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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D810/2005**

CATCHWORDS

Victorian Civil and Administrative Act 1998 - Striking out or dismissing proceeding – principles to be applied – claim in negligence – must provide particulars – Domestic Building Contracts Act 1995 – sections 8 & 9 – terms not implied into building contract entered into before commencement of act – claim struck out – whether act otherwise applies to disputes arising under the contract arguable – not appropriate for determination on s.75 application

APPLICANT:	Body Corporate Plan No: PS340350Y
FIRST RESPONDENT:	JMC Residential Pty Ltd formerly t/as Segarnet Pty Ltd (ACN 051 863 962),
SECOND RESPONDENT	Porter Street Developments Pty Ltd (ACN 106 720 101) (withdrawn from proceedings 7/12/05),
THIRD RESPONDENT	Multitex Corporation Pty Ltd (ACN 006 873 043)
WHERE HELD:	Melbourne
BEFORE:	Senior Member R Walker.
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	14 August 2007
DATE OF ORDER:	4 September 2007
CITATION:	Body Corporate Plan No: PS340350Y v JMC Residential Pty Ltd (Domestic Building) [2007] VCAT 1973

ORDERS

1. Paragraphs 3A and 4E of the Amended Points of Claim dated 10 August 2006 are struck out.

2. The application that the proceeding be struck out or dismissed under s.75 of the Act is otherwise dismissed.

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

4. Costs reserved.

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SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	Ms. S. Kirton of Counsel
For the First Respondent:	Mr R. Andrew of Counsel
For the Third Respondent:	Mr A. McKellar, Solicitor

REASONS

1. This is an application by the First Respondent ("the Builder") to strike out the Applicant's claim pursuant to s.75 of the Victorian Civil Administrative Tribunal Act. That section, where relevant, provides as follows:

> *"**75. Summary dismissal of unjustified proceedings***
>
> *(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."*

2. The manner in which this section should be applied was considered by Deputy President McKenzie in the often cited case of *Norman v Australian Red Cross Society (1998) 14 VAR 243*. In general, in order to strike out a claim or proceeding it is necessary for the Applicant for such an order to demonstrate that it is manifestly hopeless.

The proceeding

3. The Applicant is the Body Corporate of a unit subdivision at 23-32 Porter Street Prahran. The subdivision was of a building constructed by the Builder some time between 30 April 1995 and 11 January 1997.

4. The building was constructed pursuant to a building contract entered into between the Builder and another company ("the Owner"). No copy of this contract has been found but from the evidence of the progress claims and other documents that are before me, I find that it was entered into in about mid 1995.

5. Occupancy permits for the various units and common property were issued on various dates between 11 January 1997 and 3 February 1997.

6. This proceeding was commenced on 31 October 2006. By Amended Points of Claim dated 10 August 2006 the Applicant seeks damages against the Builder for allegedly defective workmanship. The two grounds for the claim are, first, that the Builder is in breach of the terms that were implied into the building contract

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by s.8 of the *Domestic Building Contracts and Tribunal Act 1995* to the effect that the work was to be done in a proper and workmanlike manner using materials good and suitable for the purpose. The second ground is that the Builder owed a duty of care to the Applicant to take reasonable care in the construction of the apartments and car parks, including the common property. This duty of care is said to arise from the relationship of the parties and by operation of law.

7. The complaint about the work largely concerns the render with which the apartment complex has been coated. It is said to have reddish brown staining caused by iron contaminants in the render material and it is also said to be blistering. The render material was supplied by the Third Respondent. In addition, there are said to be structural deficiencies and numerous other structural defects in the work, which are detailed in a report referred to in the particulars.

The application

8. The strikeout application came before me on 14 August 2007. Mr Andrew of Counsel appeared for the Builder and Ms Kirton of Counsel appeared for the Applicant to resist the application.

9. There were three branches to Mr Andrew's argument. First, he said that no particulars of negligence had been provided and it did not appear from the circumstances of the case how there could be any claim by the Applicant in negligence against the Builder. Secondly, he said that the claim in contract was doomed to failure because it was clear that the Applicant was not a party to the contract. It came into existence well after the contract had been entered into. Thirdly, he suggested that the Tribunal has no jurisdiction in regard o the matter in any event because the contract was entered into before the *Domestic Building and Contracts Act 1995* came into force and the act therefore did not apply. As a consequence, he suggested there was no enabling enactment to confer jurisdiction on the Tribunal in regard to this dispute.

The claim in negligence

10. Mr Andrew submitted that although the nature of the damage has been identified, the points of claim do not identify any act or omission by the Builder that has caused the deficiencies complained of. He said it was not suggested that the Builder had been negligent in engaging an incompetent sub-contractor or negligent in the purchase of the materials used.

11. Ms Kirton said that the duty of care and the breach were both pleaded and that a mere absence of particulars can be remedied. I think this is correct and in this respect perhaps the application under Section 75 is premature. It is trite to say that, in order to succeed in a claim based on negligence, one has to establish negligence. It is not sufficient simply to allege that the loss has been sustained. A duty of care must be shown to exist and some act or omission of the Builder amounting to a breach of that duty will have to be asserted and particulars of those matters must be provided. If no negligence can be identified and asserted then, quite obviously, a claim in negligence should not be proceeded with.

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The claim in contract

12. Since the Applicant only came into existence after the contract was entered into, Mr Andrew submitted that recovery could only be on the basis of the combined operation of ss.8 and 9 of the *Domestic Building Contracts Act 1995*. Those sections are as follows:

> *"8. Implied warranties concerning all domestic building work*
> *The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract-*
> *(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;*
> *(b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;*
> *(c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the Building Act 1993 and the regulations made under that Act;*
> *(d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;*
> *(e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;*
> *(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.*
> *9. Warranties to run with the building*
> *In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract."*

13. Where the Act applies to a contract, s.8 operates to incorporate into it the terms set out in that section. Mr Andrew says that it is on these terms that the Applicant relies. By s.9 of the Act, the warranties run with the land and are able to be enforced by any person who is the owner for the time being of the building work or of the land in respect of which the domestic building work is done.

14. Mr Andrew submitted that, since the Act (under its earlier name, the *Domestic Building Contracts and Tribunal Act 1995*) did not come into operation until 1 May 1996, which was after the contract had been entered into, it could not have operated to imply these terms into the contract. I accept this submission.

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15. Ms Kirton sensibly acknowledged that s.8 and s.9 did not apply but she submitted that, when the contract is found, it might contain similar warranties which might be expressed to confer rights on the Applicant. I think it highly likely that, if a copy of the contract is ever found it would contain similar warranties to those that would be implied into the contract by s.8 but it is mere speculation to suggest that the contract between the Owner and the Builder made before the Applicant came into existence would have purported to confer any contractual rights upon an as yet non-existent party.

16. In any event, the terms of the building contract pleaded in paragraph 3A of the Amended Points of Claim are said in the particulars to be "Implied by law". It was not suggested that there is any applicable legal principle apart from s.8 that would imply terms into a building contract between two parties that might subsequently be relied upon by a stranger to the contract such as the Applicant. It seems to me that the claim presently pleaded is a claim based upon s.8 and s.9. The wording in the Amended Points of Claim of the terms that are said to be implied is identical to the relevant parts of the terms set out in s.8. Accordingly, I agree with Mr Andrew that this part of the claim as presently pleaded is not maintainable and that therefore paragraphs 3A and 4E, which are the paragraphs by which it is made, should be struck out because a claim relying upon these sections is, in this case, manifestly hopeless.

Jurisdiction

17. Mr Andrew's third point was that, because the contract was entered into before any of the provisions of the *Domestic Building Contracts and Tribunal Act 1995* came into force, the Act and the adjudicative procedure that it established cannot apply to any dispute arising under the contract. In other words, the contract in this case is not one to which the Act, either now or under its former name, applies. There being no "enabling enactment" to confer jurisdiction upon this Tribunal, this Tribunal does not, Mr Andrew submits, have any jurisdiction to deal with the present claim.

18. This Tribunal was established in 1998 to (inter alia) assume the jurisdiction formally exercised by the Domestic Building Tribunal. In regard to domestic building disputes, jurisdiction was conferred on the Tribunal and its predecessor by the *Domestic Building Contracts Act 1995*. That jurisdiction is set out in Part 5 Division 2 of the Act, principally s.53, which confers extensive powers upon the Tribunal to determine such disputes. Neither the Tribunal's predecessor nor these express powers existed at the time the relevant contract was entered into.

19. Mr Andrew pointed to some of the powers conferred on the Tribunal, such as the power to vary terms and the power to declare unjust terms void or otherwise vary the contract to avoid injustice. He also referred to the comments made by Morris J in the case of *Law v MIC Technologies Pty Ltd* (2006) VCAT 415 concerning very similar provisions to be found in the *Fair Trading Act 1999* as authority for the proposition that these sorts of powers effect substantive rights and cannot be said to be simply procedural. He submitted that the Act should not be construed as applying to disputes about contracts that had already been entered into when it

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came into force.

20. Ms Kirton submitted that the Act merely introduced a new form of procedure for dealing with such disputes. She referred to a number of cases decided by the Domestic Building Tribunal shortly after it came into being that concerned disputes arising under contracts that had been entered into before the Act came into force. (See *Owen v Bolwell [1997] VDBT 51;Ltaif v Dowell Australia Ltd [1997] VDBT 65; Keown v HGF & ors [1997] VDBT 45; Commbe v McDonald & anor [1997] VDBT 42; Newsome v Biddle [1997] VDBT 64 and Dillon v Collard [1997] VDBT 35*). She also pointed out that the Act did not expressly exclude from its operation contracts already entered into.

21. Mr Andrew is correct in saying that, where an Act of Parliament affects substantive rights there is a presumption against its retrospective operation. Acts of Parliament affecting substantive rights are generally presumed not to act retrospectively (see *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ.

22. On the other hand, as Ms Kirton points out, no-one has a vested interest in mere matters of procedure. It is apparent from the submissions made and the authorities cited that the law concerning these matters is complex and in any given case it may not be clear just where the line is to be drawn (see *"Statutory Interpretation in Australia" 5th Edition Pearce & Geddes Chapter 10*).

The relevant legal principles

23. It is important to bear in mind just what my task is in an application such as this. In *Norman v. Red Cross* (infra), the learned Deputy President set out the relevant principles as follows:

> *"(a)The application is for the summary termination of the proceedings. It is not the full hearing of the proceeding.*
>
> *(b) The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.*
>
> *(c) If the Complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a Complainant indicates to the Tribunal that there is other evidence that he or she can call to support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the Complainant's material contains the whole of his or her case.*
>
> *(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*

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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.

(f) On an application to terminate a complaint summarily, the Tribunal must clearly distinguish between the complaint itself and the evidence which is to be given in support of it. A complaint cannot be struck out as lacking in substance because it does not itself contain the evidence which supports the claims.

(g) The test for determining whether a complaint is frivolous, vexatious, misconceived or lacking in substance is different from that applied in other Australian Anti-Discrimination jurisdictions where the legislative context is different from Victoria. It is similar to that applied by the Supreme Court in civil proceedings for the purposes of RSC r23.01.

(h) The Tribunal should not apply technical, artificial or mechanical rules in construing a complaint or coming to a view about the case a Complainant wishes to advance."

Conclusion

24. It is not possible for me to say that the Applicant's case in regard to the question of jurisdiction is obviously unsustainable in law. Although Mr Andrew has a respectable argument that the Act might not apply to disputes arising under this contract I am also mindful of the matters raised by Ms Kirton and in particular, the plain fact that Parliament has not specifically limited the operation of the Act in the way Mr Andrew urges. This is not a question of law that has been set down for preliminary hearing. It is an application that the proceeding be summarily dismissed and struck out. Such an application can only be brought in the limited circumstances set out in the section. I am not prepared to find that it is so obvious that the Tribunal has no jurisdiction that the case is manifestly hopeless. It is a difficult question that should be argued at a full hearing.

25. As to the absence of particulars of negligence, it is not apparent to me what particulars of negligence will be asserted and Ms Kirton did not say what acts of negligence would be alleged. Nevertheless, she was not conceding that there would be no evidence led to establish any negligence on the part of the builder and she was asserting that particulars would be supplied. It is premature to strike out this part of the claim until such time as those particulars have been supplied.

26. As to the claim in contract, the claim based on sections 8 and 9 will be struck out.

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