Daniel & Eva Presser v Ocean View Properties P/L ; One Beach Street P/L ; Grocon P/L; Airthrust Parquetry Flooring P/L & Katsalidis P/L

Catchwords : Contract – Application for a stay of proceeding pursuant to s.57 of the *Domestic Building Contracts Act* 1995 - Sale by developer of penthouse apartment in residential complex – Defective parquetry flooring – Subsequent Settlement Agreement between purchasers and developer for developer to rectify outstanding defects – Proceeding by purchasers against developer for breach of Settlement Agreement – Addition of parties, including builder, sub-contractor and architect – Whether proceeding was an *"action arising wholly or predominantly from a domestic building dispute"* – ss.3, 5, 54(1) and 57 of the *Domestic Building Contracts Act* 1995.

JUDGMENT : HIS HONOUR JUDGE HASBERGER : Supreme Court of Victoria at Melbourne, Commercial & Equity Division. Building Cases List. 12th April 2006

The Application

1 This is an application by Grocon Pty Ltd ("Grocon"), the fourth party and second third party, to stay this proceeding pursuant to s.57 of the *Domestic Building Contracts Act* 1995 ("the Act") on the basis that it is an "*action arising wholly or predominantly from a domestic building dispute"* (s.57(1) of the Act). Grocon submitted that pursuant to s.57(2) of the Act the proceeding must be stayed because the action could be heard by the Victorian Civil and Administrative Tribunal ("the Tribunal") and the Court had not heard any oral evidence concerning the dispute itself. The application was supported by an affidavit sworn on 9 March 2006 by Steve Coker, a Project Manager employed by Grocon. Although other possible discretionary grounds for staying the proceeding were mentioned in Mr Coker's affidavit, the argument before me, as I understood it, was limited to the ground set out above.

Background

2 In their statement of claim indorsed on the Writ filed on 25 May 2005, the plaintiffs, Daniel Presser and Eva Presser, pleaded that by an agreement in writing dated 16 November 1999 made between them and the defendant, Ocean View Properties Pty Ltd ("Ocean View") ("the Construction and Sale Agreement"), Ocean View agreed to develop and sell to them the land known as Unit 182, 95 Rouse Street, Port Melbourne ("the Property"), and they agreed to purchase the completed Property, for the sum of $3,200,000. The Property was to be a penthouse in a development known as HM@S Beach Apartments ("the Complex").

3 The plaintiffs pleaded that the Construction and Sale Agreement included terms that:

(a) Ocean View would enter into a major domestic building contract (within the meaning of the Act) with a builder for the Property Works in accordance with the Plans and Specifications (Special Condition 5.1);

(b) Ocean View and the plaintiffs had agreed upon a separate Schedule of Finishes, Purchasers' Requirements and the preliminary layout, all of which were annexed as Annexure G (Additional Special Condition 3.1);

(c) the floors in the entry, living room, dining room, study, hallways, stair and bedrooms ('the Parquetry Flooring') would be parquetry, Tallowwood 19 mm laid in du Maurier pattern 500 x 500; diamond inlay pattern to be solid black epoxy with borders in Tallowwood with black epoxy trim, available Greensborough Floors, laid on Enkasonic acoustic underlay with 2 layers ply to manufacturer's detail (Annexure G);

(d) the price included the cost of all of the items comprising the Purchasers' Finishes and Layout (Additional Special Condition 3.2);

(e) notwithstanding anything to the contrary contained in the Construction and Sale Agreement, Ocean View expressly acknowledged that the plaintiffs would not be obliged to settle the purchase unless and until the plaintiffs' architect had issued a certificate ("the completion certificate") stating that in his opinion the Property Works, both in relation to the Property and (insofar as it affected the Land) in relation to the Land, had been completed in accordance with the plans and specifications and that the penthouse and the carparks and storage rooms, comprising the Land, were complete in all respects and were able to be occupied by the plaintiffs and/or their nominees without any further work being required to be performed thereto (Additional Special Condition 5.1);

(f) Ocean View would give the plaintiffs seven days' notice of the date upon which it considered that the Property Works would be completed in accordance with the relevant plans and specifications; that within seven days of that date, the plaintiffs' architect must issue the completion certificate or provide written reasons why it should not be completed and specifying what Property Works had not been completed; and that in the event that the plaintiffs' architect supplied written reasons for his refusal to grant the completion certificate within the stipulated period, Ocean View agreed to negotiate in good faith in relation to rectifying and remedying any of the outstanding matters or to have the matter referred to expert determination (Additional Special Condition 5.3).

4 In paragraph 5 of the statement of claim the plaintiffs pleaded that on a proper construction of the Construction and Sale Agreement, Ocean View was required to carry out the works described in Annexure G.

5 The plaintiffs then pleaded that on 24 October 2001 the plaintiffs' architect provided written reasons why the completion certificate should not be issued. The plaintiffs further pleaded that:

(a) on 31 January 2002 the plaintiffs and Ocean View entered into an agreement to complete the purchase of the Property ("the Settlement Agreement");

(b) the Settlement Agreement included terms that

(i) settlement would occur on 1 February 2002;

(ii) Ocean View was obliged to remedy a specified list of outstanding defects, including the defects existing in the parquetry floor; and

(iii) if there were any defects or issues occurring in relation to the parquetry floor on or before 31 January 2003, Ocean View was obliged to remedy such defects either as might be agreed or failing agreement as might be determined by an expert to be agreed between the parties and appointed for the purpose;

(c) on 1 February 2002 the plaintiffs paid the balance of the purchase price less an amount of $100,000, which was paid to a stakeholder, and accepted title to the Property.

6 In paragraphs 12 to 17 of the statement of claim the plaintiffs pleaded that:

(a) on or before 31 January 2003 defects remained in, or issues had occurred in relation to, the parquetry floor;

(b) in February 2004 Ocean View and the plaintiffs jointly engaged Professor Robert Milner as an expert to determine certain issues in relation to the parquetry flooring;
(c) by a report dated 7 April 2004 Professor Milner concluded that the parquetry floor was defective;
(d) in breach of the Settlement Agreement, Ocean View had failed and refused to remedy the parquetry flooring; and
(e) in consequence the plaintiffs had suffered and would suffer loss and damage.

7 In paragraph 18 of the statement of claim the plaintiffs pleaded that, alternatively to paragraphs 12 to 17, in breach of the Construction and Sale Agreement the installation of the parquetry floor had not been carried out by Ocean View in a proper and workmanlike manner using reasonable care and skill and using good and proper materials.

8 By its defence filed on 1 July 2005, Ocean View denied that on a proper construction of the Construction and Sale Agreement it was required to carry out the works described in Annexure G (as alleged in paragraph 5 of the statement of claim) and further denied that in breach of the Construction and Sale Agreement the installation of the parquetry floor had not been carried out by it in a proper and workmanlike manner, using reasonable care and skill or using good and proper materials (as alleged in paragraph 18 of the statement of claim). Ocean View further denied that on or before 31 January 2003 defects remained in, or issues had occurred in relation to, the parquetry floor; or that Professor Milner's report had concluded that the parquetry floor was defective.

9 On 1 August 2005 Ocean View filed a Third Party Notice against One Beach Street Pty Ltd ("Beach Street"), in which it alleged that by an agreement made by deed dated 30 December 1999 between Ocean View, Beach Street and the security agent ("the Security Sharing Deed"), Beach Street agreed that it would carry out "the Project", which included the work in relation to the Property, with reasonable speed, with due care, skill and diligence and in accordance with the Project Requirements; and would administer the Project Contracts, including the Building Contract between Beach Street and Grocon dated 3 November 1999 and any sub-contract to Grocon in respect of the Project, with due care, diligence and skill and ensure that Grocon carried out the Project in accordance with the Building Contract and with due care, diligence and skill; and would cause to be corrected any material defect in the Complex or any material departure in the construction of the Complex from the plans and specifications and the project requirements. Ocean View further pleaded that to the extent that any material defect existed in the parquetry floor, Beach Street was in breach of the Security Sharing Deed and was liable to indemnify Ocean View in respect of the Pressers' claim.

10 On 7 October 2005 I admitted this proceeding into the Building Cases List on the application of the plaintiffs.

11 By its defence to the Third Party Notice filed on 18 October 2005 Beach Street admitted the making of the Security Sharing Deed and the terms alleged by Ocean View but denied it had any liability to Ocean View. Rather surprisingly, Beach Street and Ocean View were at this stage represented by the same firm of solicitors, although that is no longer the case.

12 Also on 18 October 2005 Beach Street filed a Fourth Party Notice against Grocon Constructors Pty Ltd, later amended to Grocon Pty Ltd, claiming pursuant to a Building Contract made between Beach Street as principal and Grocon as contractor an indemnity in respect of any material defect in the parquetry floor.

13 On 25 November 2005 Ocean View joined the fourth party, Grocon, as a second third party alleging that it was entitled to contribution from Grocon in respect of any sum which the plaintiffs might recover against Ocean View in respect of the parquetry floor, alternatively that pursuant to s.9 of the Act Ocean View was as the building owner entitled to claim against Grocon for breach of warranty in respect of the parquetry floor, alternatively that Grocon was liable to Ocean View in negligence.

14 On 1 December 2005 Grocon filed a Fifth Party Notice against the first fifth party, Airthrust Parquetry Flooring Pty Ltd ("Airthrust"), and the second fifth party, Katsalidis Pty Ltd ("Katsalidis"). Grocon pleaded that on or about 20 June 2001 Airthrust and Grocon entered into an agreement for Airthrust to install parquetry flooring at the Complex including the parquetry flooring at the Property, and that to the extent that any material defects existed in the parquetry flooring at the Property Airthrust failed to complete that work free from defects and was therefore liable for such portion of the damages which Grocon might have to pay Beach Street as the Court considered to be just and equitable. It appears, however, that at about the time the Fifth Party Notice was served Airthrust went into liquidation.

15 Also in the Fifth Party Notice, Grocon pleaded that on or about 3 July 1998 Katsalidis entered into an agreement with Beach Street to perform certain architectural services set out in the agreement ("the Consultancy Agreement") and that on or about 3 November 1999 Beach Street, Grocon and Katsalidis novated the Consultancy Agreement to Grocon. Grocon further pleaded that between September and November 1999 Katsalidis in its capacity as the Project's consultant architect prepared the plaintiffs' specification and selected and nominated Tallowwood as the appropriate material for the parquetry flooring, and that although between May 2000 and February 2001 Grocon notified Katsalidis that the Tallowwood selected for the parquetry flooring was unsuitable for the environment and that if Tallowwood was to be used as the material for the parquetry, a stable environment should be maintained and window furnishings should be installed and closed, Katsalidis confirmed that Tallowwood was the appropriate material for the parquetry flooring. Grocon pleaded that to the extent that any material defect existed in the parquetry flooring, Katsalidis had, in breach of the express terms of the Consultancy Agreement, failed to perform the Consultancy Agreement services with all due skill, care and diligence, and failed to prepare the design, materials and methods of construction in accordance with the Consultancy Agreement and/or to meet the standard required by the Consultancy Agreement and therefore was liable for such portion of the damages which Grocon might have to pay Beach Street as the Court considered just and equitable.

16 Once all the proposed parties had been joined, I ordered that this proceeding be mediated but the dispute remained unresolved. Hence, Grocon's foreshadowed application for a stay.

The *Domestic Building Contracts Act* 1995

17 Section 57 of the Act relevantly provides:

"(1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates' Court.
(2) The Court must stay any such action on the application of a party to the action if--
(a) the action could be heard by the Tribunal under this Subdivision; and
(b) the Court has not heard any oral evidence concerning the dispute itself."

18 Pursuant to the definition section of the Act, s.3, a *"domestic building dispute"* has the meaning set out in s.54. That section provides that:

> *"(1) A 'domestic building dispute' is a dispute or claim arising--*
> *(a) between a building owner and--*
> *(i) a builder; or*
> *(ii) a building practitioner (as defined in the Building Act 1993); or*
> *(iii) a sub-contractor; or*
> *(iv) an architect--*
> *in relation to a domestic building contract or the carrying out of domestic building work; or*
> *(b) between a builder and--*
> *(i) another builder; or*
> *(ii) a building practitioner (as defined in the Building Act 1993); or*
> *(iii) a sub-contractor; or*
> *(iv) an insurer--*
> *in relation to a domestic building contract or the carrying out of domestic building work; or*
> *(c) between a building owner or a builder and--*
> *(i) an architect; or*
> *(ii) a building practitioner registered under the Building Act 1993 as an engineer or draftsperson--*
> *in relation to any design work carried out by the architect or building practitioner in respect of domestic building work."*

19 A *"domestic building contract"* is defined in s.3 to mean: *"a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor."*

20 The phrase "domestic building work" is defined in s.3 to mean any work referred to in s.5 that is not excluded from the operation of the Act by s.6. Relevantly, s.5 states that the Act applies to the following work –

> *" (a) the erection or construction of a house ...*
> *(b) the renovation, alteration, extension, improvement or repair of a home."*

21 A "builder" is defined in s.3 to mean:

> *"a person who, or a partnership which--*
> *(a) carries out domestic building work; or*
> *(b) manages or arranges the carrying out of domestic building work; or*
> *(c) intends to carry out, or to manage or arrange the carrying out of, domestic building work."*

22 Section 3(4) of the Act must also be set out. It provides that:

> *"(4) A contract for the sale of land on which a home is being constructed or is to be constructed that provides or contemplates that the construction of the home will be completed before the completion of the contract is not, and is not to be taken to form part of, a domestic building contract within the meaning of this Act if--*
> *(a) the home is being constructed under a separate contract that is a major domestic building contract; or*
> *(b) the contract of sale provides that the home is to be constructed under a separate contract that is a major domestic building contract."*

Pursuant to s.3(5), the above sub-section only applies to a contract for the sale of land that is the subject of proceedings commenced in a court or tribunal before 16 March 2004 but not completed before that date in which it was alleged, before that date, that the contract was, or formed part of, a domestic building contract.

The Submissions

23 Mr Roberts of counsel, who appeared on behalf of Grocon, was supported in his submissions for a stay by the solicitors appearing for Ocean View and Beach Street. Mr Forrest of counsel, who appeared on behalf of the plaintiffs, opposed any stay. Counsel for Katsalidis neither supported nor opposed the application.

24 Mr Roberts' primary submission was that the terms of the Settlement Agreement between the plaintiffs and Ocean View meant that the plaintiffs' claim against Ocean View was a "domestic building dispute" within the meaning of s.57(1) of the Act, and therefore because all of the subsequent third party, fourth party and fifth party claims were undoubtedly domestic building disputes, this proceeding was an "action arising wholly ... from a domestic building dispute."

25 Mr Roberts pointed out that the letter dated 31 January 2002 from Ocean View's solicitors to the Pressers' then solicitors which constituted the Settlement Agreement, and which was exhibited to Mr Coker's affidavit, provided that the Retention Security of $100,000 was to be held in trust by Ocean View's solicitors as stakeholder as partial security for:

> *"the Vendor's performance and liability for:-*
> *3.1 The List of outstanding defects, attached hereto as Annexure A ('Outstanding Defects'); and*
> *3.2 To secure the long term performance of the parquetry floor ('Parquetry Retention')."*

He submitted that this and subsequent wording in the letter made it clear that it was the vendor, Ocean View, which was going to fix the defects, including the parquetry floor. This meant, he submitted, that the Settlement Agreement went beyond the situation of a simple "off the plan" sale contract because defects had already been observed and, by the Settlement Agreement, the vendor was itself agreeing to undertake repair works in relation to the construction of the home.

26 Secondly, Mr Roberts submitted that even if the plaintiffs' claim against Ocean View was not regarded as a *"domestic building dispute"* within the meaning of s.57(1) of the Act, looked at as a whole the proceeding was now an *"action arising ... predominantly from a domestic building dispute"* because all of the other claims made in the proceeding centred on which, if any, of the various parties was liable for the alleged problem with the parquetry floor, which was essentially a *"domestic building dispute"*.

27 In supporting Grocon's application for a stay, Mr Greenham, the solicitor representing Ocean View, pointed out that paragraph 5 of the statement of claim was clearly an allegation that under the Construction and Sale Agreement Ocean View was obliged to carry out the building works. He therefore submitted that the dispute between the plaintiffs and the defendant was a "domestic building dispute".

28 Mr Forrest submitted that there should be no stay. First, he submitted that, pursuant to the clarifying exception contained in s.3(4) of the Act, the Construction and Sale Agreement was not a "domestic building contract", because it was a term of that agreement that Ocean View would enter into a major domestic building contract within the meaning of the Act for a builder to carry out the Property Works.

29 Next, Mr Forrest submitted that the Settlement Agreement had to be read in that context. It was an agreement made between the Pressers and Ocean View to complete the purchase of the penthouse, whereby it was agreed that money would be retained pending rectification of the identified defects. Mr Forrest submitted that whilst Ocean View agreed that it would rectify the defects, it was understood by the parties that it would have that work performed by the builder engaged pursuant to the Construction and Sale Agreement. Mr Forrest drew attention to the fact that Mr Coker's affidavit made it clear that this is what actually happened. At the request of Ocean View, Grocon attempted to carry out the rectification work.

30 Therefore, Mr Forrest submitted that the Settlement Agreement was not a *"domestic building contract"* because it had only come into existence as a means of completing the Construction and Sale Agreement, which was clearly not a *"domestic building contract"*. The Settlement Agreement, he submitted, stemmed from the Construction and Sale Agreement and was doing nothing more than what the earlier agreement contemplated would be done. That is, that the building work would be carried out by the builder, namely Grocon, engaged by Ocean View, or more correctly Beach Street. Thus, the Settlement Agreement did not stand alone.

31 Secondly, Mr Forrest submitted that if the action brought by the plaintiffs against the defendant did not arise *"wholly or predominantly from a domestic building dispute"* it should not be stayed because there may be no jurisdiction in VCAT to hear such a dispute, regardless of whether the subsequent third, fourth and fifth party claims did involve such a dispute. He submitted that, without such a finding, VCAT would have no jurisdiction, or might not have any jurisdiction, to hear the stayed proceeding.

32 In reply, Mr Greenham submitted that even if the Construction and Sale Agreement was not a *"domestic building contract"* because of the provisions of s.3(4) of the Act, that did not mean that there was no *"domestic building dispute"* within the meaning of s.57(1) of the Act. Such a dispute was to be found in the allegation that Ocean View was required to carry out the works described in Annexure G, which was an allegation that it was required to carry out "domestic building work" (see s.54(1) of the Act).

33 Mr Greenham also drew attention to paragraph 18 of the statement of claim which alleged that the specific works were not carried out by Ocean View. He submitted that the plaintiffs' own pleading involved the allegation that Ocean View did not carry out work which was *"domestic building work"*.

34 In his reply, Mr Roberts emphasised that the provisions of the Settlement Agreement with respect to the commissioning of a joint expert report and the possible payment by Ocean View pursuant to findings in that report meant that s.3(4) was simply not applicable.

Consideration of the Issues

35 The first point to note is that, in my view, it is more important to see what was in fact agreed between the parties rather than concentrating on what is alleged in the pleadings, which may not necessarily be the correct analysis of a relationship. This is not so easy in this case, however, because the Construction and Sale Agreement was not in evidence. Nevertheless, there does appear to me to be an inherent conflict between the plaintiffs' allegations in the statement of claim that Ocean View was required to carry out the works described in Annexure G (paragraph 5) and that it failed to install the parquetry floor in a proper and workmanlike manner (paragraph 18) and their pleading that it was a term of the Construction and Sale Agreement that Ocean View would enter into a major domestic building contract (within the meaning of the Act) with a builder for the Property Works in accordance with the Plans and Specifications (Special Condition 5.1) (paragraph 4(b) of the statement of claim).

36 Without knowing all of the terms of the Construction and Sale Agreement it is not possible to be definite, but it seems to me that the correct analysis is that s.3(4) of the Act would apply so that the Construction and Sale Agreement is not, and is not taken to form part of, a *"domestic building contract"* within the meaning of the Act. Even apart from the amendment to the Act to include this provision, if the approach of Bell J in ***Shaw v Yarranova Pty Ltd***[1] is preferred to that of Byrne J in ***Mirvac (Docklands) Pty Ltd v Philp***[2], the Construction and Sale Agreement would not be regarded as a "domestic building contract." In *Shaw* Bell J held that the contract between the developer and the purchaser was not a contract *"to carry out"* domestic building work because it expressly contemplated that the building would be constructed pursuant to another contract into which the developer would enter with a builder[3] and that it was not a contract "*to arrange or manage*" the carrying out of domestic building work because it expressly recognised that the activities constituting the building work would be undertaken by someone else, namely the other party to the building contract with the developer[4] and that the developer was not agreeing to arrange or manage the carrying out of these activities.[5] I respectfully prefer this approach to the broad construction given by Byrne J to the words "arrange or manage" in ***Philp***[6]. Also, it is probable that on the approach of Bell J any work required to be carried out by Ocean View under the Construction and Sale Agreement would not be considered as *"domestic building work"*. I will therefore assume, without finally deciding, that the Construction and Sale Agreement is not a *"domestic building contract"* within the meaning of the Act.

37 Although it was necessary to consider whether the Construction and Sale Agreement was a "*domestic building contract*" because of Mr Forrest's argument about context, Mr Roberts' primary submission was, as I have said, that the terms of the Settlement Agreement meant that the plaintiffs' claim against Ocean View was a *"domestic building dispute."* The letter said to constitute the Settlement Agreement was in evidence before me. I agree with Mr Roberts' submission that this letter makes it clear that it was the vendor, Ocean View, and not Beach Street nor Grocon, which agreed with Mr and Mrs Presser that it would carry out and be liable for rectifying the outstanding defects, including the parquetry floor. Apart from the passage from the letter set out in paragraph 25 above, I refer to the following statements:
(a) "*... the Vendor shall also complete the Outstanding Defects" (para. 4.2 of the letter);*
(b) "*... the work being done by the Vendor to complete Outstanding Defects"* (para. 4.3 of the letter);
(c) *"In the event the Vendor fails to complete the Outstanding Defects ..."* (para. 5 of the letter); and
(d) *"... if there are any defects or issues occurring in relation to the parquetry on or before 31 January 2003, the Vendor will be obliged to remedy such defects ..."* (para. 6 of the letter).

I consider that, after the making of the Settlement Agreement, Ocean View therefore fell within the statutory definition of a "builder".

38 This means, in my opinion, that the plaintiffs' claim in this proceeding against Ocean View was a "domestic building dispute" within the meaning of s.54 of the Act because it arose between a building owner, the Pressers, and a builder, Ocean View, in relation to either a *"domestic building contract",* the Settlement Agreement, or *"the carrying out of domestic building work",* as the rectification of the parquetry floor was *"the renovation ... improvement or repair of a home*" (see s.5(1)(b) of the Act). I consider that it is not to the point that the Settlement Agreement was entered into in the context of the Sale and Construction Agreement, or even the Building Contract between Beach Street and Grocon, when Ocean View was so clearly itself accepting the obligation to rectify the outstanding defects, including the parquetry floor. Certainly, this is how the claim has been pleaded by the Pressers in their statement of claim. There was no suggestion in the Settlement Agreement that Ocean View's only obligation was to require the builder, Grocon, to fix the defects. I do not agree with Mr Forrest's submission that the Settlement Agreement was an extension of the Sale and Construction Agreement and therefore did not stand alone. Further, this conclusion is not altered by the statement in the Settlement Agreement that the provisions relating to the Retention Security of $100,000 were without prejudice to any other rights which the Pressers might have against Ocean View and against Grocon pursuant to the Act.

39 The next point to consider is whether s.57(1) of the Act applies because by this proceeding the Pressers had started an *"action arising wholly or predominantly from a domestic building dispute."* I have decided that, in accordance with Grocon's submission, the plaintiffs' claim against Ocean View was a *"domestic building dispute."* Initially, it seemed to me that a possible construction of this part of s.57(1) was that one looked only at whether or not the action as started by the plaintiffs arose from a domestic building dispute. Given my finding that it did, this would have been sufficient to require the granting of a stay. On further reflection, however, I consider that the correct construction is that one looks at the plaintiffs' action as a whole, including any subsequent claims against additional parties, at the time the application for a stay is made in order to decide whether the action started by the plaintiffs arose "wholly or predominantly from a domestic building dispute."

40 As previously stated, Mr Roberts submitted that this was an "action arising wholly ... from a domestic building dispute" because in addition to the plaintiffs' claim against the defendant all of the subsequent third party, fourth party and fifth party claims were undoubtedly domestic building disputes. I do not think that this submission is strictly correct because it is not clear to me that the third party claim by Ocean View against Beach Street and the fourth party claim by Beach Street against Grocon involve a domestic building dispute. Again, the Security Sharing Deed pursuant to which Ocean View made its claim against Beach Street was not in evidence so I cannot be sure exactly what that agreement provided. Possibly it would be a correct analysis to find that the Security Sharing Deed treated Beach Street as "the builder" so that the third party claim by Ocean View against Beach Street would be within s.54(1)(a)(i) and the fourth party claim by Beach Street against Grocon would be within s.54(1)(b)(i) of the Act. But even if this is not correct, I consider that because the plaintiffs' claim against Ocean View is within s.54(1)(a)(i) and because the third party claim by Ocean View against Grocon is within s.54(1)(a)(i), the fifth party claim by Grocon against Airthrust is within s.54(1)(b)(iii) and the fifth party claim by Grocon against Katsalidis is within s.54(1)(c)(i) of the Act, this is an "*action arising ... predominantly from a domestic building dispute.*"

41 In case I am wrong in concluding that the plaintiffs' claim against Ocean View under the Settlement Agreement is a *"domestic building dispute",* I turn to consider Mr Roberts' second submission, which was that because all of the other claims made in the proceeding were domestic building disputes, looked at as a whole the proceeding was now an *"action arising ... predominantly from a domestic building dispute."*

42 I have already expressed some doubt about whether the third party claim by Ocean View against Beach Street and the fourth party claim by Beach Street against Grocon involve a "*domestic building dispute*." What then is the position if the plaintiffs' claim against Ocean View is treated as not involving such a dispute? Does the change in the assessment of the plaintiffs' claim mean that the action is no longer one *"arising ... predominantly from a domestic building dispute"*?

43 In my opinion, the correct conclusion is that this would still be an *"action arising ... predominantly from a domestic building dispute."* Despite all the difficulties caused by the various contractual relationships, it seems to me that this proceeding is now all about which, if any, of the several contracting parties is liable to the Pressers for the defects in their parquetry flooring, which can be regarded as an issue arising in *"the erection or construction"* of the Pressers' home (s.5(1)(a) of the Act) or in *"the renovation ... improvement or repair"* of that home (s.5(1)(b) of the Act). Once that issue has been decided, everything else will fall into place.

44 One of the four purposes of the Act is "*to provide for the resolution of domestic building disputes*" by the Tribunal (s.1(b)). This purpose would not be served, in my opinion, by deciding that it was not appropriate to grant a stay even though the dispute essentially centres on responsibility for the allegedly unworkmanlike carrying out of an item of domestic building work. Jurisdiction is given to the Tribunal by s.53(1) of the Act to resolve domestic building disputes and the Tribunal's role in this regard is emphasised by the fact that, pursuant to s.57(2), if the Tribunal has jurisdiction, the Court must stay an action on the application of a party to the action. As I have said, I consider that this action is one *"arising ... predominantly from a domestic building dispute*" even if the correct view of the plaintiffs' claim against Ocean View is that on its own, it is not a *"domestic building dispute."*

Conclusion

45 For all of the above reasons, I have reached the conclusion that this is an *"action arising ... predominantly from a domestic building dispute"* and accordingly it must be stayed now that Grocon has made its application.

FOOTNOTES

[1] [2006] VSC 45
[2] [2004] VSC 301
[3] [2006] VSC 45 at [32]-[33]
[4] [2006] VSC 45 at [59]-[60]
[5] [2006] VSC 45 at [61]
[6] [2004] VSC 301 at [31] and [38]-[39]

For the Plaintiffs Mr J.M. Forrest instructed by Clayton Utz
For the Defendant Mr P.C. Greenham instructed by Minter Ellison

For the First Third Party Mr A. Ferguson instructed by McMahon Fearnley Solicitors
For the Second Third Party/Fourth Party Mr M.G. Roberts instructed by Deacons
For the First Fifth Party No appearance
For the Second Fifth Party Mr M.T. Settle instructed by Charlseworth Josem