VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP1334/2018

CATCHWORDS

Applications for summary dismissal or strike out – s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 – Tribunal's obligations to a self-represented party – need to accord fairness to all parties – whether claims are manifestly hopeless – compensation under s75(2)

FIRST APPLICANT	Fereshteh Khani-E
SECOND APPLICANT	Hassan Khavar
FIRST RESPONDENT	Simonds Homes (ACN: 050 197 610)
SECOND RESPONDENT	Enrik MacGregor Pty Ltd (ACN: 627 014 359) (Dismissed 05/09/2019)
THIRD RESPONDENT	Enrik Pty Ltd (Struck out 05/09/2019)
FOURTH RESPONDENT	Northpoint Building Surveyors Pty Ltd (ACN: 119 709 116) (Struck out 05/09/2019)
FIFTH RESPONDENT	Paul Shaw & Associates Pty Ltd (Dismissed 05/09/2019)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Directions Hearing
DATE OF HEARING	5 September 2019
DATE OF ORDER	18 September 2019
CITATION	Khani-E v Simonds Homes (Building and Property) [2019] VCAT 1446

ORDERS

1. The applicants' claim against the second respondent is dismissed.

2. The applicants' claim against the third respondent is struck out.
3. The applicants' claim against the fourth respondent is struck out.
4. The applicants' claim against the fifth respondent is dismissed.
5. **The proceeding against the first respondent remains listed for a compulsory conference on 10 October 2019.**
6. The applicants must pay the costs of the second, third, fourth and fifth respondents, to be taxed by the Victorian Costs Court on the standard basis on the County Court scale in default of agreement.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Ms Khani-E in person
For the First Respondent	Ms D. Abu-Elias, solicitor
For the Second and Third Respondents:	Ms E. Bateman of counsel
For the Fourth Respondent:	Ms A. Amanatidis, solicitor
For the Fifth Respondent:	Ms R.T. Campbell of counsel

REASONS

SUMMARY

1. This is an application brought by four of the five respondents for orders that the claims against them be summarily dismissed or struck out under section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (the VCAT Act).

2. For the reasons set out below, I allow the applications and order that the claims against the second and fifth respondents are dismissed and the claims against the third and fourth respondents are struck out. The proceeding against the first respondent remains listed for a compulsory conference on 10 October 2019.

THE ORIGINAL CLAIM

3. The applicants are the owners of a property in Doncaster, with house number 433. On 10 September 2018 they lodged this application with the Tribunal. The named respondents are as follows[1]:

    - Simonds Homes Victoria Pty Ltd - the builder
    - Enrik Macgregor Pty Ltd - alleged to have provided engineering services
    - Enrik Pty Ltd - alleged to have provided engineering services
    - Northpoint Building Surveyors Pty Ltd – the Building Surveyor
    - Paul Shaw & Associates Pty Ltd – provided town planning services for the development next door

4. On the application form, the applicants stated that their claim was for "$100,000,000.00 (100 million) + fixing defects + charges for intentional damages". They attached to the application form 450 pages of materials including five inspectors' reports.

5. Details of the claim were set out on the application form, in a handwritten document headed 'Points of Claim' and in an affidavit sworn by the first applicant where she deposed that "Every word, information, materials handed to the Tribunal to date are all truth, documented and facts…"

6. From these documents it was impossible to understand how the claim was being put against each of the respondents. There are allegations of defective workmanship or breaches of the building contract, presumably made against the first respondent, mixed in with allegations such as:

> "Irreversible defects due to wrong Advice, Design, Excess wider/deeper cut of an elevated block.…"

[1] The first, second, third and fourth respondents were named in the initial application and 4 days later the applicants notified the Tribunal that they wished to include a further respondent. By an order made in chambers, the fifth respondent was joined to the proceeding.

> "Contract is based on deception, collusion, false documentation, multiple costing for omitted items" and "no supervision. Lowest/the most careless workmanships - Lies and deception, no work ethics – cover-ups instead of fixing the defects. Including with others in the field at the council, influencing DBDRV, VBA, harassing, influencing all the inspectors and trades I hired. Bullying, F word, ridicule and threat to stop work…"
>
> "$1.5 to $1.7 million, Prime land is turned to a pool – total liability – irreversible damages…"
>
> "To favour no.431 (Paul Shaw Investor developer who is friend with Paul McIntyre, Vito Munafo, Michel and Council Plan/Permit staff) 11m of brick structure was shaved/cut in order to build (a gift from my money to no.431) 11m concrete sleeper retaining wall…"
>
> "I do not think that kind of deception, fraud, dishonesty, collusion, cover-ups, thuggery, bullying and insult, physical/psychological and emotional pressures should not happen to anybody."

THE DIRECTIONS MADE

7. The proceeding was listed for a directions hearing to be held on 11 December 2018 and by orders made in chambers on 26 October 2018 the applicants were advised as follows:

> At the directions hearing, the applicants will be required to explain to the Tribunal the nature of and the legal basis for their claims against each of the respondents and how they calculate the amount of damages claimed. They may wish to obtain legal advice before the Directions Hearing, either from their own solicitors or from Justice Connect.

8. At the directions hearing on 11 December 2018 the solicitors for each of the respondents advised the Tribunal that they were unable to understand the claims made against their clients based on the documents filed by the applicants to date. The following orders were made (among others):

    1. By 15 February 2019 the applicants must file and serve on each of the legal representatives of each of the parties Points of Claim which must include
        a. A list of each item of defective work which they say was carried out by the first respondent and the costs to rectify, or if rectification is not possible then the alternate damages they seek;
        b. A list of each item of incomplete work, together with the costs to complete;
        c. The legal basis on which each claim is brought against each of the respondents, including how they say each respondent owes them a legal liability;
        d. The damages sought against each of the respondents (where this is different to the cost to complete or rectify);

e. Identify all expert reports on which they rely and provide a copy unless they have already provided copies to the parties and to the Tribunal;

f. Provide any further expert reports on which they rely in accordance with order 3 below to the parties and to the Tribunal;

g. Attach any quotes or invoices for completion or rectification costs on which they rely;

h. Include the legal basis on which the proposed claim against the City of Manningham is brought and what damages are sought from the City of Manningham.

2. The amended Points of Claim will stand as the claims made in the proceeding such that all previous correspondence sent by the applicants to the Tribunal and the parties may be used as evidence but not as pleadings in the proceeding.

4. The proceeding is listed for a further directions hearing on 5 March 2019 at which time … directions [may be] made for its further conduct…

9. The applicants then sought further time in order to provide Points of Claim and at a directions hearing on 5 March 2019 the following orders were made:

3. By 30 April 2019 the applicants must file and serve Points of Claim which must include the matters set out in the Orders made on 11 December 2018.

4. This proceeding is listed for a compulsory conference to be conducted by Senior Member Lothian on 27 May 2019 commencing at 10.00 am at 55 King Street Melbourne. The function of the compulsory conference is initially to identify and clarify the nature of the issues in dispute in the proceeding pursuant to section 83(2)(a). Senior Member Lothian may make any directions in respect of the conduct of the compulsory conference.

5. The respondents are not required to attend the compulsory conference on 27 May 2019 or such later date as may be ordered, subject to any other Orders made by Senior Member Lothian.

10. On 26 April 2019 the applicants filed Points of Claim. The heading of the Points of Claim refers to this proceeding as well as a proceeding in the Planning and Environment List of the Tribunal in relation to the adjacent property at number 431, P25/2018. This proceeding had been heard and determined in 2018. The heading also refers to the applicants' property (number 433) as well as the neighbouring properties at 431 and 435 of the applicants' road. The amount of the claim is $50 million, described as follows:

> Regarding damages, the exaggerated figure that I have provided is intended to demonstrate the severity of the way our block has been ruined to be advantageous; in the beginning – to number 431 and then number 435

> developments. This was prime land which is now ruined. It has become a liability causing immeasurable physical, emotional, relationships and financial distress for us, leading to missed and delayed life plans for me, immediate and extended families.

11. I will address the matters alleged in the Points of Claim in further detail below. However, I note here that as well as the Points of Claim, the applicants rely on five expert reports which they have filed.

12. Ms Khani-E (the first applicant) alone attended a compulsory conference with Senior Member Lothian in May 2019. Senior Member Lothian then held a directions hearing on 14 June 2019 with Ms Khani-E present and all respondents represented. The orders note that the second, third and fourth respondents had foreshadowed applications under section 75 of the VCAT Act to strike out the proceedings against them. The orders included the following:

> 1. Any application to the Tribunal by any party must be served on all parties.
>
> 5. This proceeding is listed for a compulsory conference to be conducted by Senior Member Lothian on 10 October 2019…
>
> 8. If the proceeding does not settle, orders will be made for concise, comprehensive Points of Claim and the applicant's claims will be limited to the contents of the Points of Claim…

THE SECTION 75 APPLICATIONS

13. In July and August 2019 each of the second, third, fourth and fifth respondents issued applications for orders that the proceeding as against them be summarily dismissed or struck out. Section 75 of the VCAT Act provides 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;…
>
> (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.

14. Each of the second, third, fourth and fifth respondents say that they have brought the applications at this time as they are unable to participate meaningfully in the compulsory conference as they still do not understand what claims are made against their clients. In spite of the Tribunal conducting a compulsory conference with the applicants alone to try to "identify and clarify the nature of the issues in dispute", the respondents say

the claims have still not been adequately explained to them. While it might be in keeping with the Tribunal's emphasis on alternative dispute resolution to try to resolve the claims prior to bringing this application, the solicitors for these respondents say they are unable to properly advise their clients on risk and settlement options in circumstances where they cannot understand the claims that are made against them. They say they should not be required to expend further costs to answer claims which have no basis in law or fact.

MATTERS RELEVANT TO THE APPLICATION OF SECTION 75

15. I accept that Ms Khani-E has a genuine belief that she has been hard done by. As well as the pleadings filed by her, she has sent the Tribunal over 250 separate emails (many with voluminous attachments) since she commenced this proceeding. She has also approached many other organisations, including the ombudsman, the Victorian Building Authority, the Minister for Consumer Affairs, the Minister for Planning, the Manningham Council, members of state and federal parliament, the Chief Commissioner of Police, the Independent Broad-based Anticorruption Commission, and has copied the Tribunal and the respondents in to these emails.

16. At the commencement of the hearing, Ms Khani-E asked the Tribunal to appoint a "public defender" to act for her. She had made that request previously at directions hearings[2] and in the Points of Claim dated 26 April 2019. I explained to her that the Tribunal was unable to do that, and that it was a matter for her to obtain legal advice and representation. I asked if she wanted time to engage a lawyer to respond to the strike out applications. She said she had approached many solicitors but that once they found out she was suing developers and the Manningham Council, they refused to act for her. She did not ask for the opportunity to approach further lawyers, nor did she ask for an adjournment of the hearing.

17. As the applicants are not legally represented, and being mindful of the Tribunal's obligations to self-represented parties[3], I advised Ms Khani-E that I would consider the s75 applications on the basis that if I was aware of a cause of action theoretically available to her at law based on the materials and what she said to me, even if it was not disclosed in the Points of Claim, I would not strike out the claims at this stage, and would give her a further opportunity to properly put her claims prior to the compulsory conference.

18. I also note that the Tribunal's obligation under s97 of the VCAT Act is to act fairly and according to the substantial merits of the case in all proceedings. Fairness must be accorded to all parties. Paragraphs 7 and 16 of Practice Note 3 provide:

[2] When she was referred to the Domestic Building Legal Service at Justice Connect and to the Law Institute of Victoria
[3] VCAT Practice Note 3, paragraphs 17-19

> 7. The Tribunal has a general duty to ensure a fair hearing for all parties. A fair hearing involves the provision of a reasonable opportunity to parties to put their case …
>
> 16. It is necessary to balance the interests of litigants who represent themselves with the need to afford procedural fairness to all parties, and to ensure that hearings are conducted efficiently and costs are kept to a minimum.

19. This means that I must also take into consideration the respondents' rights to understand the case put against them and to ensure that their costs are kept to a minimum.

20. The following principles are relevant to an application made under s75 of the Act[4]:

    a. An application under s75 is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried, or the Tribunal is satisfied that the proceeding is undoubtedly hopeless, obviously unsustainable in fact or in law or bound to fail.

    b. The onus is on the respondent to establish that the discretion should be exercised in its favour to either summarily dismiss or strike out all or any part of the proceeding.

    c. The Tribunal is obliged to proceed on the assumption that the applicants will be able to prove each fact alleged in their claim.

    d. The application is interlocutory in nature. The Tribunal, therefore, should not proceed to entertain an application pursuant to section 75 unless the applicants indicate that the whole of their case is contained in the material which they have put before the Tribunal.

    e. Section 75 of the Act does not allow the Tribunal to strike out a pleading that merely displays poor drafting. It must be exercised when there are no merits to the claim, rather than when the pleadings have not been sufficiently detailed.

21. As Senior Member Riegler (as he then was) said:

> In the present case, the Applicant is not legally represented. Therefore, it is not expected that the document setting out her points of claim will be prepared with the same level of legal finesse as if the document had been drawn by a lawyer. Nevertheless, even with that caveat, the document must be capable of being reasonably understood and demonstrate that the claims made are also justiciable in the Tribunal. [5]

[4] *Fleming v South East Water* [2013] VCAT 349 at [6]-[7]
[5] Ibid at [8]

THE APPLICATION BY THE SECOND RESPONDENT

22. The second respondent relied on an affidavit sworn by its director Mr Armenio Sciessere in which he deposed that the company, Enrik MacGregor Pty Ltd, had no involvement with the applicants' project. The third respondent provided structural design drawings for the project. A different company, MacGregor Geo Pty Ltd, trading as MacGregor Geotechnical, provided a soil investigation report for the project. Both of these had been retained by the first respondent.

23. The Points of Claim include a section setting out the purported claim against the second respondent, however do not address the evidence of Mr Sciessere. I asked Ms Khani-E if she had any response to the submission that the second respondent did not provide any geotechnical, structural, design or engineering services in relation to the property. She said that Mr Sciessere and Mr Farchione (the director of MacGregor Geo Pty Ltd) were both involved but she was not aware of which company had been engaged by the first respondent.

24. On the basis of the uncontradicted evidence of Mr Sciessere, supported by the exhibited evidence of the soil investigation report and the structural design drawings, I am satisfied that the claim against the second respondent is misconceived and lacking in substance. It is so hopeless that no arguable cause of action could be articulated against it even if the Points of Claim were amended, and I will order that the claim against the second respondent is dismissed.

THE APPLICATION BY THE THIRD RESPONDENT

25. Mr Sciessere is also a director of the third respondent. In his affidavit he deposed that the third respondent was retained by the first respondent to prepare a structural engineering design for the dwelling. The third respondent provided structural design drawings based on the architectural drawings and soil investigation report.

26. The submission made by the third respondent is that the Points of Claim fail to reveal a legal basis for a claim against it, the expert reports filed by the applicants do not reveal any basis for a claim against it, and the allegations are frivolous, vexatious and lacking in substance.

27. It submits that the Points of Claim are impossible to follow. They purport to set out the claims made against the second and third respondents under two separate headings. However the allegations made in both sections repeat each other and do not distinguish between the actions of the second and third respondents. Further, the Points of Claim are replete with extravagant allegations of dishonesty, collusion, fraud and misconduct, for which no proper basis exists.

28. Secondly, the third respondent says that even if some cause of action recognised at law could be identified from the Points of Claim, the five expert reports relied on by the applicants fail to identify any complaint with the work carried out by the third respondent. The reports do not reveal any arguable claim against the engineer.

29. I agree with the third respondent's submission that the Points of Claim cannot be reasonably understood. It appears that the applicants allege that the engineers are responsible for the design of the slab footing, which was cut "too wide and too deep", failed to design steel beams for the ground floor and first floor frame, was responsible for design issues with the joists and supports on the upper floor, and failed to design adequate site drainage. They also allege that the engineers failed to properly supervise the builder, resulting in construction defects.

30. Although no legal cause of action is identified, I am aware that it is arguable that the third respondent owed a duty of care to the applicants to carry out its obligations under the contract with the first respondent with due care and skill. However even if the Points of Claim were amended to articulate such a cause of action, the applicants have failed to provide any evidence or opinion to suggest that the contract or the duty of care have been breached.

31. The applicants rely on five expert reports, which they have filed. None of those reports identify any failures in the engineering drawings or the drainage design. One report has noted shrinkage cracks in the slab, but says these are within tolerances. All the other matters raised in the reports are defects in the building work carried out by the first respondent.

32. I asked Ms Khani-E if she could tell me what she said was wrong with the engineering design. She said that the joists, beams and frame "had not been built strongly". The builder had bought the roof trusses "from a junkyard". The design of the drainage pipes was "too small". I asked if anyone had told her that or whether those were just her thoughts. She said everyone had told her that but no one will give her a report. She said the Victorian Building Authority (VBA) "brought two sets of experts" to test the drainage and they said "everything is crushed under the slab and the sewer and the downpipes run into the ground". She said the VBA has refused to give her copies of their reports.

33. On the basis of the expert opinions filed, and taking the advice given to the applicants at its highest (accepting what Ms Khani-E said she was told at face value), there is no material before the Tribunal to support an allegation that the third respondent is in breach of its contract with the first respondent or has breached any duty of care owed to the applicants. The complaints made by Ms Khani-E (that the building was not built strongly enough, the roof trusses were junk, the drainage pipes were crushed), may be levelled

against the first respondent. However, none of these items can be obviously related back to the engineer's design. The complaint that the drainage pipes were designed "too small" has not been supported by the experts sent by the Victorian Building Authority (on Ms Khani-E's evidence of what she was told) or by any other expert. Accordingly, even if leave were given to further amend the Points of Claim, the applicants have been unable to provide me with any factual basis on which a claim against the third respondent could succeed.

34. I will strike out the claim against the third respondent, with a right to apply for reinstatement if the applicants are able to identify a factual basis for the claims.

THE APPLICATION BY THE FOURTH RESPONDENT

35. The fourth respondent relies on an affidavit sworn by the building surveyor Mr Vito Munafo, in which he sets out the inspections carried out by him. He also says that he has read the Points of Claim and does not understand the allegations made by the applicants against the fourth respondent. They do not plead any discernible cause of action, nor how any alleged act, error, omission or breach by the fourth respondent is causative of the alleged loss and damage suffered by the applicants.

36. Counsel submitted that the fourth respondent cannot ascertain the claims made from the Points of Claim. I agreed and so I asked Ms Khani-E to tell me what she says the building surveyor did wrong. She said the surveyor forged her signature on documents. She said she did not hire him and she did not know she could choose her own building surveyor. Another allegation is that the building surveyor failed to provide copies of the stamped approved drawings to the applicants. Ms Khani-E also said that the building surveyor failed to supervise the builder's work, which allowed defects to be constructed. In the Points of Claim, she said:

> Who else expect Building Surveyor was responsible to make sure the slab preparation, drainage, compaction and formwork were correctly done by individual contractor. There was a lack of supervision of contractors to see if measurements in the plan were adhered to… Vito never did any checking.

37. In response, Counsel for the fourth respondent denied any allegation of forgery. When pressed on this allegation, Ms Khani-E was unable to say what she meant. I note that in the Points of Claim, the applicants say:

> Complete re-plot with new plans dated 22/11/2016 had been secretly carried out during 2015/2016 between Paul Shaw, Council, Enrik, Northpoint and Enrick MacGregor, not in the contract which Simmons was/is trying – deceptively – to force me sign the papers in March 2018. A fine line added as footnote to tiles documents which I had been forced and bullied to signing July 2017. Attached to the tiles documents for my signature were three pages of totally redrawn plans… Seemingly, Vito the Building

> surveyor had no idea what this was about and directed me back to Simonds, even though it is his responsibility to monitor amendments…

38. If this is the allegation of forgery referred to by Ms Khani-E during the hearing, then her own Points of Claim contradict her statement. In the Points of Claim she admits that the building surveyor was not aware of any changes made to the plans. Accordingly, on the applicants' own evidence before me, I do not accept that a claim for forgery has any factual basis.

39. As for the second allegation, Counsel submitted that even if the surveyor had an obligation to provide copies of documents to the applicants at an earlier time (which is not admitted), it has now done so. Further, the applicants have not identified any loss and damage as a result of any such failure. I agree that there is no cause of action likely to be available to the applicants on this issue.

40. The allegation that the building surveyor allowed defects to be constructed is a misunderstanding of the role and responsibilities of the building surveyor. Mr Munafo deposed that he carried out the mandatory inspections, including nine inspections prior to the frame approval and five inspections for the frame approval. He identified defects in the frame (some of which are listed in the expert reports filed by the applicants) and these were rectified prior to the frame being approved. Further, he has not carried out a final inspection, because the property has not yet reached that stage. He has not undertaken an inspection of the drainage works as the drainage has not been completed.

41. The Points of Claim refer to an excessive site cut which was not picked up by the building surveyor, nor was he "present to rectify issues when form work was intentionally or wrongly set up". This allegation is contradicted by the land survey dated 27 October 2017 which states that the slab height is in accordance with the design. Further, Mr Munafo instructed Counsel that he inspected the finished floor levels and was satisfied they had not been dropped or reduced. If there was a genuine dispute about the facts, I would accept that this is a matter which is arguable and the claim should not be struck out at this time. However, in the absence of any actual evidence from the applicants that the slab is at "the wrong level", or is "short", or "brick structure is not on boundaries at all", I am not satisfied that the claim is arguable.

42. I also note the Points of Claim include an allegation that the building surveyor should have required the builder to provide a warranty insurance policy from QBE for more than $300,000 as the contract price is $840,000 "which means the builder has excessively underinsured this project". This allegation shows that the applicants have misunderstood the insurance required by the *Building Act* 1993. The builder was only required to provide a policy for the value of $300,000, which it has done, and

accordingly the building surveyor has not committed any error in accepting the policy.

43. I will strike out the claim against the third respondent, with a right to apply for reinstatement if the applicants are able to identify a factual basis for the claims.

THE APPLICATION BY THE FIFTH RESPONDENT

44. The fifth respondent relied on an affidavit sworn by Mr Paul Shaw, a director of the company. He deposed that his company provides architectural and town planning services. It was engaged to and did lodge the application for a town planning permit for the property next to the applicants', at number 431. It also represented the owners of number 431 in the planning appeal brought by Ms Khani-E in P25/2018.

45. While the Points of Claim against the fifth respondent are difficult to understand, it appears that the applicants allege that the fifth respondent or Mr Shaw were:

    a. owners or investors or developers of the proposed project at number 431; and

    b. friendly with various people who were involved in the design and construction of the applicants dwelling at number 433.

46. Mr Shaw's evidence was that although the fifth respondent was named as the owner of the property in the planning application, it is not in fact the owner. A title search of the property confirmed that contention. Mr Shaw also deposed that the company had no involvement with the building work at number 433.

47. I asked Ms Khani-E if she had any other grounds on which she brought a claim against the fifth respondent. She said that Mr Shaw and the then registered owner of number 431 had conspired so that Mr Shaw was not registered on the title. She did not accept that he was not an owner of the property, as a person at the Manningham Council had told her that his name on the planning application form was not a typographical error.

48. I do not consider that it is open and arguable to the applicants to allege that Mr Shaw or the fifth respondent was an owner of number 431. The Certificate of Title is the best evidence of the registered ownership. The applicants have not alleged any form of beneficial ownership, nor provided any information which could support such an allegation at this time. Further, and in any event, even if it were arguable that the fifth respondent was an owner of number 431, the applicants have not set out any cause of action, any wrongdoing, or any loss or damage flowing from that alleged ownership.

49. As for the second allegation, Ms Khani-E said that Mr Shaw had somehow influenced the practitioners involved with her property to excavate her site to a deeper level than she had wanted, in order to give better views, sunlight and a higher property value to number 431. She said she had met Mr Shaw through another builder, prior to her engaging the first respondent, and at that time he had provided a sketch drawing of a possible house for her land. This was also before Mr Shaw became involved with number 431. She said that after she did not go ahead with the first builder, everything Mr Shaw did was "a collusion to improve the value of number 431".

50. I am not satisfied that these allegations, even if they could be proven, would lead to a legal cause of action against the fifth respondent. It is impossible to see how the fifth respondent would owe a duty of care to the applicants. There is no contract between the two. If the site cut at number 433 is in fact deeper than the applicants had wanted, this is a matter between the applicants and the first respondent. Further, the applicants' complaints about the conditions on the planning permit granted for number 431 (sunlight, overshadowing etc) have been heard and determined in proceeding P25/2018 in 2018.

51. I am satisfied that the claim against the fifth respondent is misconceived and lacking in substance. It is so hopeless that no arguable cause of action could be articulated even if the Points of Claim were amended, and I will order that the claim against the fifth respondent be dismissed.

COSTS

52. Each of the respondents applied for their legal costs of the proceeding pursuant to s75(2) or s109 of the VCAT Act. Each submitted that the claims made had no tenable basis in fact or law within the meaning of s109(3)(c) and that the applicants should have known this as the expert material they rely on was in their possession before they commenced the proceeding. Further, they submitted that the applicants had failed to comply with the Tribunal's orders to provide points of claim which identified the legal basis on which each claim was brought against each of the respondents, which is a matter that may be taken into consideration under ss109(3)(a)(i).

53. Further, the solicitors for the fourth and fifth respondents had written to the applicants prior to issuing the s75 applications, setting out why they said the claims were hopeless, inviting them to withdraw the claims made against their clients, and offering to bear their own costs.

54. In response, Ms Khani-E said she would not pay any costs, saying the respondents had caused her pain, and had "lied, colluded, and laughed at me".

55. The power to award costs under s75(2) has been described variously as follows:

> *Section 75(2) operates independently of s 109, and is broader than the power to award costs under s 109. It does not operate from a starting presumption that each party ordinarily bear their own costs but, equally, it does not create a presumption that costs should automatically follow the event. There is a general discretion, which should be exercised having regard to the particular circumstances of the proceeding.* [6]

> *In my view ss 75(2) and s 109 can be read together and when so read they disclose a coherent and sensible scheme. Subsection 75(2) makes specific provision for an award of compensation in circumstances where a dismissal or strike out application is successful because absent such a provision the power to award costs would be in doubt. The scope of an award of compensation is broader than the costs which may be ordered under s109 in order to discourage unmeritorious claims.* [7]

> *… the Tribunal's discretion under s75(2) is unfettered. Whilst, in deciding whether to exercise its discretion, the Tribunal might be assisted by matters similar to those set out in s109(3) it is not required to consider those specific matters.* [8]

56. I agree with and adopt these observations. Most significantly, I note that s75(2) refers to "an amount to compensate" a respondent, which is broader than the test for costs under s109, and does not start from the premise that each party should bear their own costs.

57. I am satisfied that this is a matter where it is appropriate to order the applicants to compensate each of the respondents for their legal costs of the proceeding, for the following reasons:

    a. the applicants have been given multiple opportunities to comply with the order to provide Points of Claim which set out the "legal basis on which each claim is brought against each of the respondents, including how they say each respondent owes them a legal liability", but have not done so;

    b. the applicants have been given the opportunity to obtain legal and technical advice, but either have not done so or have not accepted the advice they were given;

[6] *Ingram v McLennan & Associates Pty Ltd* [2014] VCAT 412 at [4] per Deputy President Dwyer
[7] *Naylor v Oakley Thompson & Co Pty Ltd* [2008] VCAT 2074 at [29] per Justice Ross VP
[8] *Graham v McNab* [2015] VCAT 980 at [11] per Deputy President Aird

c. the Tribunal has assisted the applicants including by the use of a compulsory conference to identify and clarify the nature of the issues in dispute (convened under s83(2)(a) of the VCAT Act);

d. despite this, the second to fifth respondents are still unable to understand the claims made against them;

e. if the proceeding were to continue against them, the second to fifth respondents would be forced to incur further costs in circumstances where they would be unable to meaningfully respond or participate in the proceeding;

f. I agree with Counsel's submission that "the Tribunal has discharged its responsibilities in providing the applicants with the assistance needed to diminish any disadvantage they may have in representing themselves. Regard must be had to the resources of the Tribunal, the respondents, as well as the applicants, in the orders made";

g. significantly, even if the Tribunal were to allow the applicants a further opportunity to amend the Points of Claim, the claims against the second and fifth respondents would still be misconceived and hopeless, as no legal cause of action can be established in circumstances where they had no involvement in the applicants' building;

h. significantly, even if the Tribunal were to allow the applicants a further opportunity to amend the Points of Claim to plead a legal cause of action against the third and fourth respondents, and assuming that the applicants could prove the facts they allege against them, the claims would still be hopeless and bound to fail, as the evidence before the Tribunal (including taking what Ms Khani-E said she was told at face value) does not disclose any factual basis for the claims; and

i. the fourth and fifth respondents made a number of offers to bear their own costs if the applicants withdrew their claims, which were not accepted.

58. I will order that the applicants must pay the costs of the proceeding of the second, third, fourth and fifth respondents, to be taxed by the Victorian Costs Court on the standard basis on the County Court scale in default of agreement.

SENIOR MEMBER S. KIRTON