VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D766/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – application to pay into Fund abandoned – strike out application – costs.

APPLICANT	Abigroup Contractors Pty Ltd
RESPONDENT	River Street Developments Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	19 September 2007
DATE OF ORDER	17 October 2007
CITATION	Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd (Domestic Building) [2007] VCAT 1965

ORDER

1 Application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 dismissed. Costs reserved in this matter.

2 Order the Applicant to pay the costs (including any reserved costs) of the Respondent in respect of the payment in application (under the *Domestic Building Contracts Act* 1995) on an indemnity basis (as regards materials prepared and filed in response to the Kus report) and otherwise of and incidental to such application on a party/party basis according to the Supreme Court scale.

3 In default of agreement by 19 November 2007 I refer the assessment of costs under s111 of the Act.

4 I refer this proceeding to a directions hearing before me on 30 October 2007 at 10.00 a.m. at 55 King Street Melbourne – allow 2 hours.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr J. Burnside, QC and Mr J. Twigg of Counsel
For the Respondent	Mr J. Delany, SC

REASONS

1 Three matters are raised for my consideration and decision:

a amendment to the Points of Claim;

b a striking out of certain paragraphs of the Amended Points of Counterclaim; and

c costs arising out of the abandoned application for moneys to be paid into the Domestic Builders Fund.

2 The application to amend the Points of Claim was not opposed. The form of the amendments sought is appropriately highlighted. I consider I should give the leave sought. At the same time, I give leave to the Respondent to amend its defence. I think I should reserve any costs thrown away occasioned thereby even though this was not mentioned to me.

3 The Applicant also raised issues concerning the lack of particulars, especially relating to defects. I consider this is something the parties themselves can attend to. There is always liberty to apply.

4 The paragraphs in the Amended Points of Counterclaim sought to be struck out are these: paragraphs 191, 207, 208 and 209 together with paragraph D of the prayer for relief (seeking: "An order that Abigroup pay RSD damages being the costs of rectifying the Defects, such damages to be assessed"). Further, it was submitted that the entirety of Schedule 1 (specifying "Common Property Defects" and "Unit Defects") should fall as well in consequence.

5 I set out paragraphs 191, 207, 208 and 209 as follows:

> 191. Pursuant to section 8 of the Act the Contract contained the following statutory warranties:
>
> (a) Abigroup warranted that the work would be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Contract;
>
> (b) Abigroup warranted that the work would be carried out in accordance with, and would comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act* 1993 and the regulations made under that Act;
>
> (c) Abigroup warranted that the work would be carried out with reasonable care and skill and would be completed by the date (or within the period) specified by the Contract.
>
> 207. Further, in breach of the Contract and in breach of the Statutory Warranties Abigroup failed to:
>
> (a) Carry out the work under the contract in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Contract;

(b) Carry out the work under the Contract in accordance with, and in compliance with all laws and legal requirements including the *Building Act* 1993 and the regulations made under that Act;

(c) Carry out the work with reasonable care and skill and complete the work under the Contract by the date (or within the period) specified by the Contract

in that the works performed by Abigroup contain substantial defects ("**the Defects**").

208. In breach of the Contract and the Statutory Warranties, and despite numerous directions from the Superintendent, Abigroup failed and/or refused to rectify the Defects and abandoned the Works leaving the Defects unrectified.

PARTICULARS

The directions are contained in letters from the Superintendent to Abigroup including the letters with the dates listed in Schedule 2.

A copy of each of the letters is in the possession of RSD's solicitors and may be inspected by appointment.

209. By reason of the foregoing Abigroup is liable to RSD for damages being the cost of rectifying the Defects.

6 The application for strike out is made under s75 (further or alternatively under s80) of the *Victorian Civil and Administrative Tribunal Act* 1998 which reads as follows:

(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.

(3) The Tribunal's power to make an order under sub-section (1) or (2) is exercisable by—

(a) the Tribunal as constituted for the proceeding; or

(b) a presidential member; or

(c) a senior member who is a legal practitioner.

(4) An order under sub-section (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.

7 It is submitted that the paragraphs in question are misconceived, lacking in substance or are an abuse of process.

8 It is not easy to establish a case under s75. To quote from the judgment of Kirby J in *Lindon v Commonwealth of Australia* (No 2) (1996) 136 ALR 251 at 256: to secure summary relief, such as by a striking out, "the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious".

9 It is clear that commencement of concurrent proceedings may constitute an abuse of process or may be vexatious. See *McHenry v Lewis* (1883) 22 Ch D 397 at 400 per Jessel M R who said "It is prima facie vexatious to bring two actions where one will do".

10 The immediate problem in the present case, as I understood the submissions, is that there are concurrent proceedings by both the Body Corporate and by the present Respondent – raising the same, or nearly all the same, issues. It was put to me that the Tribunal could be required, in effect, to sit twice to do both – hearing the same evidence and the same witnesses over again. Possibly different decisions could be given.

11 It clearly is thoroughly inconvenient if this should be so. Clearly the two should be heard and determined together and not split up in this way. In making my ruling on the Counterclaim sought to be brought by the Body Corporate as well, when it had not previously been made a party, I had intended that, if it brought a separate proceeding, the proceedings would run parallel.

12 Be that as it may, I am not satisfied that what appear to be concurrent proceedings are wholly so. Or are, at least, of a nature whereby paragraphs 191, 207, 208 and 209 are vexatious. The hurdle to be met, if s75 is to apply, is a high one and having heard senior Counsel for the Respondent I am not satisfied it is met in this instance. He referred me to paragraph 216 which reads as follows:

> 216 Accordingly, by reason of Abigroup's wrongful suspension of the works, its failure to rectify the Defects, its abandonment of the site, and its purported notice of termination, either collectively or individually, Abigroup evinced an intention to no longer be bound by the Contract, such conduct amounting to a repudiation of the Contract.

13 The point which he made is this, and I agree with him. The cause of action specified in paragraph 216 is repudiation. A founding element in that is, as appears, "failure to rectify the Defects". This element is made out in the allegations made by paragraph 207 which relates back to paragraph 191 and which is itself foundational to paragraphs 208 and 209. In such circumstances, paragraphs 191, 207, 208 and 209 have more than one utility. It is not the place for me to decide whether the facts in the case sustain the allegations they make or not. But on their face, even if there is

or may be duplication with the Body Corporate's proceedings, those paragraphs go to sustaining a case for repudiation. That means, if I was to strike them out, the case for repudiation could be adversely affected. Yet the strike out application is not for that particular case to be struck out. No mention was made of striking out paragraph 216. But if I strike out the other paragraphs that paragraph, in part, will not make sense and the case for repudiation, which is alleged, will be diminished so to speak.

14 I am not satisfied, therefore, having regard to the well-know authorities in this area, that I should proceed to strike out the paragraphs (and the consequential parts) which have been impugned. It seems to me they have dual utility. It would be a serious step to take, in my view, to deprive them of any utility at all were I to proceed to strike them out. For that would, as I say, impinge on the repudiation claim. I do not believe I should, in justice, allow that to happen.

15 I, therefore, decline to act under s75 to move to strike out. I do not recall a question of costs being argued before me on this particular point but I reserve those, if any, which may be sought in consequence of my declining so to act.

16 There is, lastly, the question otherwise of costs. The Applicant has abandoned its application for the payment of monies to be made into the Domestic Builders Fund. This application was originally adjourned by me on 25 July 2007 following a late submission of a forensic accounting report by Mr Kus. The matter was set aside for 10 days (subsequently reduced to 8) commencing on 19 September. However in a hearing before Cavanough J in the Supreme Court the Applicant indicated its decision not to proceed. In the meantime, however, the Respondent engaged specialists to counter the Kus report. Subsequently detailed affidavits of Cheree Woolcock and Loan Ong, both dated 8 August, and Les Smith, also dated 8 August, were filed. I have read those affidavits and I have re-read the Kus report. The affidavit of Cheree Woolcock, with its exhibits or annexures, is particularly detailed. But the report of Mr Kus, was, itself, very detailed indeed.

17 Because the application for a payment in has been abandoned, the Respondent applies for costs. It does so under s109 of the 1998 Act. It urges upon me that I should order costs on an indemnity basis and cites various authorities in that regard. The Applicant opposes costs and opposes indemnity costs. If I am minded to order costs it asks for a lengthy stay.

18 Costs under s109 of the Act are, in the end, in my discretion. The starting position is s109(1) whereby each party must bear their own. I may depart from this position under s109(2) if I am satisfied it is fair to do so having regard to the criteria set out in s109(3).

19 An order for indemnity costs may be made under s109. However, indemnity costs should not be ordered unless the case is "exceptional". See per Nettle J A in *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 at [91] – [92].

20 The Respondent asks me to see the Applicant as having wanted to exert pressure on it by its application for payment in. The amount involved, sought to be ordered to be paid in, is considerable – $7,824,126.00. There is no doubt that a respondent, such as the present one, could find it difficult to find such a sum and to be deprived of it while it remained paid in.

21 On the other hand, the Applicant's application for a payment in does not, on its face, indicate that the application was made for some ulterior motive of that nature.

22 Nevertheless, having caused the Respondent to ready itself to defend a significant application, the Applicant abandons its desired end. And it does so at a time after it knows the Respondent not only had readied itself but had incurred substantial expenditures in having responding materials prepared. The Applicant must have know that the preparation of those responding materials would be costly.

23 I think it is fair to depart from s109(1) in the circumstances of this case. I do so acting under s109(2) having regard to s109(3). By making an application for payment in, and then abandoning it, for whatever reason, I consider the Applicant has engaged in conduct that has caused the Respondent unnecessary disadvantage. The facts, I think, speak for themselves.

24 This justifies, in my view, an order that the Applicant pay the costs of the Respondent on Supreme Court scale. Except for one aspect of the matter, however, I am not satisfied I should order indemnity costs. The case is not one sufficiently "exceptional" in my view. It may very well be that the situation can be characterized as submitted by the Respondent, but I simply do not know. To be able to agree or not, I would need to hear the application and I cannot do that now because it has been abandoned. From the abandonment itself I do not think I can safely infer all the Respondent would want me to infer.

25 However, I make this exception which I consider I am permitted to do by s109(1). It seems to me that the Respondent should not be out of pocket at all in responding to the Kus report in terms of engaging responding experts to report on the same. I consider, therefore, that the Applicant should pay indemnity costs on the materials prepared and filed (including costs of preparation) in response to the Kus report. I act on this basis because in my view the Respondent was put to considerable expense to meet an expert forensic report filed for the purposes of an application which has been abandoned. It would be unjust if it should be out of pocket at all in that regard.

26 I therefore order the Applicant to pay the costs of the Respondent of and incidental to the application (subsequently abandoned) on Supreme Court Scale. In default of agreement I refer the amount of such costs (with any reserved costs) under s111 of the Act. As regards the reports contained in response to that of Mr Kus (and the preparation spent on them) I order the

Applicant to pay indemnity costs. Once again, in default of agreement I refer the amount of same under s111 of the Act for assessment.

SENIOR MEMBER D. CREMEAN