

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D59/2014

CATCHWORDS

Domestic Building Dispute – s.75 of the Victorian Civil and Administrative Tribunal Act 1998 – application to dismiss or strike out proceeding, application to amend application under s.127 of the VCAT Act, by substituting respondent; application to join party under s.60 of the VCAT Act.

APPLICANT	Judy McNiece
RESPONDENT	Vince Vella
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	28 October 2014
DATE OF ORDER	11 March 2015
CITATION	McNiece v Vella (Building and Property) [2015] VCAT 271

ORDERS

1. The respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. The applicant's application to substitute V & L Quality Home Improvements Pty Ltd (ACN 065 475 765) for Vince Vella as respondent is allowed.
3. **I direct the Principal Registrar to amend the applicant's application by substituting for Mr Vella the words "ATV Constructions Pty Ltd (formerly V & L Quality Home Improvements Pty Ltd) (ACN 065 475 765) as the respondent. The amendment is effective as and from 22 January 2014.**

- 4. The proceeding is listed for hearing on 1 May 2015 on 10:00 a.m. before Member Marks at 55 King Street Melbourne – allow 3 hours.**

MEMBER F. MARKS

APPEARANCES:

For Applicant

Mr S. Lowry of counsel

For Respondent

Mr Rewell, solicitor

REASONS

Background

- 1 The applicant, Mrs McNiece, claims that the respondent, Mr Vella has carried out building works that are defective. Mr Vella disputes this claim.

The parties' applications

- 2 Mr Vella, has applied for the dismissal or strike out of the proceeding pursuant to s 75 of the Victorian Civil and Administrative Tribunal Act 1998 (**VCAT Act**).
- 3 Mrs McNiece has applied for V & L Quality Home Improvements Pty Ltd (**the Company**) to be substituted for Mr Vella under s 127 of the VCAT Act or joined as a respondent under s 60 of the VCAT Act. Orders are sought to take effect from the date of filing the application on 22 January 2014.

The hearing

- 4 I heard the parties' applications on 28 October 2014. Mr S Lowry of counsel appeared for Mrs McNiece. Mr Rewell, solicitor, appeared for Mr Vella. The parties filed written submissions. Mrs McNiece and Mr Vella did not give evidence at the hearing.
- 5 In my reasons I have dealt first with Mrs McNiece's applications under s 127 and s 60 of the VCAT Act and then with Mr Vella's application under s 75 of the VCAT Act.

The history of the proceeding

- 6 The parties signed a building contract dated 10 July 2002 (**contract**). The question for determination is whether Mr Vella signed the contract in his own capacity or on behalf of the Company. The contract named the builder as ATV Constructions and gave its Australian company number (**ACN**) as 065 475 765. The Company summary shown on the ASIC website shows that the owner of that ACN is now ATV Constructions Pty Ltd, formerly named V & L Quality Home Improvements Pty Ltd.
- 7 Mr Vella has been the sole director of the Company since 27 July 2007. Between 30 June 1994 and 27 July 2007 Mr Vella and his wife, Lorraine Marie Vella were directors of the Company.
- 8 On 24 March 2004 an Occupancy Certificate was issued. Therefore the 10 year limitation period under s 134 of the Building Act 1993 (*Building Act*) expired on 23 March 2014.
- 9 On 22 January 2014 Mrs McNiece commenced this proceeding. Her application described the respondent as "builder" and "company". She

named the respondent as ATV Constructions and included the Australian business name (ABN) 88065475765 which is the ABN of the Company. The address given for ATV Constructions was 34B Ninth Street, Eden Park, 3757. The actual address of ATV Constructions and the Company, at that time, was 34 Ninth Avenue, Eden Park, 3757.

- 10 On 24 January 2014 the Tribunal wrote to Mrs McNiece to seek further information about the respondent. The letter stated in part:

"Who are you making this claim against "(they are the Respondent)".
The Respondent can be a company, a business or a sole trader. The Respondent can also be an individual.

If the Respondent is a Company-

- (a) You need to supply details of the registered office and an Australian company number (ACN). A company search can be obtained at the Australian Securities and Investment Commission...

If the Respondent is a registered business -

- (b) A business extract naming the proprietors and the status of the business MUST be provided. A company search [sic] can be obtained at the Australian Securities and Investment Commission...

NB- the screen information from the Australian Securities and Investment Commission Internet site is not sufficient as it only provides an ABN number and not the proprietors' names."

- 11 On 14 February 2014 the Tribunal received an undated letter from Mrs McNiece. She did not provide a business name search or a company search but stated:

"In reply to your letter dated 24 January 2014 I advise that the respondent is Mr Vince Vella, 20 Gilding Avenue, Eden Park 3757. Mr Vella is an individual. He previously owned ATV Constructions."

- 12 On 21 February 2014 the Tribunal sent a letter to the parties giving them notice of the hearing listed for 3 April 2014. The letter to Mr Vella enclosed a copy of the application which showed the respondent as ATV Constructions and included the ABN of the Company.

- 13 On 3 April 2014 Mrs McNiece appeared for herself. As there was no appearance by Mr Vella I ordered that the hearing be converted to a directions hearing and made orders for the further conduct of the proceeding. I gave Mrs McNiece leave to amend her application to include a claim for defective carpet. I fixed the matter for hearing on 4 August 2014.

- 14 By letter dated 1 July 2014 Mrs McNiece applied to the Tribunal to increase her claim to \$15,897. On the same day an ASIC extract of the Company was filed with the Tribunal.

15 On 4 August 2014 the proceeding came back before me for hearing. Mr Vella was represented by Mr Rewell, who foreshadowed an application to strike out or dismiss the proceeding under s 75 of the VCAT Act. I adjourned the application for hearing to 28 October 2014.

APPLICANT'S APPLICATIONS

Should the Company be substituted for Mr Vella?

Section 127 of the VCAT Act

16 Mrs McNiece has applied for the Company to be substituted for Mr Vella as respondent under s 127 of the VCAT.

17 Section 127 (1) of the VCAT Act provides:

"At any time, the Tribunal may order that any document in a proceeding be amended."

18 The document that Mrs McNiece has sought to amend is her application, whereby the Company is substituted for Mr Vella as respondent.

19 Mr Lowry submitted that the Tribunal may take into account whatever factors it considers relevant. They may include factors which courts take into account in determining whether or not to amend claims and that the power is discretionary and unrestricted (*Yim v Victoria* [2000] VCAT 821).

20 In addition to the factors submitted by Mr Lowry, the Tribunal may also take into account factors which include any prejudice that a party may suffer if the amendment is allowed or refused.

21 Mr Lowry submitted that the Tribunal's order for substitution should be effective from the date on which Mrs McNiece commenced her proceeding. He submitted that at all times Mrs McNiece intended to bring a claim against the builder.

22 Mr Lowry also submitted that Mr Vella was estopped from claiming that he was not the builder or the correct respondent in this proceeding. He submitted that in 2005, Mrs McNiece filed proceedings against ATV Constructions which were settled with Mr Vella and Mrs McNiece signing terms of settlement.

23 Mr Lowry submitted that as Mr Vella had signed the terms of settlement, the parties had proceeded on the basis that it was adequate and correct for ATV to be bound by the terms of settlement. Mr Lowry further submitted that the parties also proceeded on the assumption that they were responsible for any order made by the Tribunal against them.

24 Mr Lowry's submission begs the question as to the capacity in which Mr Vella signed the terms of settlement. As the terms of settlement

were not in evidence any findings of fact at this stage would be premature.

- 25 Mr Rewell submitted that Mrs McNiece always intended to bring a claim against Mr Vella in his personal capacity because he provided the hands and mind that did the work for the Company. He submitted that this was not a case of an error in description or a mistake in the name of the party but a case where Mrs McNiece sought to change the identity of the party. He relied on *Tran v Ibrahim and Ors* [2014] VSC 264 at [24] and *Bridge Shipping Pty Limited v Grand Shipping S.A. and anor* (1991) 173 CLR 231.
- 26 Mrs McNiece originally issued her application filed on 22 January 2014 against ATV Constructions. Rules of court provide that an applicant may sue a firm in its business name. If this is done, an applicant is not suing the business name but rather, the owner carrying on business under that name. In this case Mrs McNiece did not file proceedings against a non-existent party but against the owner of ATV Constructions.
- 27 I agree with the comments of and principles set out by Senior Member Walker in *Riga v Peninsula Home Improvements* [2000] VCAT 56 (*Riga*) in relation to suing a business name and to the importance of the intention of the party filing an application against a respondent. Senior Member Walker said at [16]:
- "What the Applicants are seeking to do here is not the joinder of any other party but rather, to replace a business name in the title to the application with the name of the entity that that business name represents. That does not involve the replacement of a party with another party."
- 28 Although unlike in this case, *Riga* dealt with an application to amend the name of the respondent where final orders had been made (s119 of the VCAT Act), they remain relevant. Here Mrs McNiece seeks to substitute one person for another entity, the Company, having originally issued against ATV Constructions.
- 29 I am satisfied that Mrs McNiece intended to bring a claim against the builder and not against Mr Vella personally. Her application was originally filed against ATV Constructions who I find she first understood to be the builder. After correspondence with the Tribunal she then changed the respondent to be Mr Vella who I find she believed to be the previous owner of ATV Constructions.

Can the Tribunal make a retrospective order under s 127?

- 30 Mr Lowry submitted that if I found that Mrs McNiece intended to bring a claim against the builder, whoever that may be, I should make an order substituting the Company for Mr Vella, effective as at 22 January 2014, being the date Mrs McNiece commenced proceedings.

- 31 Mr Rewell agreed that s127 of the VCAT Act allows the Tribunal to substitute a party to the proceeding. However, he submitted that the power of an amendment under s 127 of the VCAT Act cannot be used to outflank an absolute time limit (*Di Dio Nominees Pty Ltd v Commissioner of the State Revenue* (2004) VAR 285 at [66]).
- 32 Mr Rewell submitted that the Tribunal should dismiss the application because of the operation of s 134 of the *Building Act*. He submitted that under s 134 an owner must bring a claim for defective workmanship within 10 years from the date of the certificate of occupancy. He submitted that as the certificate of occupancy was dated 24 March 2004, any claim now filed against the Company was out of time and statute barred.
- 33 Section 134 of the *Building Act* commences with the words:
"Despite any thing to the contrary in the Limitation of Actions Act or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy certificate in respect of the building work...."
- 34 By way of response, Mr Lowry submitted that s 127 of the VCAT Act allowed the Tribunal to make orders which were effective as at the date of commencement of the proceedings. He submitted that I did not have to take into account s 134 of the *Building Act* in determining whether to make an order for substitution under s 127 of the VCAT Act in this case because the proceeding had been commenced before the limitation period expired under s 134.
- 35 Mr Lowry also submitted that the Tribunal was bound by the rules of natural justice and should take into account the fact that, at the relevant time, Mrs McNiece was a self represented party.
- 36 I am satisfied that I have the power under s 127 of the VCAT Act to make an order substituting the Company for Mr Vella as a respondent in this proceeding, effective as at 22 January 2014, for the following reasons.
- 37 First, on 22 January 2014 Mrs McNiece commenced proceedings against the builder, ATV Constructions. In her application she referred to a company being a respondent and included the ABN of the Company and its address.
- 38 Second, in suing ATV Constructions, Mrs McNiece was not suing the business name but rather the Company, as owner carrying on business under that business name at the relevant time. Mrs McNiece then changed the respondent to Mr Vella. What Mrs McNiece is seeking to do here is to substitute the Company for Mr Vella, as the builder, and who, as submitted by Mr Rewell, carried out the building work under the contract.

- 39 Third, Mrs McNiece commenced proceedings against the Company, as owner of ATV Constructions at the relevant time, before the limitation period expired under s 134 of the *Building Act*.
- 40 Fourth, the Tribunal is bound by s 98 of the VCAT Act and the rules of natural justice. However, the Tribunal is not bound by any practices or procedures applicable to courts of record, except to the extent that the Tribunal has adopted those practices and procedures. That is, the Tribunal is not bound by the Supreme Court Rules which deal with substitution of a party.
- 41 Fifth, Mrs McNiece was self represented when she commenced proceedings and did not have the benefit of legal advice.
- 42 Finally, I find that the Company will not suffer any prejudice if it is substituted for Mr Vella as Mrs McNiece commenced proceedings against the Company, being the owner of ATV Constructions at the relevant time, prior to the expiration of any limitation period.
- 43 I therefore find that Mrs McNiece has succeeded in her application under s 127 of the VCAT Act to substitute the Company for Mr Vella, such order being effective as at 22 January 2014.
- 44 In the light of my finding in favour of Mrs McNiece under s 127 of the VCAT Act, it is unnecessary for me to deal with Mrs McNiece's joinder application under s 60 of the VCAT Act.
- 45 In the light of my allowing the Company to be substituted for Mr Vella as respondent, effective as and from 22 January 2114, I must dismiss Mr Vella's application under s75 of the VCAT Act.

Orders

- 46 I will make orders allowing Mrs McNiece's application to amend the application by substituting the Company for Mr Vella under s 127 of the VCAT Act, such order to be effective as and from 22 January 2014. I will also make orders dismissing Mr Vella's application under s 75 of the VCAT Act and order that the proceeding be listed for hearing before me.

MEMBER F. MARKS