma came before me for directions that it became apparent that the works were being carried out for him on a building site he owned. Mr Sharma is represented by Vin Ryan, solicitor, in both proceedings.
- 4 This proceeding has progressed through a number of interlocutory processes including mediation and a directions hearing on 6 March 2018 (at which time the respondent was not legally represented), when it was listed for hearing commencing on 5 June 2018. On 23 March 2018, by which time the respondent was represented by Mr Ryan, Mr Sharma filed a counterclaim, Points of Defence and List of Documents. Mr Sharma has not filed any expert reports, noting that the directions made on 6 March 2018 required him to file and serve any expert report by 6 April 2018.
- 5 On 23 May 2018 Mr Sharma filed an Application for Directions Hearing or Orders seeking the following orders:
 - (i) the application of the applicant be dismissed.
 - (ii) upon dismissal of the application the applicant be given leave to withdraw his counterclaim.
 - (iii) the applicant pay the respondent's costs of the action.
 - (iv) such further order as the Tribunal thinks appropriate.
- 6 Upon the application being referred to me, I listed it for urgent hearing at a directions hearing on 1 June 2018 and made the following orders

Having regard to:

 - (i) The respondent's Application for Directions Hearing or Orders filed on 23 May 2018;

- (ii) the Tribunal's order in BP403/2018
- (iii) s57 (sic) of the *Domestic Building Contracts Act 1995*

the Tribunal orders

1. **The proceeding is listed for a directions hearing before Deputy President Aird on 1 June 2018 at 12 noon at 55 King Street Melbourne at which time the respondent's application will be heard.**
2. At the directions hearing the Tribunal will determine whether the proceeding should be dismissed or alternatively stayed until the applicant obtains a certificate of conciliation issued by Domestic Building Dispute Resolution Victoria ('DBDRV').
3. The directions hearing may be vacated if consent orders are filed and approved by 4pm on 31 May 2018.

7 At the commencement of the directions hearing on 1 June 2018, Mr Phillpott of Counsel who appeared on behalf of Warren's Plumbing indicated that it had referred the dispute to DBDRV which had prepared a certificate of conciliation – not suitable. However, following discussions with Mr Ryan, DBDRV had indicated it would issue the certificate of conciliation to the parties once the Tribunal had determined the question of jurisdiction.

IS THIS A DOMESTIC BUILDING WORK DISPUTE

8 A 'domestic building work dispute' is relevantly defined in s44 of the *Domestic Building Contracts Act 1995* ('DBCAs') as:

44 What is a domestic building work dispute?

- (1) In this Part, a *domestic building work dispute* is a domestic building dispute arising between a building owner and—
 - (a) a builder; or

.....
- (2) In this Part, *domestic building work matter* means any matter relating to a domestic building contract or the carrying out of domestic building work, including any of the following—

.....

 - (e) an alleged failure to pay money for domestic building work performed under the contract.
- (3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.

- 9 It appears to be common ground that the works carried out by Warren's Plumbing were being carried out in association with or in conjunction with the *erection or construction of a home* and they therefore fall within in s5 of the DBCA which defines the works to which the Act applies.
- 10 I am therefore satisfied Warren's Plumbing's claim is a domestic building work dispute, and that Mr Sharma is an owner as defined in s44(3).

Is a certificate of conciliation required and if so, should the proceeding be dismissed?

- 11 Mr Ryan contends that as the proceeding was commenced without a certificate of conciliation that the Tribunal does not have jurisdiction to hear it, DBDRV cannot now issue a certificate of conciliation, and accordingly the proceeding should be dismissed. In discussions during the directions hearing, Mr Ryan confirmed that if the Tribunal dismissed the application, then Warren's Plumbing would be left without a remedy and could not issue fresh proceedings to recover the monies it claims are owed to it.
- 12 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.

- 13 Mr Ryan 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.

- 14 Mr Ryan contends that because these proceedings have been commenced that the dispute cannot be made to DBDRV. 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

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.

- 15 During the directions hearing I referred Mr Ryan to *Burbank Australia Pty Ltd v Owners Corporation*¹ where McDonald J held, by reference to a decision of the NSW Court of Appeal² in relation to a similar provision in the *Strata Schemes Management Act 1996* (NSW), that where a proceeding was commenced by an owners corporation without a special resolution as required by s18 of the *Owners Corporation Act 2006* ('OC Act'), the proceeding was not invalid. Rather, non-compliance with s18 constituted a procedural irregularity which could be cured by ratification by a subsequent special resolution. In those circumstances, the appropriate order was for the proceeding to be stayed pending the owners corporation passing a special resolution.
- 16 Mr Ryan submitted that the situation in *Burbank* and under the OC Act was entirely different – that s18 was a procedural requirement whereas s45(5) of the DBCA meant that the commencement of a proceeding at VCAT without a certificate of conciliation issued by DBDRV was substantive, not procedural and could not be cured by the proceeding being stayed pending the issuing of a certificate of conciliation by DBDRV.
- 17 I disagree. As Mr Phillpott submitted, there are no consequences set out in the DBCA where a proceeding is commenced without a certificate of conciliation. There is nothing in the DBCA that says such a proceeding would be invalid. Regrettably, there is not a provision similar to s87 of the *Retail Leases Act 2003*. However, s87 simply makes it clear a failure to obtain the required certificate issued by the Small Business Commissioner before commencing proceedings in the Tribunal does not affect the validity of any decision made by the Tribunal.
- 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.
- 19 If Mr Ryan was correct, then an owner who becomes aware of defects in their home close to the 10 year limitation period, would not be able to make an application to the Tribunal pending receipt of a certificate of conciliation from DBDRV, and if the dispute could not be resolved by conciliation at DBDRV would therefore be left without a remedy. This could not have been Parliament's intention.
- 20 I am satisfied that this is a procedural requirement which can be cured by the proceeding being stayed pending the applicant obtaining a certificate of

¹ [2015] VSC 160

² *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 72943* (2014) NSWCA 407

conciliation from DBDRV. Having regard to s45(5), I am satisfied that proceedings having been commenced at VCAT, that once Warren's Plumbing obtains a certificate of conciliation from DBDRV, Mr Sharma is not required to obtain a certificate of conciliation to proceed with his counterclaim.

SHOULD THIS PROCEEDING BE HEARD AT THE SAME TIME AS BP430/2018

- 21 In correspondence between the parties' legal representatives, and during this directions hearing, Mr Ryan asserted that this proceeding should be consolidated with or heard and determined at the same time as BP430/2018. BP430/2018 is an application by Mr Sharma against, what I will call, the second excavator, who Mr Sharma engaged to carry out a site cut and fill at the same site where Warren's Plumbing had carried out excavation works. Other than the works by both contractors having been carried out at the same site, there are no common facts that I can discern from the pleadings in both proceedings.
- 22 As noted above, the claim by Warren's Plumbing in this proceeding is for the cost of carrying out certain excavation and associated works. Mr Sharma's defence in that proceeding is that the works were not carried out, as agreed, and that he has been overcharged. In the counterclaim he claims that as a result of the works not being carried out as agreed, that he has incurred additional costs totalling \$17,230.75. In BP430/2018 Mr Sharma claims that the works carried out by the second excavator were not as agreed, and that as a consequence he claims damages of \$438,888.18.
- 23 This proceeding was initially listed for a 1 day hearing which I revised to 2 days when making directions for its further conduct at this directions hearing, including granting Mr Sharma an adjournment so that he could obtain expert report/s.
- 24 On considering the claim in BP430/2018 it seems likely to be a lengthy hearing. Although Mr Ryan submitted on behalf of Mr Sharma that it would be unfair to him if he is required to incur the cost of obtaining two expert reports, noting that the building works have apparently been completed, that is a matter for him. Having regard to the Tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* it could not possibly be fair to the other party in both proceedings to become embroiled in, and incur the costs of a hearing about matters which do not concern them. There is no indication, at this stage, that the other party in either proceeding will seek to join the other excavator as a concurrent wrongdoer for the purposes of a defence under Part IVAA of the *Wrongs Act 1958*. Of course, if such an application were made, and was successful, then it might be appropriate to reconsider whether the proceedings should be heard and determined at the same time.

CONCLUSION

- 25 Accordingly, orders were made that the proceeding be stayed until the applicant files a certificate of conciliation issued by DBDRV, and refusing the respondent's application for this proceeding to be heard and determined at the same time as BP430/2018.
- 26 These Reasons are provided as I indicated I would do at the directions hearing.

DEPUTY PRESIDENT C. AIRD