

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP344/2014

CATCHWORDS

BUILDING AND PROPERTY LIST—major domestic building contract for erection of dwelling house—works currently suspended by the builder—contract remains in place—slab laid and frame and roof erected—all approved by building surveyor—owner alleges finished floor level of slab to be defective—owner also alleges frame and drainage to be defective—owner fears that founding material below slab may be defective—builder counterclaims under the contract for outstanding frame stage payment.

Application made by the Applicant, during period that the proceeding is reserved for decision, for the Tribunal to make certain requests of regulators, permitted under Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*, and for an order that the respondent demolish the slab—application dismissed.

APPLICANT	Mr Shannon Draper
RESPONDENT	Simonds Homes Victoria Pty Ltd (ACN 050 197 610)
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Application after hearing, before determination.
DATE OF HEARING	18 December 2015
DATE OF ORDER	25 January 2016
CITATION	Draper v Simonds Homes Victoria Pty Ltd (Building and Property) [2016] VCAT 91

ORDERS

- 1 The application by the Applicant to the Tribunal to make a request of the Director of Consumer Affairs pursuant to Clause 12(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to conduct an investigation pursuant to Clause 12(2) of Schedule 1, is dismissed.
- 2 The application by the Applicant for an order requiring the Respondent to demolish the slab, is dismissed.
- 3 The application by the Applicant to the Tribunal to make a request to the Victorian Building Authority pursuant to Clause 12A(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* to provide to the Tribunal with a copy of a report allegedly obtained by the Victorian Building Authority dated 24 June 2015, is dismissed.

- 4 Liberty to apply.
- 5 Costs reserved.

MEMBER A KINCAID

APPEARANCES:

For Applicant

Mr S Draper on his own behalf

For Respondent

Mr N Cutts, Solicitor

REASONS

THE PARTIES

- 1 The applicant (“**Mr Draper**”), a qualified carpenter, purchased a block of land in Alpine Drive, Wallan in August 2013.
- 2 On 5 June 2014 he signed a contract (the “**contract**”) with the respondent, Simonds Homes Melbourne Pty Ltd (“**Simonds**”), requiring Simonds to construct a brick veneer dwelling on the site (the “**works**”) for the contract sum of \$193,380 (the “**contract sum**”).
- 3 Vallence Gary Simonds (“**Mr Simonds**”), a director of Simonds, is named in the Building Permit as the “Building Practitioner Engaged in the Building Work”.
- 4 Mr Draper and Simonds are parties to a proceeding before the Tribunal concerning the works. It involved a hearing before me on 18-21 May 2015, 25-26 May 2015, 27 May 2015 (half day), 28-29 May 2015, and 14 September 2015 (final oral submissions). Final written submissions were filed on behalf of Simonds on 13 October 2015.
- 5 Following the receipt of further correspondence from Mr Draper, whilst the matter was reserved for decision, I fixed the matter on 18 December 2015 to hear his application for further orders. I deal with his applications below.

BACKGROUND

- 6 Simonds started work on the project in about July 2014. On 14 July 2014, Mr Draper sent an email to Simonds’s site supervisor, informing him that he was concerned that the site had been cut by Simonds deeper than the level achieved by Mr Draper’s earlier levelling and compaction works, and that soil from another site had been brought onto his property to serve as the founding material for the proposed slab. He also expressed concerns that the drainage design would not be effective.
- 7 Mr Draper alleges that on 22 July 2014, after the pouring of the concrete ground slab, he instructed Simonds to stop work on the project, having by then also expressed his concerns concerning the level of the slab, and the drainage requirements not having been adequately addressed by Simonds. He gave evidence that he was subsequently distressed to discover that, notwithstanding his instructions, Simonds had chosen to proceed with the construction of the wooden frame. Mr Draper considers that Simonds should not have proceeded to construct the frame, given the concerns that he had then raised about the base stage.
- 8 At about that time, Mr Draper also wished to have the documents forming the contract properly consolidated, and signed by him. Mr Draper alleges that Simonds failed to draw to his attention material differences between the “contract drawings” and the “construction drawings” signed by him some weeks later.

- 9 Notwithstanding his concerns, Mr Draper paid Simonds the Stage 1 base stage claim for 20% of the contract sum.
- 10 Simonds subsequently submitted a progress claim to Mr Draper for completion of the Stage 2 frame stage in the amount of \$48,345 including GST, being 25% of the contract sum. Under the contract, this was the stage when the frame had been completed and approved by the building surveyor.
- 11 By email dated 9 September 2014 Mr Draper informed Simonds that he was not intending to pay the frame stage claim, and set out his reasons for not doing so. In summary, he was challenging Simonds's proposition that the dwelling was, at that point, 45% complete.
- 12 On 26 September 2014 Simonds issued a Notice of Suspension of the works pursuant to Clause 35 of the contract.
- 13 By email dated 7 October 2014, Simonds agreed not to press for payment of the frame stage claim, pending a further inspection of the frame to determine its compliance or otherwise with relevant provisions of the framing standard AS 1684. Having subsequently formed the view that the frame complied, Simonds sought payment.
- 14 One of the disputes between the parties that also arose in July 2014 relates to the alleged Finished Floor Level ("**FFL**") of the concrete slab. Clause 3.1.2.3 of the *Building Code of Australia* (the "**BCA**") provides, in effect, that the surface height of a slab-on-ground must be not less than 150mm above the external finished surface level ("**FGL**"). Relying on this requirement, Mr Draper also contends that Simonds failed to construct the slab with an FFL of RL98.73 in respect of the garage, as would allow the FGL adjacent to the garage to be RL98.58 (being 150mm below). Mr Draper says that this is the FGL required to be achieved by Simonds under the contract.
- 15 It is accepted that the FFL of the garage section of slab is RL98.55. This means that the FGL at slab edge can be no higher than RL98.40 (150mm below RL98.55), rather than RL98.58 required by Mr Draper. The FGL external to the garage section of slab has been measured by Simonds at RL98.33, which is level to the horizontal section of the slab rebate.
- 16 Simonds contends that the FFL of RL98.55 for the garage section of slab is in accordance with the contract, that is to say, it was not contractually required to achieve a FFL of the slab such that a FGL of RL98.58 can be achieved. It says that to the extent that the FGL was expressed in the plans as RL98.58, this was indicative only.
- 17 It would follow, from Mr Draper's argument, that the FFL of the connecting "house" slab would need to have been RL98.865, because a 135mm step up to the house from the garage was required by the plans.
- 18 Simonds also contends that the FFL of the house section of the slab for is in accordance with the contract viz. RL98.685. There is also evidence from a survey on 14 August 2014, commissioned by Intrax Consulting Engineers Pty

Ltd, that the FFL of the house section of the slab is between RL98.67 and RL98.70.

- 19 Assuming for present purposes that the FFL of the house section of slab is RL98.685, this means that the FGL can be no higher than RL98.535 (150mm below the claimed FFL of the house section of the slab). The FGL external to the house section of slab has been measured by Simonds at RL98.43, which (assuming again, for present purposes, that the FFL is RL98.685) is 35mm below the horizontal section of the slab rebate.
- 20 Again, Simonds says that it was not contractually required to lay the house section of the slab such that a FGL of RL98.58 can be achieved.
- 21 Without prejudice to its contentions that the FFLs of both sections of slab are in accordance with the contract, Simonds has proposed a design that may allow the FGL adjacent to the slab to be raised from its present level to RL98.58 (the “**P2 proposal**”).
- 22 Although each party has in correspondence threatened to terminate the contract, neither party has yet done so.
- 23 The dwelling has stood uncompleted, to frame and roof stage only, since late 2014.

MR DRAPER’S CLAIMS

- 24 By his Final Submissions dated 31 August 2015 (the “**Final Submissions**”), Mr Draper seeks the following orders from the Tribunal:
 - (a) In the absence of compliance certificate, alleged by Mr Draper to be required to be produced under the contract, the BCA and the regulations, which demonstrates that the foundation material below the slab has been properly prepared and compacted, an order that Simonds must demolish the slab, and re-lay it, with proper certifications;¹
 - (b) alternatively, given that Mr Draper also alleges that there is a variation of the level across the surface of the slab greater than 20 mm, Simonds must demolish the slab, and re-lay it;²
 - (c) if the need for a new frame does not arise as a result of the Tribunal making either of the orders described in sub-paragraphs (a) and (b) above, Simonds must provide a certificate of compliance in respect of the frame design;³
 - (d) in the absence of a certificate of compliance referred to in sub-paragraph (c), the frame must be demolished by Simonds and reconstructed in accordance with relevant requirements;⁴

¹ See part 16(2)(a) of the Final Submissions.

² See part 16(3) of the Final Submissions.

³ See part 16(2)(d) of the Final Submissions

⁴ See paragraph starting “Failing to...” on page 211 of the Final Submissions.

- (e) to the extent that the P2 proposal proposed by Simonds for achieving an FGL of RL98.58 at the slab edge is an “Alternative Solution” within the meaning of the BCA (and therefore required to comply with the “Performance Requirements” by adoption of one of the “Assessment Methods” in the BCA), Simonds must comply with the relevant requirements such that they meet the approval of the Relevant Building Surveyor.⁵
 - (f) alternatively to (e), Simonds must demolish the slab, and re-lay it so that an FGL of RL98.58 can be achieved, and the FFL of the slab is no lower than 150mm above it, in compliance with Clause 3.1.2.3 of the BCA;⁶
 - (g) to the extent that the proposal put by Simonds for rectifying the design of the drainage is an “Alternative Solution” within the meaning of the BCA, (and therefore required to comply with the “Performance Requirements” by adoption of one of the “Assessment Methods” in the BCA), an order requiring Simonds to comply with the relevant requirements such that they meet the approval of the Relevant Building Surveyor.⁷
 - (h) a declaration that the commencement date of the contract is 31 May 2014, and that liquidated damages of \$400 per week must be paid by Simonds to Mr Draper from 7 January 2015 (being Mr Draper’s calculated date of completion of the works) and continuing;⁸
 - (i) Simonds pay Mr Draper \$70,000 in “restitution”;⁹
 - (j) Simonds pay Mr Draper \$50,000 for “distress and mental trauma” caused by these events;¹⁰ and
 - (k) Simonds pay Mr Draper \$200,000 exemplary damages as a result of Simonds’s alleged “vexatious handling of not only the proceeding, but the entire contract provision and build process”.¹¹
- 25 The gist of Mr Draper’s final submissions is that given that the Tribunal is granted power to make performance-based orders by sections 53(g) and (h) *Domestic Building Contracts Act 1995* (the “**DBC Act**”), the Tribunal should not refrain from making such orders in this case.
- 26 In addition to these claims (although it is not referred to in Part 16 of his final submissions), Mr Draper also seeks an enquiry by the Building Practitioners Board (“**BPB**”) pursuant to section 178 of the *Building Act 1993* (the “**Building Act**”), about the conduct or ability to practise of Mr Simonds, on an express referral by the Tribunal pursuant to section 178(1)(ca) of the Building Act.¹² Mr Draper called for a referral from the Tribunal in his opening submissions, and

⁵ See part 16(2)(b) of the Final Submissions.

⁶ See bracketed section in part 16(2)(b) of the Final Submissions.

⁷ See Part 16(2)(c) of the Final Submissions.

⁸ See Part 16(5)-(7) of the Final Submissions.

⁹ See Part 16(8) of the Final Submissions.

¹⁰ See Part 16(9) of the Final Submissions.

¹¹ See Part 16(10)-(11) of the Final Submissions.

¹² See paragraph 34 on page 22 of the Final Submissions.

he often re-submitted this request during the hearing and afterwards. This course was opposed by Simonds. I was not prepared to make such a referral, until after I had heard the evidence and determined whether there was evidence of a sufficiently egregious breach of the Building Act or the *Building Regulations 2006* (the “**Regulations**”) to warrant referral.

SIMONDS’S CLAIMS

- 27 Simonds seeks the outstanding frame stage payment of \$48,345, plus interest of \$5,526 from 16 September 2014 to 10 July 2015, and continuing.

APPLICANT’S COMPLAINT TO THE VICTORIAN BUILDING AUTHORITY PRIOR TO THE HEARING

- 28 On the first day of the hearing, Mr Draper tendered material demonstrating that in early 2015, he made a complaint to the Victorian Building Authority (“**VBA**”) about the works. By her email dated 28 April 2015, Ms Grayson of the VBA informed Mr Draper that his complaint was undergoing a “technical assessment”. A further letter dated 14 May 2015 from Mr Douglass, Manager, Inspections and Complaints Services of the VBA informed Mr Draper that the assessment had not been completed. Mr Douglass also informed Mr Draper that as the matters raised by him were to be the subject of this proceeding, and given that Mr Draper had summonsed VBA employees to give evidence at the hearing, the VBA would not be in a position to comment further until the proceeding had been determined.
- 29 Mr Draper also tendered a copy of a letter from the BPB to him dated 18 March 2015 stating that, in response to a request made by him, it had appointed a person pursuant to s 177(1) of the Act to report and make recommendations to it on whether or not it should hold an enquiry under s 178 of the Building Act about the conduct or ability to practise of Mr Simonds. There is no material to indicate whether any such report and recommendations have been made to the BPB.

MR DRAPER’S FURTHER APPLICATION TO THE TRIBUNAL

- 30 While the proceeding was adjourned for my decision:
- (a) by paragraph 11 of an email from Mr Draper to the Tribunal dated 3 November 2015, he requested the Tribunal to stay its decision until after “the completion of [the Tribunal’s review pursuant to section 182A(3)(a) of the DBC Act] of [an alleged] failure by the BPB to conduct the enquiry [pursuant to section 179 of the Act] within a reasonable time;
 - (b) by paragraph 12 of the same email, Mr Draper wants the Tribunal to request the Director of Consumer Affairs (the “**Director**”) pursuant to Clause 12(1) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (the “**VCAT Act**”), to conduct an investigation pursuant to Clause 12(2) of Schedule 1 to the VCAT Act; and
 - (c) by a further email dated 2 December 2015, Mr Draper requested the Tribunal to refer the issues to the BPB for an enquiry, being in Mr Draper’s

view, “the more appropriate forum considering the changing nature of this case”. This was, of course, a reference to an enquiry conducted by the BPB under section 178 of the Building Act, in support of which Mr Draper had previously made submissions, and to which I have referred.

ORDERS SOUGHT BY MR DRAPER

- 31 Following receipt of these emails, the Tribunal fixed the proceeding for further directions on 18 December 2015.
- 32 At the directions hearing, Mr Draper announced that he was seeking only 3 outcomes, as follows:
- (a) a request being made by the Tribunal of the Director pursuant to Clause 12(1) of Schedule 1 to the VCAT Act to conduct an investigation;
 - (b) an order of the tribunal that the slab be demolished; and
 - (c) a request being made by the Tribunal of the VBA pursuant to Clause 12A(1) of Schedule 1 to the VCAT Act that the VBA provide to the Tribunal a report dated 24 June 2015 alleged to be in the possession of the VBA.

Request by the Tribunal of the Director of Consumer Affairs

- 33 Clauses 12(1) and (2) of Schedule 1 to the VCAT Act provide:
- (1) The Tribunal may request the Director [of Consumer Affairs]...to investigate any matter that **arises in a proceeding** under the [the DBC Act].
 - (2) The Director [of Consumer Affairs] **may** investigate a matter on request under subclause (1) and, if the Director does so, [he/she] must report on the investigation to the Tribunal (**emphasis added**).
- 34 Chapter 6 of the *Australian Consumer Law and Fair Trading Act 2012* (the “**ACL**”) sets out the functions of the Director. Section 109(e) of the ACL provides:
- The Director has the following functions-
- ...(e) to investigate breaches of [the ACL or the DBC Act, and any other Act defined in the ACL as a “Consumer Act”] or the [Regulations, and any other Regulation made under any other “Consumer Act”];
 - ...(n) any other function conferred on the Director by or under this Act or any other Act
- 35 The reference in section 109(n) refers to the function conferred on the Director by Clauses 12(1) and (2) of Schedule 1 to the VCAT Act.
- 36 Section 197 of the BA provides:
- Functions of the [Victorian Building] Authority**
- The Authority has the following functions-
- (a) to monitor and enforce compliance with [the BA] and the regulations...

- 37 The words of Clause 12(1) of Schedule 1 to the VCAT Act are broad in nature. The words “any matter that arises in a proceeding...” may arguably go beyond whether there has been a breach of the DBC Act or the regulations. Notwithstanding the Director’s broad powers of investigation conferred by this provision, I am not satisfied that, at this stage, that there is any matter that has arisen in the proceeding under the DBC Act that calls for an investigation by the Director, assuming the Director should decide to act on any such request.
- 38 Further, a central part of Mr Draper’s complaints, that he may wish to revive in any investigation by the Director, has been that Simonds has acted or is in breach of the Building Act and/or the regulations. One of the principal means by which compliance with the Building Act and the regulations is also enforced, is by the Building Practitioners Board, established under Part 11 Division 3 of the Building Act, conducting an enquiry of a registered building practitioner under sections 179-182 of the Building Act to determine, among other things, whether the registered building practitioner has complied with the Building Act or the regulations.¹³ This is the very inquiry sought by Mr Draper of Mr Simonds in respect of which he seeks a referral from the Tribunal pursuant to section 178(1)(ca) of the Building Act.
- 39 Should I determine that there is a need for an inquiry into the extent to which Simonds has or has not complied with provisions of the Building Act or the regulations, I am presently of the mind that the BPB, by virtue of its expertise in matters of building regulation and compliance, would be the preferable forum.
- 40 One of the other reasons expressed by Mr Draper for his wishing the Tribunal to request the Director to undertake an investigation, is that it would also be open to the Director to institute a proceeding against Simonds, in the public interest or otherwise, under ss115-116 of the ACL, and/or to provide legal assistance to Mr Draper to bring a legal proceeding under s 117 of the ACL.
- 41 Mr Draper also suggests in his email to the Tribunal dated 3 November 2015 that an investigation by the Director would “allow [Mr] Draper to present better and further evidence to the Tribunal, assisting [the Member] to ensure decision is made on the facts and not misleading assertions by [Simonds] or misdirected discretion”. This suggests that Mr Draper would seek to use such findings as may be made by the Director in its investigation, as the basis for the calling of further evidence in this proceeding by Mr Draper. This would have the result that Mr Draper would be seeking a stay of this proceeding pending the outcome of any investigation that the Director may undertake, should he choose to do so.
- 42 I am not prepared to stay the proceeding, in which there is a sizeable counterclaim, for this purpose.
- 43 I am not satisfied that Mr Draper’s desire for the Director to exercise against Simonds any of the powers conferred by the ACL, is a matter that “arises in [the] proceeding” within the meaning of Clause 12(1) of Schedule 1 to the

¹³ See section 179(1)(b) of the Building Act.

VCAT Act. Rather, it is a matter arising from Mr Draper's desire to litigate the issues raised in this proceeding in a different forum. A party will be prevented from litigating issues in a forum, if an action is already pending with respect to the matter in issue elsewhere.¹⁴

- 44 I am also guided in this respect by the decision of the High Court in *Aon Risk services Australia Limited v Australian National University*¹⁵ to the effect that there is an irreparable element of unfair prejudice to a respondent (particularly, I may add, where the respondent has a counterclaim) in unnecessarily delaying a proceeding. Further, at paragraph [24] the Court stated:

Undue delay can undermine confidence in the rule of law. To that extent [the avoidance of delay], based upon a proper regard for the interests of the parties, transcends those interests. Another factor that relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency created by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation.¹⁶

- 45 For these reasons, I dismiss Mr Draper's application for a request to be made by the Tribunal of the Director for an investigation. I do not, however, rule out giving further consideration to making such a request after the determination of the proceeding.

Mr Draper's request for an order that the slab be demolished

- 46 Mr Draper tendered a letter from the VBA to him dated 26 November 2015. It indicates that on 1 October 2015 the VBA consented to the termination of the appointment of Mr Giambattista as the Relevant Building Surveyor appointed to carry out the statutory functions in respect of the works. It appears that the view was taken by the VBA that the relationship between Mr Draper and Mr Giambattista had completely broken down, resulting in the obtaining by Mr Giambattista of an intervention order against Mr Draper.
- 47 The letter also records that in the absence of Mr Draper appointing a replacement building surveyor, the municipal building surveyor "will be the [Relevant Building Surveyor] for the works".
- 48 Mr Draper has since received a letter from the municipal building surveyor of Mitchell Shire Council dated 26 November 2015, which reads as follows:

As previously [mentioned] Council policy is to not complete a private building surveyor's function once work has commenced. This is for insurance and risk reasons.

¹⁴ See *Henry v Henry* (1996) 185 CLR 571 at 591

¹⁵ [2009] HCA 27 (5 August 2009) at [5]-[6], and [30].

¹⁶ Supra at [24]

I have communicated with the previous building surveyor for this dwelling and read the reports you have provided and am satisfied that although the works on site may not be compliant they do not pose a risk in their current state.

This leaves you with two options from this point on:

Option (a) appoint a new private building survey to complete the function.

Or

Option (b) make an application to Council to demolish what has been erected and start afresh with a new building permit to construct a dwelling with your building survey of choice.

I hope this gives you some clarity and direction for your next decision.

- 49 By email dated 27 November 2015, Mr Draper invited Simonds to submit an application for a demolition permit, and then also submit an application for a new permit based on a proper design including amended contract drawings setting out Mr Draper's requirements. Simonds has declined to do so.
- 50 I am not prepared to order that the slab be demolished. The Tribunal can only order rectification of defective building work (including any necessary demolition) if the building work is found to be "defective".¹⁷ This is an issue for my subsequent determination.

Mr Draper's request for an order that that the VBA provide to the Tribunal a report dated 24 June 2015

- 51 Mr Draper submitted that since exchange of final submissions, he had become aware of the existence of a report obtained by the VBA dated 24 June 2015. It is possible that the obtaining of a report is part of the technical assessment being undertaken by the VBA to which I have referred.
- 52 Clause 12A(1) of Schedule 1 to the VCAT Act provides as follows:

Tribunal may request information about domestic building dispute

The Tribunal may request the [VBA] to provide the Tribunal with any information held by the [VBA] **that relates to a proceeding under the [DBC Act]** in relation to a domestic building dispute within the meaning of section 3 of [the DBC Act]."

- 53 Mr Nick Kukulka, a private building surveyor was engaged by the VBA pursuant to section 45 of the DBC Act, to examine whether the building work performed by Simonds was defective. He inspected the works on 15 September 2014 with Mr Draper and Mr Harrington, Building Manager of Simonds. He subsequently submitted a lengthy report dated 17 October 2014, providing his conclusions on:
- (a) whether the heights of the FFLs, as shown in a survey plan obtained by Intrax Consulting Engineers were such that they were not in accordance with the contractual requirements;

¹⁷ See section 53(g) DBC Act.

- (b) whether the heights of the FGLs were too high relative to the FFLs of the slab;¹⁸
 - (c) whether the drainage system was inadequate; and
 - (d) whether the studs around certain windows were adequate.
- 54 Mr Draper summonsed Mr Kukulka to give evidence at the hearing. Mr Draper also summonsed Mr Daniel De Lacy, Manager of the VBA Inspections Department to give evidence at the hearing, and to produce documents. Documents were produced by both witnesses.¹⁹ I set aside the subpoena addressed to Mr De Lacy, on the grounds that his evidence could not have been relevant to the issues in the proceeding.
- 55 In the event, Mr Kukulka was called by Simonds to give evidence, which will be the subject of consideration during the preparation of my decision.
- 56 The proceeding is adjourned for my decision. Even after a hearing has concluded, and before judgment which has been reserved is delivered, the court has power to allow a party to admit further evidence.²⁰ I have no difficulty in accepting the proposition that the Tribunal, in the interests of justice, has a similar discretion.
- 57 It has been said however, that fresh evidence should be admitted only when it is so material that the interests of justice require it, that the evidence if believed would most probably affect the result, the evidence could not be reasonable diligence have been discovered before, and the evidence could be admitted on conditions which ensured no prejudice to the other party be reason of its introduction late.
- 58 I have concluded that there is no reasonable basis, after the hearing of this proceeding has concluded and prior to decision, for the exercise of my discretion to requesting a copy of a further report said to have been obtained by the VBA, where it can only be a matter of speculation as to the opinion expressed, if any, on issues in the proceeding.

MEMBER A KINCAID

¹⁸ Mr Draper argues that his complaint has always been not that the FGLs are too high, but that the FFLs of the slab are too low to enable a FGL of RL98.58 to be achieved.

¹⁹ Letter from the VBA to the Tribunal dated 13 May 2015.

²⁰ See *Civil Procedure Victoria Vol 1* paragraph 49.01.75 and cases referred to.