VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP422/2016

CATCHWORDS

Domestic building – application for proceeding against second respondent to be struck out – s75 *Victorian Civil and Administrative Tribunal Act 1998* – relevant considerations – application dismissed

APPLICANT	Mrs Lien Tu Lu
FIRST RESPONDENT	Oakmont Properties Pty Ltd (ACN 106 786 010)
SECOND RESPONDENT	Steven Just
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	24 July 2018, submissions on behalf of applicant 7 August 2018
DATE OF ORDER	15 August 2018
CITATION	Lu v Oakmont Properties Pty Ltd (Building and Property) [2018] VCAT 1276

ORDERS

1. The second respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.

2. Costs reserved with liberty to apply. If any application for costs is received I direct the principal registrar to refer it to Deputy President Aird or another member for orders to be made for such application to be determined.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr D Epstein of Counsel
For the Respondent	Mr J Gray, solicitor

REASONS

1 On 31 May 2018 the second respondent ('Mr Just') filed an Application for Directions Hearing or Orders dated 29 May 2018 seeking orders under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* that the proceeding against him be struck out with costs ('the s75 application').

2 The application was said to be urgent because '2nd respondent is incurring costs unnecessarily'. At that time the proceeding was listed for a four day hearing commencing on 29 August 2018 which has since been adjourned to 29 January 2019.

3 Following the filing of the s75 application, the following orders were made in chambers:

> Having regard to the second respondent's application for directions hearing or orders dated 25 May 2018 and filed on 31 May 2018 seeking orders that the proceeding as against the second respondent be struck out with costs, the Tribunal orders:
>
> 1. The second respondent's application for directions hearing or orders is listed for hearing at a directions hearing on 24 July 2018 commencing at 2.15pm at 55 King Street Melbourne – allow 1 hour.
> 2. By 19 June 2018 the second respondent must file and serve any affidavit material in support of his application together with submissions.
> 3. By 26 June 2018 the applicant must file and serve any material in reply.

4 The second respondent did not comply with the orders. At the commencement of the directions hearing on 24 July 2018 Mr Gray, solicitor, who appeared on behalf of both respondents, handed up an affidavit affirmed by him the same day. No submissions were filed on behalf in support of the s75 application.

5 Mr Epstein of counsel who appeared on behalf of the applicant indicated he was not in a position to respond to the application having only been provided with a copy of Mr Gray's affidavit at the commencement of the directions hearing. I therefore made orders for the applicant to file and serve any material in reply to the s75 application by 7 August 2018, and further that I would then determine the application in chambers.

6 The applicant filed 'Submissions Against Strike Out Section 75 Application' dated 7 August 2018 together with 'caselaw in support of submissions'.[1] However, as this authority is not referred to in the submissions and it is not clear how it is relevant to the s75 application I have not had regard to it.

[1] *Downing v Cipcon Pty Ltd & Anor* [2013] VCAT 344

7 Surprisingly neither party addressed me about the factors to be taken into account in determining a s75 application.

8 For the reasons which follow the application is dismissed.

SECTION 75

9 Section 75 of the VCAT Act provides:

> (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.
>
> …
>
> (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.

10 The power under s75 is discretionary. It is well established that any exercise of this discretion must be approached with caution, noting that the hurdle to be overcome by a party making an application under s75 is very high. As Judge Bowman said in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd*[2] at [32 and 34]:

> 31. There have been a number of decisions of the courts generally and of this Tribunal in relation to the principles which operate when applying a provision such as S.75 of the Act. In relation to this Tribunal, these were summarised by Deputy President McKenzie in Norman v Australian Red Cross Society (1998) 14 VAR 243. One such principle is that, for a dismissal or strike out application to succeed, the proceeding must be obviously hopeless, obviously unsustainable in fact or in law, on no reasonable view justify relief, or be bound to fail. This is consistent with the approach adopted by the courts over the years. As was stated by Dixon J in Dey v Victorian Railways Commissioners (1949) 78 CLR 62:-
>
> > "The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be

[2] [2005] VCAT 306.

> very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court …".

…

34. Whether or not a burden of proof in the strict sense exists in proceedings before this Tribunal, I am also of the view that the party making an application such as this is required to induce in my mind a state of satisfaction that the claim is obviously hopeless, unsustainable, and bound to fail, and that it is "very clear indeed" that this is so. [emphasis added]

11 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[3] considered recent authorities:

8. In Forrester v AIMS Corporation, Kaye J considered the principles applicable to s 75(1) applications. Before a proceeding can be summarily dismissed:

   (a) it must be 'very clear indeed' that the action is 'absolutely hopeless'; or

   (b) the action must be 'so clearly untenable that it cannot possibly succeed'.

Kaye J also held that:

   (c) the strike out power 'may not be invoked where all that is shown is that, on the material currently put before the Tribunal, the complainant may fail to adduce evidence substantiating an essential element of the complaint'; and

   (d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.

9 In Ausecon Developments Pty Ltd v Kamil, Judge Davis noted that for a strike out application to be successful, the proceeding must:

> … must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail. A claim would be regarded as frivolous or vexatious or misconceived if it is obviously groundless, made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction. A claim may be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence. The power to strike out should be exercised with great caution.

10 In Fancourt v Mercantile Credits Pty Ltd ('Fancourt'), the High Court held that:

> … the power to order summary or final judgment 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.

[3] [2015] VCAT 1683

11 In *Lay v Alliswell Pty Ltd*, Balmford J accepted that the High Court's observations in *Fancourt* are applicable to applications under s 75 of the VCAT Act.

[citations omitted]

THE APPLICANT'S CLAIM

12 The applicant owner claims $263,231 for the rectification of defective work and associated costs, including water ingress, drainage issues, and defects in the swimming pool.

13 The following is a summary of the applicant's claim as set out in the Points of Claim ('POC') dated 17 October 2016 insofar as they concern the claims against Mr Just:

i the first respondent ('Oakmont') is a builder within the meaning of the *Domestic Building Contracts Act 1995* ('the DBCA')

ii Oakmont is the registered builder on the domestic building contract for the dwelling on the subject site

iii Mr Just is a director of Oakmont, a registered building practitioner with a DBU registration and a builder within the meaning of the DBCA

iv Mr Just is the director of Swiss Cow Pty Ltd ('Swiss Cow') which was the owner of the subject site and the vendor in the contract of sale to the applicant. Further, Swiss Cow is the registered owner on the domestic building contract for the dwelling and swimming pool construction at the subject site

v Swiss Cow engaged Oakmont to build the dwelling and the swimming pool

vi the domestic building contract was party written and partly implied including a Domestic Building Contract with associated designs, plans and specifications

vii the registered builder on the certificate insurance for the warranty insurance was Oakmont

viii the building permits for the construction of the dwelling and the swimming pool name Oakmont as the agent for the owner (Swiss Cow) and classed Mr Just as the builder[4]

ix the Occupancy Permit for the dwelling name Oakmont and Mr Just as the building practitioner and Mr Just is classed as the builder

x in early 2015 Mr Just represented, warranted and stated to the applicant that he would rectify the defects – these representations occurred during negotiations facilitated by the Victorian Building Authority ('the VBA') and were made in emails and telephone calls

[4] 'classed as the builder' is the description used by the applicant in her Points of Claim

xi the works have not been rectified and accordingly Mr Just engaged in misleading and deceptive conduct in making the representations

MR JUST'S POSITION

14 Mr Just is a director of the first respondent builder. In his affidavit dated 24 July 2018 Mr Gray states:

i Mr Just is the principal of Oakmont

ii the applicant purchased the property from Swiss Cow

iii Swiss Cow engaged Oakmont to build the house and the swimming pool, and that there was no written contract 'for the build'. Mr Just was the registered building practitioner and the principal of Swiss Cow

iv the home warranty certificate of insurance describes the builder as Oakmont

v the building permits describe the builder as 'Steve Just Oakmont Properties Pty Ltd'

vi all invoicing and subcontracts for the builder were between Oakmont and the relevant subcontractor

vii accordingly the builder is properly characterised as Oakmont and *so there is no sustainable claim available to the Applicant against Steve Just in respect of the defects claims*…

DISCUSSION

15 I cannot be satisfied on the material before me that the applicant's case against Mr Just is *frivolous, vexatious, misconceived or lacking in substance*. The matters raised in Mr Gray's affidavit simply set out what can best be described as Mr Just's defence to the applicant's claims.

16 Mr Gray exhibits the four building permits to his affidavit. The building permit for the swimming pool identifies the 'Builder' as 'Stephen Just' not 'Steve Just Oakmont Properties Pty Ltd' as stated by Mr Gray in his affidavit.

17 There are three building permits for the dwelling and other stages of construction which identify the builder as Steve Just Oakmont Properties Pty Ltd as stated by Mr Gray in his affidavit.

18 Two Applications for a Building Permit for the construction of the dwelling and another stage of construction are exhibited to Mr Gray's affidavit and identify the builder as Oakmont Properties Pty Ltd. The Application for a Building Permit for the swimming pool has not been exhibited to Mr Gray's affidavit.

19 Mr Gray makes no mention in his affidavit of the misleading and deceptive claim made against Mr Just or why such claim is misconceived or lacking in substance.

20 Surprisingly, as noted by Mr Epstein in his submissions on behalf of the applicant, no issues were raised in the respondents' Points of Defence dated 30 November 2016 as to whether Mr Just was properly a respondent to the proceeding. There are no material facts set out in the respondents' Points of Defence, rather, they simply contain bare admissions or bald denials which I note is contrary to the Tribunal's orders dated 13 September 2016 which required:

> By 18 November 2016 the respondent must file and serve Points of Defence specifying the material facts relied upon.

21 I note, in passing, that there has been an inordinate, unexplained delay in the bringing of this application. This proceeding was commenced in April 2016. The respondents have been represented by Mr James Gray, solicitor since at least the first directions hearing on 13 September 2016, and Points of Defence were filed on 30 November 2016, yet this application was not made until nearly two years later, approximately three months prior to the scheduled hearing date of 29 August 2018, which has since been adjourned to now commence on 29 January 2019.

22 Accordingly, the s75 application will be dismissed with costs reserved.

DEPUTY PRESIDENT C. AIRD