VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D638/2004**

CATCHWORDS

Appeal against decision of insurer – negotiated resolution between Respondent owner and Applicant builder – leave to withdraw granted to Applicant builder – application for summary dismissal under s.75 of the *Victorian Civil and Administrative Tribunal Act* 1998 by insurer – leave to withdraw granted to Applicant under s.74 – application under s74(2) for costs by First Respondent insurer

[2005] VCAT 751

APPLICANT	Philtom Developments Pty Ltd t/as Lynch Homes
RESPONDENT	Vero Insurance Limited
SUFFICIENTLY INTERESTED PARTY	Fay Armitstead
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	19 April 2005
DATE OF ORDER	27 April 2005

ORDER

1. The proceeding as between the Applicant and the First Respondent is withdrawn.

2. The Applicant and the First Respondent shall each pay their own costs of this proceeding.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr N Lynch, Director
For Respondent	Mr P Dobeli, Solicitor
For Sufficiently Interested Party	Ms F Armitstead, via telephone

REASONS

1. By application dated 22 September 2004 the Applicant ("the builder") sought to review the decisions of the First Respondent ("the insurer") dated 26 August 2004 and 17 September 2004 on the grounds that the insurer's decisions are wrong in law and/or fact. At the request of the insurer, the owner, Ms Fay Armitstead, was subsequently joined as a party to the proceeding at a directions hearing on 3 November 2004.

2. On 25 October 2004 the insurer's solicitors wrote to the principal registrar seeking an early hearing to determine the threshold issue of whether the alleged decisions of 26 August 2004 and 17 September 2004 were in fact decisions, or whether the only decision made by the insurer was made on 9 December 2003. If the only decision was made on 9 December 2003, the builder would need to seek an extension of time to appeal that decision. At the directions hearing on 3 November 2004, I ordered that the proceeding be referred to mediation with liberty to the insurer to renew the application for an earlier hearing on the threshold issue should settlement not be achieved.

3. Mediation was held on 10 November 2004 and was adjourned to 27 January 2005. On 24 January 2005, the builder's solicitors wrote to the Tribunal advising:

> *"We wish to inform the Tribunal that the parties are currently undergoing settlement discussions involving the purchase of the property by my client from the interested party. To this end it is likely the parties will write to you seeking an adjournment of the mediation. At this stage there is some disagreement as to what length of time for adjournment of the mediation would be appropriate "*

4. The mediation date of 27 January 2005 was subsequently vacated and the mediation adjourned to 24 February 2005. The mediation was further adjourned by consent of all parties to 15 March 2005. By letter dated 8 March 2005 Ms Armitstead advised the Tribunal that the matter had been resolved satisfactorily for her, and on 9 March 2005 the builder and insurer provided Minutes of

Consent Orders requesting that the mediation be vacated and a directions hearing be scheduled.

5. On 15 April 2005 the insurer filed an affidavit in support of an application pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act* 1998. It is helpful to set out some extracts from that affidavit:

> *"9. On 11 March 2005 I had a telephone conversation with Mr Neville Lynch, who I understand is a director of the Applicant builder. Mr Lynch informed me that he had entered into a contract of sale with the sufficiently interested party and that settlement of the contract of sale occurred "last Monday" or on 7 March 2005. Mr Lynch also informed me that the Applicant entered into a release with the owner. I informed Mr Lynch that if the Applicant wished to withdraw the proceeding, the Applicant would be liable for the Respondent's costs.*
>
> *10. By letter dated 11 March 2005, I wrote to the Applicant. The letter referred to the contents of the telephone conversation I had with Mr Lynch referred to at paragraph 7. The Applicant was informed that the Respondent would consent to the VCAT granting the Applicant leave to withdraw the proceeding on condition that the Applicant pay the Respondent's costs of the proceeding.*
> *…*
>
> *11. By letter dated 5 April 2005, I wrote to the Applicant and again requested a copy of the release entered into between the Applicant and the owner. The Applicant was also invited to provide its position regarding the payment of the Respondent's costs. The Applicant was informed that if no response was received regarding the issue of costs, then an application would be made at the directions hearing on 19 April 2005 for the Applicant to pay the Respondent's costs of the proceeding...*
>
> *12. I humbly request an order from this honourable Tribunal pursuant to section 75(1) of the act, summarily dismissing the proceeding as against the Respondent on the basis that it is frivolous, vexatious, misconceived and lacking in substance.*
>
> *13. If an order is made as requested at paragraph 12, I further humbly request this honourable Tribunal to make an order for costs pursuant to section 75(2).*

Withdrawal of Proceedings

6. At the directions hearing on 19 April 2005 Mr Dobeli, solicitor, appeared on behalf of the insurer and confirmed that his client was seeking summary dismissal of the proceedings pursuant to s.75 of the Act. Mr Lynch, director, of the builder who confirmed the subject property had been purchased from Ms

Armitstead (who also confirmed this by telephone), and that he wished to withdraw the application. It is helpful to set out s.74 of the Act in full:

> **74. Withdrawal of proceedings**
>
> (1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.
>
> (2) If an applicant withdraws an application or referral—
>
> (a) the applicant must notify all other parties in writing of the withdrawal; and
>
> (b) the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding; and
>
> (c) the principal registrar may refund any application fee paid by the applicant; and
>
> (d) the applicant cannot make a further application or request or require a further referral in relation to the same facts and circumstances without the leave of the Tribunal.
>
> (3) Sub-section (2)(a) does not apply if the principal registrar notifies the other parties in writing on behalf of the applicant.

7. In my view, generally where an applicant seeks to withdraw a claim, it is inappropriate for another party to refuse to consent to such withdrawal and instead seek summary dismissal under s.75. I therefore granted the builder leave to withdraw the application and confirmed with Mr Dobeli that the insurer was seeking its costs pursuant to s.74(2) of the Act.

Costs

8. Mr Dobeli submitted that his client was entitled to an order for costs in its favour as it was apparent that the builder's case was without merit and lacking in substance. He referred to the lack of particulars and detail on the application form and also noted that the builder had failed to provide any material in support of its application. However, this proceeding was referred to mediation by order of the Tribunal and no orders were made in respect to the furnishing of additional material prior to that mediation. The attitude of the insurer in this case is surprising and, in my view, unreasonable especially given Mr Dobeli's confirmation that the usual approach of the insurer where a builder or an owner, as the case may be, appeals a decision of the insurer, is to encourage the owner

and the builder to reach a resolution between themselves. This is precisely what occurred in this case. Mr Lynch said that following the mediation the builder had three choices:-

- To engage an expert to advise on the necessary scope of works and carry out those works;
- To engage an expert and attempt to achieve a financial resolution;
- To buy back the house.

9. The builder chose the third of these options and made a commercial decision to purchase the house. This cannot be regarded, of itself, as validation of the insurer's decision. Mr Lynch said the decision to purchase the house was made notwithstanding the builder had estimated the cost of repairs at approximately $8,000 to $10,000. Mr Dobeli responded with an indication that quotations obtained by the insurer were approximately $64,000 and another of approximately $87,000. However, again, in the absence of an adjudication on the merits, this is not conclusive.

10. The simple fact that the owner and the builder reached a resolution in this matter is not indicative that the builder's appeal was totally without merit or that an order for costs should be made under s109(2) or s74(2). I note that s.109 of the *Victorian Civil and Administrative Tribunal Act* makes it clear that each party should bear their own costs subject to the exercise of a discretion by the presiding member under s.109(2) having regard to the provisions of s.109(3). Although I accept that the power set out on s74(2) of the Act is a separate power to that conferred under s.109 it would not, in my view, be in the spirit of the *Domestic Building Contracts Act* 1995 and the *Victorian Civil and Administrative Tribunal Act* 1998 to make an order for costs in circumstances where the owner and the builder reach a resolution at an early stage. There is no evidence of disadvantage to the insurer by the commencement of these proceedings. Further, in the absence of any adjudication on the merits, it cannot be said that the application had no chance of success, or that any application for an extension of time, had it been made, would have failed.

11. Further, I refer to my earlier decision in *Brown v Allianz Australia Insurance Limited* [2004] VCAT 1748 (7 September 2004). In that case the parties negotiated a settlement in substantially the same terms as the original decision of the insurer. Application was made by the owners for their costs of the successful enforcement of the insurance claim which was rejected the insurer also applied for its costs of what it submitted was an unnecessary application. Of particular relevance are my comments at paragraph 12:

> *"…I accept Mr Moshidis' submission that it would set an unfortunate precedent if costs were to be awarded to a party that appeals a decision of the insurer, but ultimately agreed to a resolution which was substantially the same as the insurer's original decision, and actively participated in enabling the works as originally directed by the insurer to be carried out by the builder. However, I am also of the view it would set an unfortunate precedent if a party who appealed a decision of an insurer and then entered into a negotiated settlement in substantially the same terms as the original direction, without the assistance of the Tribunal, were ordered to pay the insurer's costs of the proceeding."*

12. I will therefore order that the Applicant and the Respondent each pay their own costs of this proceeding.

DEPUTY PRESIDENT C AIRD