

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP42/2014

CATCHWORDS

Domestic building, s75 of the *Victorian Civil and Administrative Tribunal Act*1998, abuse of process, dismissal, strike out, res judicata, issue estoppel, Anshun estoppel, earlier case dismissed, possible movement since the earlier proceeding, earlier claim mistaken, *Onerati* principle.

APPLICANT	Mr Okkes Kapyapar
FIRST RESPONDENT	Johns Const Vic Pty Ltd (ACN: 089 600 555)
SECOND RESPONDENT	Excel Building Pty Ltd (ACN: 146 459 412)
THIRD RESPONDENT	Boral Pty Ltd (ACN: 082 448 342)
FOURTH RESPONDENT	Western Distributors Pty Ltd (ACN: 156 516 826)
FIFTH RESPONDENT	Westgate Bobcat Hire Pty Ltd (ACN: 074 164 088)
SIXTH RESPONDENT	Con Valenti Paving Pty Ltd (ACN: 102 012 457)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	4 February 2015
DATE OF ORDER	24 March 2015
CITATION	Kapyapar v Johns Const Vic Pty Ltd (Building and Property) [2015] VCAT 322

ORDERS

Having regard to s75 of the *Victorian Civil and Administrative Tribunal Act*1998:

- 1 I decline to dismiss the proceeding.
- 2 I strike out the Applicant's claim for defective brickwork, except for the alleged failure to bond the brick piers to the adjacent wall and for brickwork defects that were not obvious on 18 April 2013.

- 3 I strike out the Applicant's claim concerning defective or bowed plasterwork, except for defects that were not obvious on 18 April 2013.
- 4 These orders do not limit the Respondent's right to defend the claims against it on the basis that they should properly be characterised as res judicata, issue estopped or Anshun estopped.
- 5 Costs are reserved with liberty to apply.
- 6 **The proceeding is set down for directions before Senior Member Lothian at 9:30 a.m. on 7 May 2015 at 55 King Street Melbourne to make directions for the further conduct of the proceeding and to hear any submissions concerning costs of the directions hearings of 2 December 2014 and/or 4 February 2015 – allow 1 hour.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr O. Kapyapar in person
For Respondents	Mr K. Oliver of Counsel

REASONS

- 1 This decision concerns the first respondent -Builder's application for the applicant-Owner's claim against it to be dismissed under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act").
- 2 The Builder claims that this proceeding amounts to an abuse of process having regard to the Owner's claim in proceeding D361/2012 ("the first proceeding"). Dismissal is sought under the principles of res judicata, issue estoppel and/or Anshun estoppel.
- 3 The Owner's claim concerns an allegedly defective slab, brickwork and plasterwork.

HISTORY

Proceeding D361/2012

- 4 On 23 April 2012 the Owner commenced the first proceeding. The items claimed, as described in the points of claim received on 25 January 2013, included an allegedly defective slab requiring, on the Owner's assessment, demolition, and cracking bricks. There were other items claimed which are irrelevant to the items claimed in this proceeding.
- 5 In the first proceeding there were four expert reports before the Tribunal:
 - a report by Mr Karkut of the Victorian Building Commission, arising out of an inspection on 13 September 2011;
 - a report by Mr Mamone of Archicentre dated 6 March 2012 obtained by the Owner;
 - a report by Mr Lennon of the BSS Group dated 14 March 2013 obtained by the Builder; and
 - a report by Mr Henry Herzog of Henry Herzog Consulting Engineers Pty Ltd, dated 13 July 2012 obtained by the Owner.
- 6 There was also a letter from Mr Doug Shanks, Area Manager of Boral Bricks, to the Owner dated 20 October 2011. Mr Shanks said that the brickwork he inspected was not defective.
- 7 None of the Karkut, Mamone or Herzog reports referred to the allegedly defective slab. All referred to the brickwork. Mr Lennon reported on the brickwork and was the only expert to report on the concrete slab.
- 8 The proceeding was heard on 18 April 2013. The first order was that the application was dismissed for the reasons given orally at the hearing. Almost a year later, on 7 April 2014, the Owner wrote to the Tribunal seeking written reasons. The request was declined under section 117(2) of the VCAT Act.

Proceeding BP42/2014

9 On 11 July 2014 the Owner commenced this proceeding against the Builder and five other respondents. It came before me for directions on 23 September 2014 and on that occasion the Builder foreshadowed an application under section 75 or section 78 of the VCAT Act. I also gave the Owner liberty to withdraw his claims against the second to sixth respondents under certain conditions. At the directions hearing of 2 December 2014 I gave the Owner leave to withdraw proceedings against the second to sixth respondents and adjourned the Builder's application under s75 to 4 February 2015. The last sentence of Order 2 is:

The adjournment is granted to enable the applicant to seek legal representation.

10 Regrettably, the Owner was not legally represented on 4 February 2015. His claim is for a lot of money, it is technically difficult and legally complex. The Owner is urged to consider obtaining legal representation.

11 The Builder was represented by Mr K Oliver of counsel.

12 The Owner's claims can be summarised as:

- for the slab – movement and incorrect installation of reinforcement;
- defective internal walls and wall surfaces; and
- defective brickwork/cracking mortar between brick piers and the adjacent wall in the garage.

13 These claims are supported by a report from Mr Harry Liden of Simply Structural Pty Ltd, consulting structural engineers, dated 20 January 2014, and a letter from Mr Liden to the Tribunal dated 10 October 2014.

Section 75

14 The relevant parts of s75 of the VCAT Act are:

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.
- (2) If the Tribunal makes an order under subsection (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.
- ...
- (4) An order under subsection (1) or (2) may be made on the application of a party or on the Tribunal's own initiative.

- (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.
- 15 I am satisfied that an attempt by a person to re-litigate an issue or a whole proceeding that has been previously determined between the parties amounts to an abuse of process.
- 16 I accept the Builder's written submission that:
- The law in relation to section 75 of the VCAT Act is that the Builder must establish that the proceeding is obviously hopeless and bound to fail... It is a high threshold and the power should only be exercised with great care.
- 17 Mr Oliver concluded his submissions by saying that if I declined to make the orders sought by the Builder under section 75, it would make similar submissions at the conclusion of the final hearing of the substantive proceeding.
- 18 In order to make the determination sought by the Builder, I must be satisfied that the Owner's claim it is obviously hopeless or bound to fail without considering the merits of expert and lay evidence, which evidence would be given at the final hearing.
- 19 In refusing the Builder's application in part, I emphasise that I have made no findings about the strength or likely success of the Owner's claims. The effect of my decision is no more than to find the Owner's case is arguable.
- 20 As discussed below, I have not granted the whole of the Builder's application under section 75. In relation to those claims that I have accepted as being arguable, my decision does not prevent the Builder from relying on res judicata, issue estoppel or Anshun estoppel at the hearing, as submitted by Mr Oliver.

Dismiss or strike out?

- 21 As the learned author Pizer wrote:¹

There is an important distinction between an order dismissing a proceeding under s 75 of the VCAT Act and an order striking out a proceeding under that section. An order dismissing a proceeding brings the proceeding to an end without the possibility of reinstatement.

...

Put another way, an order dismissing a proceeding renders the tribunal functus officio whereas an order striking out that proceeding does not.

- 22 An order striking out part of the Owner's claim does not permit him to raise that part of the claim again without an order by the Tribunal. However

¹ *Pizer's Annotated VCAT Act, 4th edition* Jason Pizer, [VCAT.75.60]

strike out orders can be made to minimise the difficulties that can arise when part, but not all, of a claim is an abuse of process.

Res Judicata

- 23 Simply put, the principal 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 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 proceedings².
- 26 In *Shaw* the Court of Appeal said:

[T]he principal 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.
- 28 In *Shaw* the Court of Appeal said:

[T]he principal 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.

² *John Anthony Jeans v John Richard Bruce and Ors* [2004] NSWSC 539 [304]

ALLEGED DEFECTS

Slab

The first proceeding

- 29 The section of the Points of Claim in the first proceeding concerning the slab were:
- 1(i) Foundation or footings and Concrete slab: Our foundations or Concrete slab is defective. We believe builder has failed to comply the requirements of the approved drawings. Who has built the house with wrong concrete slab (slab on ground). It must be stiffened raft slab. House is moving we have many cracks.
 - (ii) What needs to be done: There is only way to demolish the house and build again.
 - (iii) How much it will cost of initial repair it: it will cost \$284,425.[sic]
- 30 Mr Lennon observed that there was no cracking to the exterior walls to indicate settlement of the footing system due to a footing failure, inadequate footings for the soil classification type or poor site work. He also observed that there were no cracks internally which might indicate uneven or excessive settlement of the building. He concluded that the dwelling slab was performing as expected and no defects were noted.
- 31 There was no expert evidence to support the Owner's claim that the slab had moved at the date the first proceeding was heard and determined, on 18 April 2013.

This claim

- 32 The Owner has again claimed that the slab is defective and the consequence is the house must be demolished and rebuilt. The amount now claimed is significantly greater because it includes additional consequential matters plus the cost of moving and accommodation for a year. The Owner is claiming \$485,732.60.
- 33 The relevant pleading in the Amended Points of Claim provides in part:

5. Alleged Defective Works:

(a) Incorrect installation of reinforcement.

- (i) the slab reinforcement was inspected by structural engineer Harry Liden:

“the reinforcement is not correctly located with slab thickness, the concrete slab reinforcement was exposed to two locations within the kitchen and meals area, both areas indicated the slab reinforcement was well below the required locations (45 mm – 90 mm concrete cover within a 100 mm slab thickness). It is defective at both areas.

These reinforcements must be located 20 mm from the internal surface of achieve adequate strength the integrity of the concrete slab, it is clearly outside the guidance of AS2870 – 1996, the slab performance is unknown and limited in strength. There is no guarantee regarding the future safe structural integrity of the current footing system".

- (ii) I was advised by structural engineer Harry Liden: "House is sitting on the clay soil, class H site can extend between 40 – 70 mm make cracks or footing failure because of wrong installation of reinforcement".

In structural engineer's opinion the rectification for compliance with AS2870 is not possible without removal of the current footing system, and reconstruct to within allowable reinforcement levels. We have to demolish the house and remove current footing system. [sic]

- 34 At page 11 of the report by Harry Liden there is a plan showing internal floor levels. This plan indicates that there is a difference in floor levels in the south-east corner in a single room of approximately 9 mm and the overall difference in the home is 11 mm.

- 35 Mr Liden said at page 3 of his report:

At this stage, footing movement is slight, also ground movement on "Class H" sites can extend between 40 – 70 mm. As the slab reinforcement has been lowered below the required levels, the flexural strength of the slab surface has been compromised. [Underlining added]

- 36 Mr Liden's basis for saying that the slab reinforcement is in the wrong position was that holes were drilled in two locations in the kitchen/meals area. It is noted that the Owner states in his written submissions: "The Answers of the Applicant for Submission of the Respondent" handed up on 4 February 2015, that these holes were drilled by him.

- 37 At paragraph 23 of its submissions, the Builder said:

The allegation in the 2014 proceeding of a failure to properly install the reinforcement in the slab is in substance the same allegation [of slab failure], albeit with different particulars.

- 38 In his letter to the Tribunal of 10 October 2014 Mr Liden said in part:

[The first proceeding] was in relation to an incorrect "footing type/foundation/concrete slab design/movement of footings and foundations" which was designed and constructed to a dwelling on the above property. This claim was dismissed at the time of review and to our understanding cannot be further assessed.

This further claim is not in reference to the above "footing type/foundation/concrete slab design/movement of footings and foundations", but rather the footings constructed by the builder, and its

non-compliance to the structural drawings or to [AS2870-1996]. This is a separate defect than the original submission.

...

This hidden defect cannot be observed through traditional investigation techniques or without intensive concrete scanning, or concrete reinforcement exposure. [sic]

Anshun estoppel

- 39 The Builder's written submissions are that the Owner could and should have raised the issue of whether the reinforcement was in the wrong position because:
- ... it was the excavation of the slab *by the Owner* which revealed the "defect" about which he now complains.
- 40 The Owner's written submissions³ are that *res judicata*, issue estoppel and Anshun estoppel do not apply because the defect he alleges (poorly placed reinforcing) is a separate defect, it is a hidden defect and it was found accidentally (while seeking the central beam in the slab) after the first proceeding.
- 41 During the hearing on 4 February 2015 Mr Oliver expressed concern that if the Owner were to be unsuccessful in this proceeding he might attempt to bring a third, based for example, on poor concrete strength. Such an outcome is against the interests of both parties, which is why it is important for them to take all reasonable steps to bring forward their whole claim, or whole defence.

Conclusion

- 42 In both this proceeding and the first proceeding the Owner claimed that the slab was defective, and in both he claimed that the same rectification was necessary (demolition and rebuilding). Nevertheless, as Mr Liden said in his letter of 10 October 2014, it is arguable that the claims are not identical.
- 43 Further, despite the apparent lack of evidence in Mr Liden's report of 20 January 2014 that the Owner's home is seriously defective, there is now expert evidence that could be consistent with some movement. Although alleged by the Owner, there was no expert evidence of slab movement in the reports filed in the first proceeding. The only relevant expert evidence was Mr Lennon's: that there was no movement. It is therefore possible that there has been movement since the hearing date of 18 April 2013.
- 44 The question of whether the Owner should have undertaken the investigations to identify every possible defect in the slab is one for the final hearing, when evidence will be available from experts for both parties about whether the defect now complained of is the same as the defect complained of in the earlier proceeding, or a different defect.

³ The Answers of the Applicant for the Submission of the Respondent – handed up 4 February 2015

- 45 If my characterisation of the history of the Owner’s claims is correct, then his first claim for a defective slab was mistaken. I am not satisfied that an earlier mistaken claim should necessarily prevent the Owner from bringing the later claim.
- 46 I have had the advantage of reading the decision of Senior Member Walker in *Meier v Balbin* of 20 March 2015, who considered the *Onerati* principle⁴ in the context of the legislation governing domestic building in Victoria. With reference to s10 of the *Domestic Building Contracts Act 1995* he said at paragraph 45:
- It contemplates that an owner entitled to the benefit of a warranty might, by an 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 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. [Underlining added]
- 47 If movement has become obvious since 18 April 2013, the Owner has not “unreasonably” failed to raise it.⁵ This is a matter that can only be determined after considering all the evidence given by both parties at the final hearing.
- 48 I decline to make an order to dismiss under s75, or to make any other order concerning the slab. The questions of whether the claim regarding the slab has already been determined, or should have been brought forward earlier, may still be argued at the final hearing.

Brickwork

The first proceeding

- 49 The section of the Points of Claim concerning brickwork was:
- 2(i) Cracking bricks: Builder has built a house under the standard bricks. More than 60% of the bricks are broken and still is breaking because of foundation moving and weak bricks. Bricks are also spalling and chipping off.
- (ii) What need to be done to finish or repair: If we replace all the bricks, mortar or bricks will be cracked again because foundation

⁴ *Onerati v Phillips Contructions Pty Ltd* (1998) 16 NSWLR 730, where Giles J adopted and applied the reasoning in *Conquer v Boot* [1928] 2KB 336 that only one cause of action – failure to build in accordance with the contract – arose out of a breach, and that the owner could not bring a further claim for defects discovered later.

⁵ *Siddalls v Housing Guarantee Fund Ltd* [2004] VCAT 701, *Graham v Marinovic & Anor* [2011] VCAT 2264

is moving. We can't solve this problem with out foundation. We have to correct foundation first. [sic]

- 50 I note that the bricks used are rustic in appearance.
- 51 Mr Karkut found that the cracks and marks on the bricks observed by him were normal characteristic features of the bricks and within acceptable tolerances. He found it was not defective and no work was recommended.
- 52 Mr Mamone expressed the view that there were a large number of cracks and some crazing and therefore the brickwork was defective, however he also said that he did not have the experience to know if the cracking and crazing was characteristic of the "masonry units".
- 53 Mr Herzog reported on the numbers of bricks per square metre that were observed to have cracks. He said:
- Although I doubt that your bricks have had their structural strength reduced by an amount that could make them structurally unsound, I think that your bricks according to the Victorian Building Commission document on Standards and Tolerances are defective.
- 54 Mr Lennon said that approximately one third of the bricks exhibited extremely small cracks but that the largest was less than .5 mm wide. It was his view that the bricks were not defective.

This claim

- 55 The relevant section of the Amended Points of Claim is:

(c) Defective brick work/cracking mortar between the piers and the adjacent wall in the garage

- (i) brickwork was inspected by structural engineer. He found out that majority of the brick have hairline cracking and cracks existed through the brickwork also bricks are spalled.

(ii) How to fix

I was advised by consulting engineer Henry Hertzog "if you decide to have the house rendered it is likely that cracks will occur and a render may come away with time". I must replace the bricks.

(iii) Total cost estimate

Replacement of the bricks: \$44,640

it is estimated building surveyor be included or timber structural members, external and internal lining.[sic]

- 56 Mr Liden said on page 2 of his report:

The external brickwork surrounding the entire building was also inspected for cracking and spalling. Sections of bricks have spalled, whilst hairline cracking can be seen to a majority of this brickwork. The garage brick piers also indicate cracking between the piers and the adjacent wall. These piers are not bonded.

57 In his written submissions the Owner said:

It is easy to see that changing cracks have come from 3 mm to 75 mm, one third to majority by the times, also cracks between the piers and the adjacent wall. [sic]

58 I am unsure what the Owner means by “3mm to 75mm” as the relevant part of Mr Liden’s report concerning brickwork was:

Sections of bricks have spalled, whilst hairline cracking can be seen to a majority of this brickwork.

Res Judicata

59 Except for the claim that the garage brick piers have cracked from the adjacent wall and the claim that brick cracking has worsened since the hearing in the first proceeding, I am satisfied that this claim is identical to the earlier claim.

60 I strike out the Owner’s claim for defective brickwork, except for the alleged failure to bond the brick piers to the adjacent wall and for brickwork defects that were not obvious on 18 April 2013.

Plasterwork

The first proceeding

61 There was no specific claim regarding plasterwork. However, as mentioned above, Mr Lennon reported with respect to the concrete slab:

No cracks were observed internally which would indicate any uneven or excessive settlement of the building.

62 The Owner provided a photograph in part 3 of his document dated 7 January 2013 which appears to show a crack beside a door architrave and also referred to Mr Karkut’s report “house is settling, shrinking and moving”. The Owner may not have done so deliberately, but these words have been slightly misquoted, and when taken in context give a different impression:

Observations revealed that the grout along the perimeter edges between the floor tiles and skirting boards had become dislodged throughout various areas of the dwelling due to general building settlement, shrinkage and movement. The gapping was generally noted to be of minor nature and less than 1 mm in width ...
[Underlining added]

63 There is no expert evidence that there were any serious matters concerning plasterwork at the date of hearing for the first proceeding on 18 April 2013.

This claim

64 The relevant section of the Amended Points of Claim is:

(b) Defective internal walls and wall surfaces (plasterboards)

(i) All the internal walls and wall surfaces (plaster boards) are defective, they were measured by structural engineer for vertical and horizontal alignment throughout the dwelling. A 1200 mm digital level indicated an 8.5 mm horizontal misalignment when placed vertically along several internal walls. Hence over a 2550 mm overall wall height the internal bowing of all frames is excessive. Also I measured all walls and wall surfaces are defective in house please see structural engineer Harry Liden.

(ii) **How to fix:** Structural engineer: "such walls cannot be levelled/straightened without removal of plaster lining, future footing movement may result in further bowing of walls". I got some advice from builders that there are hundreds of parts in wall it is hard to say before opening the plaster which parts would be changed also plaster boards have to be changed. The best way is the replacement of the walls.

(iii) **Total cost estimate**

Replacement of internal walls: \$30,720

priced by quantity surveyor and cost consultant. [sic]

Anshun estoppel.

65 If the walls are unchanged from their condition at the date of hearing of the first proceeding, any claim regarding them should have been brought then and may not be brought now.

66 I strike out the Owner's claim concerning defective or bowed plasterwork, except for defects that were not obvious on 18 April 2013.

COSTS

67 Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN