VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D609/2014

CATCHWORDS

Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 – whether claims made by the owners in this proceeding ought to have been made in a previous proceeding – relevant principles – application allowed in part

FIRST APPLICANT:	Mr Michael Humphrey Hill
SECOND APPLICANT:	Ms Klara Maria Dawson-Grove
FIRST RESPONDENT:	Mr Timothy John Stout
SECOND RESPONDENT:	Ms Kym Joanne Stout
THIRD RESPONDENT:	Mr Robert Holmes
FOURTH RESPONDENT:	Mr Joel Grimmond
WHERE HELD:	Melbourne
BEFORE:	Deputy President C. Aird
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	3 March 2015
DATE OF ORDER	1 May 2015
CITATION	Hill v Stout (Building and Property) [2015] VCAT 578

ORDER

1. The following claims set out in paragraph 17 (xvi) and (xvii) of the applicant's Points of Claim dated 26 June 2014 are dismissed:
2. The first and second respondents' application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 is otherwise refused.
3. The proceeding is listed for a further directions hearing before Deputy President Aird on 15 May 2015 at 9.30am at 55 King Street Melbourne.
4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Owners:	Mr D. Pumpa, of Counsel
For the First Respondent:	Mr T. Stout, in person
For the Second Respondent:	Ms K. Stout, in person
For the Third Respondent:	Mr P. Tuohey, Solicitor
For the Fourth Respondent:	Mr R. Lee, Solicitor

REASONS

1 In late 2011 the applicant owners purchased their home, which is the subject of this proceeding, from the first and second respondent owner builders. In March 2012 they made an application to this Tribunal claiming there were defective building works ('the 2012 proceeding'). The 2012 proceeding was settled in August 2012 and Terms of Settlement entered into. On 26 June 2014 the owners made a further application to the Tribunal claiming rectification costs of $764,193 from the owner builders, the relevant building surveyor and the engineer who prepared the engineering drawings and computations.

2 The owner builders apply under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') for the proceeding to be dismissed because, they say, the claims made in this proceeding are the same as the claims made by the owners in the first proceeding. For the reasons which follow, the owner builders' application is partly allowed.

3 At the directions hearing listed to consider the owner builders' s75 application, the owner builders were self represented, their former solicitors having filed a Notice of Solicitor Ceasing to Act shortly before the application and supporting affidavit material were filed. The affidavits by the owner builders filed in support of the application were witnessed by their former solicitor.

4 The owners were represented by Mr Pumpa of counsel. The third and fourth respondents were represented respectively by Mr Tuohey, solicitor and Mr Lee, solicitor who did not make any submissions in relation to the s75 application.

5 The issues raised by the owner builders in support of this application were first raised by them in their Points of Defence dated September 2014 and filed on 13 October 2014.

SECTION 75

6 Section 75 of the VCAT Act provides:

> (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.
>
> (2) If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.

…

(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.

7 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[1] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243. One such principle is that, for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62:-
>
> > "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".
>
> …
>
> 34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

8 In *Smeaton v Accident Compensation Conciliation Service*[2], Deputy President Macnamara, as he then was, said at [34]:

> It is not appropriate to make a determination of summary dismissal under Section 75 if the matter is at all arguable or if the outcome of the proceeding turns in any way upon any contested piece of evidence depending, for instance, on credibility. [emphasis added]

9 Further, as I observed in *Wood v Calliden Insurance Ltd & Ors*[3] at [15]:

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[1] [2005] VCAT 306
[2] [2010] VCAT 1236

It must be remembered that in considering an application under s75 I am not required to consider or be satisfied as to the likely success of the Woods' claim. I am required to consider whether the allegations are *'frivolous, vexatious, misconceived or lacking in substance'*, in other words, whether they are doomed to fail. This does not contemplate a detailed consideration of the evidence. As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority* [2008] VCAT 402 at [15-17]:

> 15. …. I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course, and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.
> 16. There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. <u>There should not be a trial before a trial</u>. [emphasis added]

10 Therefore, where it is not entirely clear from the material before me whether certain of the owners' claims in this proceeding were or ought to have been included in the first proceeding, they have not been dismissed or struck out. I have dismissed those claims which were clearly included or clearly ought to have been included in the first proceeding.

THE RELEASE

11 The Terms of Settlement entered into on 24 July 2012 contain the following Release:

> 2. That upon receipt by the Respondents of these terms signed by the Applicant's solicitors:
>
> (a) the Applicants release the Respondents and the Respondents release each other from all claims arising out of the allegations specified in Points of Claim dated 30 March 2012 in VCAT Proceeding Number D278/2012 and as specified in the Applicants' Building Inspection Report of Peter Mackie dated 4 May 2012.
>
> (b) the settlement sum includes a full and final settlement of the Applicants' claim, costs, interest and any GST
>
> …

WHERE THERE HAS BEEN A PREVIOUS PROCEEDING

12 It is well established that owners cannot make claims for alleged defects which were apparent when they purchased their home[4], or which have been included in previous court or tribunal proceedings. The summary of the

[3] [2008] VCAT 1339
[4] *De Lutis v Housing guarantee Fund Ltd* [2004] VCAT 2544, *Beamish v Rosvoll* [2006] VCAT 440

relevant principles recently articulated by Senior Member Lothian in *Kapyapayar v Johns Const Vic Pty Ltd*[5] at [23-28]are helpful:

> ***Res Judicata***
>
> 23. Simply put, the principal (sic) of res judicata prevents a party from bringing the same claim more than once.
>
> 24. In its written submissions the Builder quoted the summaries by the Court of Appeal in *Shaw v Gadens Lawyers* [2014] VSCA 74 at [59]. The relevant part is:
>
> > *Res judicata*, or "cause of action estoppel", prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the nonexistence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.
>
> ***Issue Estoppel***
>
> 25. The principal (sic) of issue estoppel prevents a party from raising new claims that are founded on issues of fact that were necessarily determined between the parties on a previous occasion. It differs from res judicata in that the scope of its operation is not limited to the final conclusions of law reached in prior proceedings.
>
> 26. In *Shaw* the Court of Appeal said:
>
> > [T]he principal (sic) of issue estoppel is that a judicial determination directly involving an issue of fact or law disposes once and for all of that issue, so that it cannot afterwards be raised between the same parties or their privies.
>
> ***Anshun estoppel.***
>
> 27 Simply put, Anshun estoppel requires a party to raise all matters against the other party in litigation and if they do not do so, they will be prevented from making a later claim or raising a defence that should have been raised earlier.
>
> In *Shaw* the Court of Appeal said:
>
> > [T]he principal (sic) of Anshun estoppel prevents a party from later relying upon a claim or defence which it has unreasonably refrained from raising in earlier proceedings, being proceedings so closely connected with the later subject matter that it might reasonably have been expected that the claim or defence would have been raised in those earlier proceedings.

13 In relation to claims for defective building work, the owners are not prevented from making claims for items which have become apparent since the 2012 proceeding was settled. This was recently considered by Senior Member Walker in *Meier v Balbin*[6] where he said at paragraph 45:

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[5] [2015] VCAT 322
[6] [2015] VCAT 306

> It [s10 of the *Domestic Building Contracts Act 1998*] contemplates that an owner entitled to the benefit of a warranty might by agreement or instrument, remove or restrict the right to rely upon it in regard to some breach of which the owner is aware. If that should occur the section provides that such a release does not apply to a breach that was not known or ought reasonably to have been known to the owner to exist at the time the agreement or instrument was executed. If the contract were to be construed so that several items of defective workmanship amounted to a single breach, there would be no room for the operation of this section. The release of one breach would be a complete release because there could only be a single breach of the contract.

ARE THE CLAIMS THE SAME AS THOSE IN THE FIRST PROCEEDING

The claims in the first proceeding

14 The owners' claims in the 2012 proceeding are set out in Points of Claim dated 30 March 2012 ('the 2012 POC'). They claim the owner builders breached the contractual warranties including the warranties set out in s137C of the *Building Act 1993* which, by virtue of s137B, are implied into every contract of sale where an owner builder has carried out domestic building works.

15 I will refer to those claims made in the 2012 proceeding which are relevant to this application, in considering the owners' claims in this proceeding.

The claims in this proceeding

16 The owners claim that the owner builders have breached the warranties set out in the Contract of Sale, including the warranties set out in s137C of the *Building Act 1993*. Relevantly in paragraph 17 of their Points of Claim dated 26 June 2014 ('2014 POC') the owners provide the following particulars of the claimed defects:

> The concrete slab to the house has slab depths of less than the required 100mm to the living room, the pool room and laundry. The placement of reinforcement to the concrete slab does not comply with the requirements of the relevant Australian Standard – AS2870. …
>
> As a result of the incorrect placement of the reinforcement the electrical floor heating has been affected such that scorching of timberwork attached to the floor surface has occurred where the reinforcing, and as a consequence, the floor heating cable, is located too high in the slab.
>
> …
>
> Further to the defects identified in the CGE Report Mr Smith identifies the following defects:
>
> i. Cracking throughout the floor slab ranging in width between 1 to 3mm.
>
> ii. The floor slab has heaved and failed structurally.

iii. Floor level to living, dining, kitchen area has a deflection of 25mm, hogging at the kitchen area.

iv. Excavation for slab was performed out of level with concrete installed at or approximate level resulting in:

    i. Concrete slab to the West is only 50mm thick in parts with shallow reinforcement and under slab heating cabling with insufficient concrete cover;

    ii. Extra thickness to slab of up to 85mm to the East with very deep cover to reinforcing which has resulted in uncontrolled shrinkage cracking to the finished surface.

v. Excessive drape of reinforcing mesh indicating excessive spacing of bar chairs;

vi. Surface cracks are visible associated with cold joints in concrete;

vii. Concrete piers not installed as required to support the edge and internal beams;

viii. There is un-compacted fill greater than 600mm in depth;

ix. Edge beam structural depth is not at the required minimum and is set on un-compacted fill;

x. Settlement to the south side of the building has occurred with settlement of about 50% of the building expected to be ongoing;

xi. The dwelling is unstable and has heaved so as to pivot at the entry areas of the 2 adjacent wings;

xii. Stone wall to south of building constructed without an engineer designed wall now is hogging with heave of 32mm;

xiii. Hog of 40mm is observed in the fascia and gutter of the south wall;

xiv. Kitchen bench heaving by 7mm over 5m;

xv. Along south and east wall of the main building the external soil was at the same level as the internal floor finish;

xvi. No flashing installed to protect infiltration of moisture to load bearing walls;

xvii. No physical barrier to prevent termites or rot penetrating into load bearing walls;

xviii. Load bearing wall overhands concrete slab by 20mm in places with no flashing installed; and

xix. Slab has no step down to provide a natural barrier to moisture, pests or vermin entering the wall cavity.

The affidavit material

17 The owner builders' application is supported by affidavits by the first respondent, Timothy John Stout sworn 18 February 2015 and his wife, the second respondent, Kym Joanne Stout sworn 18 February 2015. Mrs Stout's affidavit does no more than confirm that the contents of her husband's affidavit about which she has personal knowledge are true and correct. The owners have filed affidavits in reply by Michael Humphrey Hill sworn 2 March 2015 and by his wife, Klara Maria Dawson-Grove sworn 18 February 2015 in which she confirms that the matters set out in Mr Hill's affidavit about which she has personal knowledge are true and correct.

18 Unfortunately the affidavit material is not particularly helpful. It is clear that there is considerable ill feeling between the parties. However, in considering a s75 application, I am not required, nor would it be appropriate, to consider evidence about the conduct of the parties since the owners purchased the home. I am simply required to consider whether the Points of Claim filed by the owners disclose an open and arguable case, and in the circumstances of this proceeding, whether the owners' claims were or should have been included in the first proceeding.

19 Similarly, the owner builders' assertion that they only settled the 2012 proceeding because of threats made to them by Mr Hill are irrelevant to the issues I must decide in considering the s75 application.

20 In his affidavit Mr Stout states at [23]:

> We were then surprised to receive the proceeding issued by the Owners in this current VCAT file. We believed and understood that on settlement of the 2012 VCAT proceeding we had settled all the claims of the Owners and not only the claims of which the Owners were aware of but also all claims of which the Owners ought reasonably to be aware of. Any claims that were not part of the 2012 proceeding ought to have been known to the Owners or their building consultants as there were numerous indications of the existence of those defects. [sic]

21 I will consider each of the items set out in the particulars to paragraph 17 of the POC, using the same numbering for ease of reference.

The slab defects

22 The owners say that a number of defects in the construction of the slab were identified following further investigations carried out after it was discovered during repairs to the under floor heating system that:

(a) the floor slab was only 50mm thick instead of the 100mm shown on the approved drawings; and

(b) the concrete cover to the steel reinforcing mesh was 10 to 15mm instead of the 25mm shown on the approved drawings.

23 In paragraph 17 of their 2014 POC they allege:

> As a consequence of the breach of warranties referred to in paragraph 16 above there are defects in the Works.
>
> **PARTICULARS**
>
> The concrete slab to the house has depths of less than the required 100mm to the living room, the pool room and laundry. The placement of reinforcement to the concrete slab does not comply with the requirements of the relevant Australian Standard – AS2870. …
>
> As a result of the incorrect placement of the reinforcement the electrical floor heating has been affected such that scorching of timberwork attached to the floor surface has occurred where the reinforcing, and as a consequence the floor heating cable, is located too high in the slab.
>
> …
>
> Further to the defects identified [by the expert who identified the slab issues] Mr Smith identifies the following defects…[which will be considered separately]

24 The owner builders contend that the owners ought reasonably to have known about these defects at the time of the 2012 proceeding. They contend that the owners would have discovered these defects if they had carried out the investigations recommended by their expert to identify the cause of the problems with the heating.

25 As I understand the owner builders' submissions, and Mr Stout's affidavit, they contend that had the investigations recommended by Mr Mackie been carried out to determine the cause of the alleged defects in the slab heating, that the owners would have been aware of the slab defects claimed in this proceeding at the time the 2012 proceeding was settled. Mr Stout states in his affidavit at paragraph 23.1

> On page 23 of the Peter Mackie report produced for the Owners in the 2012 proceedings in item 9 Mr Mackie identifies defects in the slab heating and states that an electrician ought to check the wiring connection and to determine the problem which required repair.

26 Mr Mackie states in his report dated 4 May 2012 ('the 2012 report') at [9]:

> Floor heating
>
> The Owner informed me that the electric floor heating located in the kitchen and living area does not work.
>
> Further, after investigation of this item I contacted Mr Lawrence from Flor Heating Repair who explained to me that there could be more than one problem. First locate the control switch on the wall for this area. The Owner tried to find this switch but was unable to locate it.
>
> He then explained that most of the problems occurred during construction and that there may be a break in the floor wiring. A standard call out and test to locate and repair faults would be

approximately $1000 per fault. According to his experiences there are usually three faults found.

The second common problem is the junction of the heating cables to the incoming power source. My inspection of the meter box revealed that there are signs of carbon deposits in this area which may be contributing to the problems.

Conclusion

Mr Lawrence Hill should be requested to inspect and determine the problems with the faulty floor hearing. If there are any obstructions to repair either the floor or wall materials there will be an extra cost.

27 In his cost estimates Mr Mackie allowed $3000 for this item:

> Lawrence Hill electrician to check wiring connection and continuity to determine problem. Repair 3 standard faults excluding Repair Floor Covering.

28 In his report dated 12 June 2012, prepared for the owner builders, Mr Lee observes that:

> the slab was warm under foot

and

> It would be expected if the slab was not working the polished concrete would have been cold.

29 In his 2012 report Mr Mackie does not seem to contemplate destructive testing, or for the slab to be scanned to determine the 'faults' with the slab heating. The cost he allows for investigation and repair of $1000 per fault for up to three faults is modest, although he indicates that if any obstructions were found necessitating repairs to the floor or wall material that this would be at an additional cost.

30 It seems the alleged defects in the construction of the slab were discovered by happenstance during rectification of the heating. On the material before me, it is not clear whether they would have been discovered if the owners had carried out the investigations recommended by Mr Mackie. Therefore, I am not persuaded that the owners ought reasonably to have known about the alleged defects in the construction of the slab at the time of settlement of the 2012 proceeding. They were entitled to rely on the expert evidence that the cost of identification and rectification of the 'usual' type of faults with in slab heating was modest.

The other alleged defects

(i) Cracking throughout the floor slab ranging in width between 1 to 3mm.

31 It is common ground that there were cracks in the slab when the owners purchased the home. Mr Stout deposes in his affidavit that before and after the Contract of Sale was signed, and before settlement, his wife personally showed the owners cracks in the slab which exceeded 1mm in width, and

cracks in the plaster walls. The owners deny they were shown the plaster cracks and in relation to the cracks in the concrete slab say they were assured by the owner builders that the cracking was typical of all polished concrete floors. Further, that the cracks have widened to 3mm+ since they moved into the home.

32 In my view it is irrelevant whether these were expressly discussed or not. The cracks were clearly visible at the time the owners purchased the house. However, I reject the suggestion by the owner builders that the owners should have carried out all possible tests to identify whether there were any significant issues with the slab. The extent of what, if any, testing might have been reasonable in 2012 is a matter for consideration by the Tribunal after hearing the expert evidence at the final hearing.

(ii) The floor slab has heaved and failed structurally

33 I am satisfied there are no similar allegations in the 2012 POC or the expert report relied on by the owners in that proceeding. I cannot be satisfied on the material before me that the owners ought reasonably to have known about any defects in the construction of the slab which would have caused these alleged defects when they settled the 2012 proceeding.

(iii) Floor level to living, dining, kitchen area has a deflection of 25mm, hogging at the kitchen area.

34 At paragraph 23.2 of his affidavit, Mr Stout states:

> The floor level to the living/dining/kitchen area is and was in 2012 visibly not perfectly flat in all areas.

35 In Mr Smith's 2014 report, this item discussed in paragraph 8.2 noting that paragraph 8 is headed 'Slab Hogging in Living/Kitchen/Dining Wing'. Therefore whether this has been caused by movement of the slab, or whether this is how the slab was constructed, is a matter to be determined by the Tribunal after considering all the expert evidence at the final hearing.

(iv) Excavation for slab was performed out of level with concrete installed at or approximate level [sic]

36 The owners allege this has resulted in:

(a) Concrete slab to the West is only 50mm thick in parts with shallow reinforcement and under slab heating cabling with insufficient concrete cover;

(b) Extra thickness to slab of up to 85mm to the East with very deep cover to reinforcing which has resulted in uncontrolled shrinkage cracking to the finished surface

37 This was not included in the 2012 POC or the expert report relied on in the 2012 proceeding. This item is related to the alleged slab defects discussed above, and whether the owners could or ought reasonably to have known about this item at the time they settled the 2012 proceeding is a matter to be

determined by the Tribunal after considering all of the expert evidence at the final hearing.

(v) Excessive drape of reinforcing mesh indicating excessive spacing of bar chairs;

38 This item was not included in the 2012 POC or the expert report relied on in the 2012 proceeding. This item is related to the alleged slab defects discussed above, and whether the owners could or ought reasonably to have known about this item at the time they settled the 2012 proceeding is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

(vi) Surface cracks are visible associated with cold joints in concrete;

39 This seems to be a duplicate of item (i).

(vii) Concrete piers not installed as required to support the edge and internal beams

40 This item was not included in the 2012 POC or the expert reports relied on in the 2012 proceeding. On the material before me and without hearing the expert evidence, I cannot determine whether this issue could or ought reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

There is un-compacted fill greater than 600mm in depth

41 This item was not included in the 2012 POC or the expert report relied on in the 2012 proceeding. On the material before me and without hearing the expert evidence, I cannot determine whether this issue could or ought reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

(x) Settlement to the south side of the building has occurred with settlement of about 50% of the building expected to be ongoing;

42 This item was not included in the 2012 POC or the expert report relied on in the 2012 proceeding. On the material before me and without hearing the expert evidence, I cannot determine whether this issue could or ought reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

(xi) The dwelling is unstable and has heaved so as to pivot at the entry areas of the 2 adjacent wings

43 This item was not included in the 2012 POC or the expert report relied on in the 2012 proceeding. On the material before me and without hearing the expert evidence, I cannot determine whether this issue could or ought

reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

(xii) Stone wall to south of building constructed without an engineer designed wall now is hogging with heave of 32mm

44 In the 2012 proceeding the owners claimed that the stone wall/fascia had not been grouted. The owners now claim that it was constructed without an engineer designed wall, and is now hogging with a heave of 32mm.

45 The question is whether the owners could have been or ought reasonably to have been aware of the current issues identified with the construction of the stone wall when they settled the 2012 proceeding. The owner builders' former solicitors instructed Tim Gibney, structural engineer, to review the reports prepared by the parties' experts for the 2012 proceeding, and to prepare a report:

> identifying visible superstructure distress while making particular note of the subfloor defects, adequacy of the condition of the slab on ground footing system.

46 In paragraph 7.1 of his report dated 25 November 2014, Mr Gibney states:

> It is not clear why Mackie did not further investigate the stone fascia wall which is now an issue.

47 Mr Gibney opines that in 2012:

> …the movement in the stone clad wall should have caused the engineer to take a series of levels along the stone tiled joints and along the southern edge of the slab floor in order to check the alignment of the floor adjacent to the wall.

48 Mr Lees in his report dated 24 September 2014, where he has prepared a table comparing the claims in this proceeding and the 2012 proceeding, states in relation to the stone wall:

> …there was significant construction relating to the construction of the wall in 2012. Any structural inadequacies would have been obvious at that time.

49 However, there is no mention in Mr Mackies' 2012 report of any movement in the stone wall. At paragraph 17 of his 2012 report he states:

> Stone Fascia
>
> There is a stone finish to the front of the home. The stonework is in panels of 1200mm x 650mm and have not been grouted or sealed. My inspection of the stonework revealed leaching of the glue and staining to the face of the stone. Further investigation found the panels were glued to blueboard and supported on shelf angles every 1200mm. It is undetermined if a primer was used to adhere the glue to the boards or if a waterproof membrane has been used.
>
> Conclusion

> To eliminate the possibility of water entering the building and staining the stone surface it would be good building practice to seal the joints with flexible sealant.

50 Whether there was any apparent movement in the stone wall in 2012, or whether Mr Mackie should have considered the structural issues with the stone wall in 2012, or whether the owners should have sought further expert advice in 2012 are matters for the final hearing when the Tribunal will have the benefit of having heard from the parties, and the experts.

(xiii) Hog of 40mm is observed in the fascia and gutter of the south wall;

51 This item was not included in the 2012 POC or the expert report relied on in the 2012 proceeding.

52 Mr Lees is equivocal in his 2014 report as to the cause of this and further states:

> If the slab has heaved as is claimed the variation in the gutter could become exaggerated.

53 On the material before me and without hearing the expert evidence, I cannot determine whether this issue could or ought reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the expert evidence at the final hearing.

(xiv) Kitchen bench heaving by 7mm over 5m

54 Mr Stout states at paragraph 23.3 of his affidavit that:

> The kitchen bench between the dining and the kitchen has one leg shorter than the other. Again this was very noticeable and evident at the time that the Owners inspected the premises before the auctions in 2012.

and that the owners took photographs of the home which he states clearly show:

> the existence of cracks in the slab, kitchen bench with a gap from the concrete floor and bench size.

It is not clear how Mr Stout knows what was shown by the photographs, allegedly taken by the owners before they purchased the property, as there has not yet been discovery in this proceeding.

55 On the material before me I am unable to make any findings as to whether this is the cause of this alleged defect. This will be a matter for the hearing. However, if the cause of this defect is as suggested by Mr Stout then this item ought to have been claimed in the 2012 proceeding.

(xv) Along south and east wall of the main building the external soil was at the same level as the internal floor finish;

56 At paragraph 5(1)(ii) of the 2012 POC the owners claimed:

> The height of the finished slab contravened the applicable Australian Standards and is defective.

And in paragraph 7(ii) of the 2012 POC:

> The finished height of the slab does not meet the requirements of the BCA Clause 3.1.2.3(B)(i)

57 At paragraph 23.6 of his affidavit, Mr Stout states:

> It was evident in 2012 that along the south and east wall of the main building the external soil was at the same level as the internal floor finish and this is referred to in the 2012 report of Mr Rob Lees on page 28.

58 In his 2012 report Mr Mackie states under the heading 'Gravel driveway and slab height' :

> …
>
> The second problem is the finished slab height. The Owners have taken several screw fixings out of the metal cladding to reveal the slab height in relation to the finished surface…

59 In his 2012 report under the heading 'Gravel driveway and slab height' Mr Lee states::

> It is agreed that at present the gravel driveway generally lacks the required fall away from the house and the freeboard between the top of the slab and the ground level is 45mm.

At page 28 of his 2012 report Mr Lees estimates the cost of regrading the gravel driveway, it is not clear to me whether this claim is the same as the claim made in the 2012 proceeding.

60 In his 2014 report Mr Mackie states under the heading 'Other Issues Observed in Site Investigation':

> Along the South & East Wall of the Main building, the external soil was at the same level as the internal floor finish.

61 In circumstances where it is unclear whether these claims are the same, this is a matter which can only be determined by the Tribunal having heard all of the expert evidence at the final hearing.

(xvi) No flashing installed to protect infiltration of moisture to load bearing walls

62 Claims for defective window flashing and defective roof flashings were included in paragraph 5(1)(vi) and (vii) of the 2012 POC. Furthermore, in his 2012 report Mr Mackie allows for the installation of missing window flashings and the removal and replacement of defective roof flashings.

63 Therefore I find this item was included in the 2012 proceeding and cannot be re-litigated in this proceeding. This claim is therefore dismissed.

(xvii) No physical barrier to prevent termites or rot penetrating into load bearing walls

64 In paragraph 5(i)(viii) of the 2012 POC the owners claim:

> There has been significant water damage to internal and external walls, including major decay and water penetration to the internal structural timbers (studs and noggins) and the bottom plates in the area around the fourth bedroom and adjacent bathroom at the property due to defective workmanship in terms of the installation of water proofing materials, which was done negligently so as to allow for ingress of water.

65 In paragraph 23.5 of his affidavit, Mr Stout states:

> On page 2 Item 5 of the 14 March 2012 Mackie report he recommends that a licensed pet inspector be engaged to inspect and report.

66 On page 19 of his 2012 report, under item 18, although discussing the timber deck, Mr Mackie recommends:

> Conclusion
>
> The Owner Builder of this property should provide paperwork to show that there has been [termite] protection provided as good building practice.

67 In paragraph 23.7 of his affidavit, Mr Stout states:

> Mr Peter Mackie was aware of the problem concerning the flashing to protect infiltration of moisture to load bearing walls as appears from photograph 6 on page 7 of the 4 May 2012 Mackie report and as appears from the conclusion starting on page 7 of the 4 May 2012 Mackie report. I recall Mr Mackie taking photographs of flashing in 2012 and complaining that flashing was rusting.

68 On page 7 of the 2012 report Mr Mackie states*:*

> Conclusion
>
> It can clearly be seen from the above photos that these items are defective [the fall in the gravel driveway, the finished slab height and the rusting of the bottom flashing which he says happens when the flashing is in constant contact with water] and the water may be entering the bottom plate after heavy rain. Lowering of the driveway must take place with the required fall away from the entire building to the required drainage outlet…

69 Mr Stout continues in paragraphs 23.8 and 23.9 of his affidavit:

> 23.8 Again, on page 2 Item 5 of the 4 May 2012 Mackie report he recommends that a licensed pest inspector be engaged to inspect and report. In any event we engaged Guardian Pest Control Pty Ltd and paid it to carry out termite treatment.
>
> 23.9 In relation to the allegation that there is no physical barrier to prevent termites or rot penetrating load bearing walls I refer to:

2012 proceeding:

5(f) The window flashings are defective

5(c) There is rusting to the bottom of the flashing to the corrugated metal cladding on the driveway side of the property due to the issues noted in paragraph 5(a0 and 5(b) above.

5(a) The levelling and surface draining of the gravel driveway contravenes the applicable Australian Standard and does not drain properly.

5(b) The height of the finished slab contravened the applicable Australian Standards and is defective.

5(g) The roof flashings are defective.

Further on pages 13 and 14 of the 4 May 2012 Mackie report he was aware of concerns about moisture penetrating load bearing walls. I further refer to the first paragraph on page 7 of the 4 May 2012 Mackie report.

70 On page 14 of the 2012 report Mr Mackie states:

Conclusion

Water penetration mainly occurs at joints, in particular at floor and wall junctions. Waterproofing barriers are required to prevent water entering adjoining constructions or rooms.

I cannot rule out the possibility of water entering from the driveway side due to the slab height and ponding of water.

71 This claim was clearly included in the 2012 proceeding and cannot be re-litigated in this proceeding and is therefore dismissed.

(xviii) Load bearing wall overhangs concrete slab by 20mm in places with no flashing installed

72 In paragraph 23.10 of his affidavit, Mr Stout states:

In Item 27 (xiii) (sic) the Owners claim that load bearing wall overhangs concrete slab by 20mm in places with no flashing installed. On page 6 of the 4 May 2012 Mackie report Mr Mackie alleges that: *"the problem with the poor slab height finish is all around the perimeter of the home"*.

73 I am not persuaded that this item and the 'poor slab height' identified by Mr Mackie in 2012 refer to the same alleged defect. This is a matter to be considered by the Tribunal after hearing from the experts at the final hearing.

74 On the material before me and without hearing the all of the evidence, including the expert evidence, I cannot determine whether this issue could or ought reasonably to have been known by the owners when they settled the 2012 proceeding. This is a matter to be determined by the Tribunal after considering all of the evidence at the final hearing.

75 Further, as explained to the owner builders during the directions hearing, the alleged defects in relation to the slab height identified in the 2012 report, and included in the 2012 proceeding, are not the same as the claims made by the owners in this proceeding concerning the thickness of the concrete slab.

(xix) Slab has no step down to provide a natural barrier to moisture, pests or vermin entering the wall cavity.

76 Mr Stout states at paragraph 23.11 of his affidavit:

> Again in relation to the claim made in 17(xix) that the slab has no step down to provide a natural barrier to moisture, pests or vermin entering the wall cavity Mr Mackie was aware of this problem as appears from his comments on page 6 of his 4 May 2012 report.

77 At page 6 of his 2012 report, Mr Mackie discusses the issues with the slab height. There is no mention of this particular issue. Therefore this is a matter to be determined by the Tribunal after hearing all of the expert evidence.

CONCLUSION

78 I will therefore dismiss the owners' claims set out in paragraph 17(xvi), and (xvii) of the 2014 POC. The owner builders' application under s75 is otherwise refused.

79 Although I have declined to strike out or dismiss a number of the claims made by the owners in the 2014 POC, the question of whether the alleged defects could or ought reasonably to have been known by the owners at the time they settled the 2012 proceeding are matters which will be determined by the Tribunal after hearing all of the evidence, including expert evidence at the final hearing.

DEPUTY PRESIDENT C AIRD