VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D362/2007

CATCHWORDS

Limitations period for commencement of building actions – s5 *Limitations of Actions Act* 1958, s134 *Building Act* 1993 – Part IVAA of the *Wrongs Act* 1958 – premature to consider whether an apportionable claim

APPLICANT	Julie Hardiman
FIRST RESPONDENT	Michael Gory
SECOND RESPONDENT	Helen Gory
THIRD RESPONDENT	Nanjey & Partners (Aust) Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	22 November 2007
DATE OF ORDER	19 February 2008
CITATION	Hardiman v Gory (Domestic Building) [2008] VCAT 267

RULING

1. The applicant's claim is not statute barred.

ORDERS

1 This proceeding is set down for hearing before Deputy President Aird on 13 March 2008 at 10.00 a.m. at 55 King Street Melbourne with an estimated hearing time of one day unless the parties advise the principal registrar in writing that this will be insufficient.

2 The applicant having settled with the third respondent, the third respondent is excused from attending or participating in the further hearing.

3 Liberty to the applicant and the first and second respondents to apply for the proceeding to be referred to mediation.

4 Costs reserved – liberty to apply

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr Ritchie of Counsel
For First and Second Respondents	Mr M. Gory, in person
For Third Respondent	Mr N. Cumaran, director

REASONS

1 Ms Hardiman purchased a two storey unit from Mr and Mrs Gory ('the Gorys') by Contract of Sale dated 1 April 1998. The unit was one of a multi-unit development built by the Gorys as owner-builders. The occupancy permit was issued on or about 7 November 1997. Neither Ms Hardiman nor the Gorys have been able to locate a copy of the relevant occupancy permit, but the Gorys concede that it would have been issued at about the same time as the one for Unit 3 – 7 November 1997.

2 On 1 June 2007 Ms Hardiman lodged an application seeking the sum of $16,578.45, being reimbursement of the costs of investigation and rectification works including ventilation to the sub-floor area and replacement of sub-floor timbers and floorboards in the kitchen area and associated costs. The respondents are the Gorys and the building surveyor, Nanjey & Partners (Aust) Pty Ltd ('Nanjey'). Ms Hardiman has settled with Nanjey and on 16 November 2007 filed Minutes of Consent Orders signed by her solicitors and Nanda Cumaran, for and on behalf of Nanjey, seeking that the proceeding as against, what she describes as, the 'other parties' be struck out with no orders as to costs. I declined to make these orders in the absence of the consent of the Gorys.

3 At the commencement of the hearing Mr Gory, who appeared on behalf of himself and his ex-wife, handed up written submissions prepared by their solicitors. They submit they have an absolute defence to the owner's claim contending that insofar as it is a claim for breach of contract it is statute barred under the *Limitations of Actions Act* 1958. Insofar as it is a claim in negligence they contend that under the law as it stands in Victoria they do not owe a duty of care to the owner as owner builders. Further, if the claim is not statute barred, they contend it is an apportionable claim under the provisions of Part IVAA of the *Wrongs Act* 1958. The only material before me is the owner's application, the expert reports on which she seeks to rely, affidavit material (which has not been tendered) and written submissions from Ms Hardiman and the Gorys. Given the quantum of the claim, Points of Claim and Points of Defence were not ordered.

4 Mr Ritchie of Counsel appeared on behalf of Ms Hardiman. Mr Gory confirmed that they would not be legally represented at the hearing, although they have solicitors on the record and their submissions had been prepared with their lawyers' assistance. Mr Cumaran, a director of Nanjey, appeared on its behalf.

5 As mentioned in my Reasons of 22 November 2007, after discussion with the parties it was agreed that it was appropriate to determine whether the claim is statute barred, and whether it is an apportionable claim for the purposes of Part IVAA before considering the question of liability.

Is the owner's claim statute barred?

6 The Gorys contend that s5 of the *Limitations of Actions Act* 1958 applies, and that any claim is statute barred having been commenced more than six years after the date of the alleged breach of the contract – the failure to comply with the warranties in s137C of the *Building Act* 1993 (which are incorporated into the contract of sale). Whether there has been a breach of the warranties is not relevant in determining these preliminary issues. Section 5(1) of the *Limitations of Actions Act* provides:

> (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued—
>
> (a) Subject to subsections (1AAA), (1AA) and (1A), actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty;

7 Ms Hardiman contends that under s134 of the *Building Act* 1993 the limitations period for the commencement of a building action, whether in contract or negligence, is ten years. Section 134 of the *Building Act* provides:

> Despite anything to the contrary in the Limitations of Actions Act or in any other Act or Law, a building action cannot be brought more than ten years after the date of issue of the occupancy permit in respect of the building work…(emphasis added).

8 The Gorys contend that the proper interpretation of s134 is that it is a 'long stop' for the commencement of building actions, and that it does not replace s5 of the *Limitations of Actions Act*. They refer to a paper by Craig Harrison and James Greentree (2006) 22 BCL 243 and, in particular, the learned authors' reliance on the comments made by Ipp J in his review of the law of negligence where he observed:

> 6.33 The purpose of a long stop period is to fix a date on which an action will become statute barred irrespective of whether the date of discoverability has occurred. In other words, under the proposed system … a claim will become statute-barred on the expiry of the limitations period or long stop whichever is the earlier.

7 However, the views expressed by the learned authors are but one interpretation of s134. Mr James Morgan-Payler in the April 2003 edition of the *Australian Construction Law Bulletin* expressed the contrary view, that s134 replaces the 6 year limitation period with a 10 year limitation period for the bringing of a 'building action'.

9 The Gorys also submit that the 'long stop' interpretation is to be preferred by reference to the prefatory words in s134: *'Despite anything to the contrary'* and that these words mean that the *Limitations of Actions Act* applies. When considered in context of the Second Reading Speech this prefatory phrase reinforces my view that the replacement interpretation is

correct. The Gorys have not referred me to any authority for the curious assertion '*There is a judicial trend away from second reading speeches, as the works used in the provision are to be construed objectively*' (para 8 of their Further Supplementary Submissions), and I am satisfied that, by reference to section 35 of the *Interpretation of Legislation Act* 1984, I may have regard to the second reading speech for the *Building Bill* on 11 November 1993 viz:

> The Building Bill defines a clear starting date – the date of issue of an occupancy permit – and a clear conclusion date of 10 years after the date of issue. This will remove the existing ambiguity surrounding the time during which the building owner retains the right to issue proceedings.
>
> This will provide property owners with additional protection in terms of years beyond the very short number of years that now exist. '

In my view, the prefatory phrase should be simply read as 'but for the provisions of this section, section 5 of the *Limitations of Actions Act* would apply.

10 Senior Member Lothian recently considered the alternative interpretations and I respectfully concur with her conclusions in *Thurston v Campbell* [2007] VCAT 340 that the replacement interpretation is the proper interpretation. As I am satisfied Ms Hardiman's claim is not statute barred, it is not necessary to (nor could I in the absence of hearing sworn evidence from the parties) consider her alternative submission that the case in negligence was brought within the six year limitation period otherwise imposed by s5 of the *Limitations of Actions Act.*

Is this an apportionable claim?

11 Ms Hardiman has settled with Nanjey and, as noted above, filed Minutes of Consent Orders that the proceeding between her and Nanjey be struck out with a right to apply for reinstatement and no orders as to costs. Being mindful of the provisions of s24AL of the *Wrongs Act* 1958, I declined to make the orders in the absence of consent from the Gorys. At the commencement of the hearing, Mr Gory confirmed they do not consent to the orders being made. In their initial submissions the Gorys argue that the building surveyor is a concurrent wrongdoer within the meaning of s24AI of the *Wrongs Act* and that Ms Hardiman's claim is an apportionable claim.

12 It is submitted by the Gorys that it is '*too soon in this case to determine whether the Building Surveyor owed a duty with respect to the occupancy permit. The Court of Appeal had no opportunity to consider the conduct of a building surveyor after the issue of a building permit.*' (para 18 of their Further Supplementary Submissions). I reject this. The tribunal is seized with the responsibility to hear and determine cases that come before it, whether or not the Court of Appeal has decided similar questions.

13 However, whether this is an apportionable claim is an important issue (not just in the context of this claim) with potentially wide and far reaching ramifications. The submissions filed by the Gorys are difficult to follow, and at times appear inconsistent. In their initial submissions they rely on Part IVAA of the *Wrongs Act 1958,* and contend that they are concurrent wrongdoers, that liability should be apportioned between them and the building surveyor under s24AI of the *Wrongs Act*. Section 24AF(1) defines an apportionable claim as:

> (1) This Part applies to—
>
> (a) a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care; and
>
> (b) a claim for damages for a contravention of section 9 of the **Fair Trading Act 1999**.

14 In their Further Supplementary Submissions filed on 30 November 2007, the Gorys are seemingly now seeking to rely on both the contribution provisions under s23B and the apportionment provisions under Part IVAA of the *Wrongs Act*, although they have not formally made a claim for contribution, and this is the first time they have raised this issue. This is one of the difficulties where lawyers assist parties in the preparation of legal submissions but do not appear at the hearing to fully argue and ventilate the legal issues.

15 Notwithstanding that the third respondent building surveyor is Nanjey Partners Pty Ltd not Mr Cumaran personally, the Gorys contend that Mr Cumaran (who they describe as the building surveyor) breached his duty of care in issuing the occupancy permit without inspecting the property. Whether Mr Cumaran personally inspected the property before the occupancy permit was issued does not appear relevant in determining whether the building surveyor – Nanjey - breached any duty of care it may have had to the Gorys as owner-builders and/or to Ms Hardiman as the owner. It may be that the inspections were carried out by another employee or properly authorised agent of Nanjey, but that is a matter to be determined upon hearing the evidence. Whether Nanjey owed and/or breached a duty of care to the Gorys and/or Ms Hardiman in respect of any other inspections is also a matter to be determined.

16 Further on the one hand the Gorys argue that as owner-builders they do not owe a duty of care to Ms Hardiman as a subsequent owner, yet on the other that they are concurrent wrongdoers with Nanjey, the building surveyor. Part IVAA of the *Wrongs Act* does not apply to a claim for breach of contract. It only applies where there has been *'a failure to take reasonable care'*. If the Gorys do not owe a duty of care to Ms Hardiman they are not and cannot be concurrent wrongdoers within the meaning of s24AI of the *Wrongs Act*.

17 Ms Hardiman's primary claim against the Gorys is for breach of the warranties in s137C of the *Building Act* which were incorporated into the Contract of Sale. If Ms Hardiman succeeds in her contractual claim it will not be an apportionable claim and it may not be necessary to consider the alternative claim founded in negligence. As noted above there are a number of evidentiary issues to be considered before it can be determined whether the building surveyor owed a duty of care to Ms Hardiman, and if so whether there has been any breach of that duty of care.

18 Having regard to the provisions of ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998, it is not appropriate that the question as to whether this is an apportionable claim be determined prior to the hearing. I will set the matter down for hearing with liberty to the parties to apply by consent to it being referred to mediation.

19 Any apportionment of liability (if, ultimately, I am satisfied this is an apportionable claim) as between the Gorys and Nanjey will necessarily impact on any damages awarded in the Ms Hardiman's favour as against the Gorys but will not give rise to an award of damages as against Nanjey. The approach taken by Senior Member Walker in *Vollenbroich v Krongold Constructions* [2006] VCAT 1710 where the applicant case settled with a number of parties during the course of the hearing is eminently sensible and practical. I will therefore excuse Nanjey from participating in the hearing unless it wishes to do so. I will also reserve the question of costs but draw the parties' attention to the provisions of s109 of the *VCAT Act.*

DEPUTY PRESIDENT C. AIRD