VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D840/2005

APPLICANT	Ascoli Developments Pty Ltd
FIRST RESPONDENT	John Chomaniuk
SECOND RESPONDENT	Mark Chomaniuk
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	29 June 2006
DATE OF ORDER	4 July 2006

Ascoli Developments Pty Ltd v Chomaniuk (Domestic Building) [2006] VCAT 1428

ORDER

1. The application to strike out the proceeding is dismissed.

2. The proceeding is referred to the Deputy President in charge of the Domestic Building List to determine whether or not it should remain in that List.

3. Direct that the proceeding be otherwise listed for directions as soon as practicable.

4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr T. Mitchell of Counsel
For the First Respondent	Mr D.A. Klempfner of Counsel
For the Second Respondent	Mr D.A. Klempfner of Counsel

REASONS

The application

1 The Respondents apply for an order that this proceeding be summarily dismissed for want of jurisdiction. Alternatively, they seek that it be summarily dismissed pursuant to the provisions of s.75 of the ***Victorian Civil and Administrative Tribunal Act 1998*** ("***VCAT Act***"). They also seek an order that the Applicant pay their costs of the proceeding.

Correct respondents

2 One of the matters raised relates to the identity of the contracting party. The First Respondent and his wife, Wladyslawa Chomaniuk carry on business as painting contractors under the name "J & W Painting Service". The Second Respondent, Mr Mark Chomaniuk is their son who works for them in the business but is not a partner. Since the claim concerns work done by the partnership Wladyslawa Chomaniuk should have been the Second Respondent, not Mark Chomaniuk. This was conceded, although the Respondents' Counsel Mr Klempfner opposed any substitution of the Second Respondent.

The proceeding

3 The complaint concerns painting work carried out by the partnership on two new units being constructed by the Applicant in Canterbury. The Applicant was building the units under a major domestic building contract entered into with another person. The partnership was the sub-contract painter. The Applicant complains that the work was defective or incomplete and seeks the sum of $28,500.00 which it claims is the cost of rectifying and completing it. It also claims a further $1,800.00, being the cost of an expert's report.

4 In accordance with directions given by the Tribunal the Applicant filed Points of Claim dated 9 May 2006. It is a document of nine numbered paragraphs setting out a claim for damages for defective and incomplete work. There is no reference in the document to the ***Domestic Buildings Contracts Act 1995*** ("***Domestic Buildings Contracts Act***") although the heading and number of the document indicate that it is a proceeding brought in the Domestic Building List of this Tribunal.

Hearing

5 The application to dismiss the proceeding came before me for hearing on 29 June 2006. Mr Klempfner of Counsel appeared on behalf of the Respondents and Mr Mitchell of Counsel appeared on behalf of the Applicant.

6 Mr Klempfner referred to s.54 of the ***Domestic Buildings Contracts Act*** which defines a domestic building dispute for the purpose of that Act. He

said that in regard to this proceeding the Applicant must rely upon the definition in s.54(1)(b)(3) that is, that it is a dispute between a builder and a sub-contractor; *"… in relation to a domestic building contract or the carrying out of domestic building work"*. He pointed out that the term *"domestic building work"* is defined in s.3 as meaning any work referred to in s.5 that is not excluded from the operation of the Act by s.6. It is unnecessary to refer to s.5. The key provision is s. 6(a), which provides that the Act does not apply to any work that the regulations say is work to which the Act does not apply.

7 Mr Klempfner took me to the relevant regulations, which are the ***Domestic Building Contracts and Tribunal (General) Regulations 1996*** ("the Regulations"). Section 4 of the Regulations, under the heading "*Building work to which Act does not apply"* states:

> *"(1) For the purposes of section 6(a) of the Act, the Act does not apply to the following building work if it is to be carried out under a contract that applies to one only of the following-*
>
> *……*
>
> *(g) painting;"*

8 Mr Klempfner pointed out that it was not suggested here that the contract between the Applicant and the Respondents concerned anything other than painting and therefore the exemption applied.

9 As to whether the painting work was "in relation to a domestic building contract", Mr Klempfner referred to the decision of Osborn J in the case of ***Chartin Group Pty Ltd v L U Simon Builders Pty Ltd*** [2004] VSC 531 (unreported). In that case his Honour was faced with similar questions to those before me. The relevant passages are paragraphs 9 and 10 which are as follows:

> *"The Plaintiff contends, however, that the disputes are "in relation to a domestic building contract" because they relate to works undertaken on behalf of the Plaintiff builder in performance of head contracts comprising domestic building contracts. In my view this contention must fail. The dispute between the parties is in relation to the contracts alleged in the Statement of Claim. The limitation of the notion of domestic building contract which is to be found in its definition does not create a situation where no domestic building dispute can arise between a builder and a sub-contractor. Section 54(1)(b) provides that a dispute between a builder and sub-contractor in relation to the carrying out of domestic building work will be a domestic building dispute. The difficulty in the present case is as I have said that the definition of domestic building work has been confined by regulation. The present case would be caught by the definition of domestic building work but for the exemption contained in the regulations".*

10 Mr Klempfner submitted that the dispute between the Applicant and the Respondents was therefore not a domestic building dispute and the Tribunal did not have jurisdiction to hear it.

11 Mr Mitchell referred to a number of decisions of this Tribunal and its predecessor, the Domestic Building Tribunal. The first of these was that of Judge Davey in the case of ***Bartucca Tiling & Construction Pty Ltd v Hornsby Manor*** [1997] VDBT 84 (8 April 1997). In that case his Honour rejected a similar argument to that advanced by Mr Klempfner for the detailed reasons given with the decision. It is unprofitable to consider those or any of the cases that followed his Honour's decision because I am bound by the decision in ***Chartin Group Pty Ltd v L U Simon Builders Pty Ltd*** and must follow it. Despite Mr Mitchell's valiant attempt to distinguish that case I think that it is not distinguishable. Although the evidence available in the present case might be different from that before his Honour in ***Chartin*** that does not permit me to adopt a different interpretation of the legislation from that expressed in his Honour's judgement. I therefore find that Mr Klempfner's argument is sound and that the claim brought in this proceeding is not a domestic building dispute.

Other jurisdiction

12 However that is not an end to the matter. The application to strike out this proceeding is on the ground that the Tribunal has no jurisdiction to hear the proceeding. For the reasons given it certainly has no jurisdiction to hear it as a domestic building dispute but the Tribunal has power under another enabling enactment, the ***Fair Trading Act 1999*** ("***Fair Trading Act***").

13 By s.108(1) of the ***Fair Trading Act*** the Tribunal may hear and determine a consumer and trader dispute. Despite its name, a consumer and trader dispute is widely defined in s.107(1) as follows:

> *"Consumer and trader dispute" is a dispute or claim arising between a purchaser or possible purchaser of goods of service and a supply or possible supply of goods or services in relation to a supply or possible supply of goods of services"*

14 Since the dispute here concerns work and materials supplied by the Respondent partnership to the Applicant, it is a consumer trader dispute and the Tribunal has jurisdiction to deal with it.

15 I put to Mr Klempfner that, despite the soundness of his submission, it seemed unprofitable to dismiss the matter simply because it had been brought in the wrong list. I also queried whether it could be said that the Tribunal had no jurisdiction to hear the dispute if it could be determined in the Civil Claims List. He replied that it had been brought as a domestic building dispute and was not such and so the appropriate order would be to dismiss it and, if the Applicant so wished, it could recommence proceedings in the correct list.

16 By Section 98 of the ***VCAT Act***, this Tribunal is to determine proceedings brought before it within the minimum of formality and according to the substantial merits of the case. We should also proceed expeditiously. It seems to me to be inconsistent with these requirements to dismiss a proceeding simply because it has been brought in the wrong list and to require the Applicant to start again if the Tribunal does in fact have jurisdiction to deal with the matter. I think the better course order is to refer it to the appropriate list.

17 A similar approach was adopted by Judge Bowman in the case of ***Zeus & Ra Pty Ltd v Nicolaou & Anor*** [2002] VCAT 1041. In that case the Respondent sought the dismissal of the Applicant's proceedings pursuant to s.75 of the VCAT Act. The proceedings had been brought in the Retail Tenancies List but in concurrent Supreme Court proceedings it had been determined that the premises in question were not retail premises within the meaning of the ***Retail Tenancies Reform Act 1998*** and the lease of them was not a retail tenancies lease. The basis of the strike out application was that in those circumstances the Tribunal no longer had jurisdiction to deal with the matter and so the proceedings should be summarily dismissed. The learned Judge found that, by reason of the concurrent Supreme Court ruling the retail tenancy aspects of the dispute could not be determined and they were therefore struck out. However there was a claim maintainable under the ***Fair Trading Act*** and as to that his Honour said (at paragraph 9 of the judgement):

> *"I also agree with the basic proposition that, once it is established that the matter is a fair trading dispute within the meaning of s.108(1) of that Act, the Tribunal may hear the dispute, and issues concerning the legislation upon which reliance is placed can be clarified by amendment if required. I agree with the fundamental proposition that it matters not how the dispute came to be before the Tribunal. Once it is before the Tribunal and is a fair trading dispute, the Tribunal can then hear it. This is a fair trading dispute. The Tribunal can hear it".* (my emphasis).

Power to strike out proceedings

18 The power to strike out proceedings is conferred by s75 of the ***VCAT Ac***t which states (where relevant):

> *"(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.*
>
> …
>
> *(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.*

19 The manner in which this section should be applied was considered by Deputy President Mackenzie in the case of ***Norman v Australian Red Cross*** 1998 14 VAR 243, where the learned Deputy President said:

> *"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, is bound to fail. This will include, but is not limited to a case where a complainant can be said to dispose no reasonable cause of action, or where a respondent can show a good defence sufficient to warrant the summary termination of proceedings".*

I respectfully agree with these comments.

20 A proceeding ought not to be struck out pursuant to s.75 of the VCAT Act unless it is manifestly hopeless or untenable. As previously indicated the Points of Claim filed disclose a cause of action under the ***Fair Trading Act*** albeit, they are filed in a proceeding commenced in the Domestic Building List. If the facts pleaded in that document are proven they are capable of entitling the Applicant to the relief it seeks. In those circumstances, it is not possible to strike the proceeding out as being manifestly hopeless or unsustainable. The application pursuant to s.75 of the ***VCAT Act*** and the application to dismiss the proceeding as lacking in jurisdiction will therefore be dismissed.

Further orders

21 Mr Mitchell sought an order substituting Wladyslawa Chomaniuk as the Second Respondent in place of her son Mark Chomaniuk. The grounds for the application were the facts deposed to in the Affidavit of the First Respondent filed in support of this application. However the application for substitution was not made on notice and Mr Klempfner had no instructions. I think it is appropriate to refer this proceeding to a directions hearing so that this matter can be attended to and any further directions that might be required can be given. Otherwise I refer the matter to the Deputy President in charge of the Domestic Building List to determine whether or not it ought to be transferred to the Civil Claims List. The costs of this application shall be reserved.

SENIOR MEMBER R. WALKER