VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D565/2008

CATCHWORDS

Application to strike out certain paragraphs in Points of Claim – s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 – relevant considerations – 'open and arguable' case – whether terms of confidential settlement with second respondent discoverable

APPLICANTS	Nicholas Mathers and Jennifer Mathers
FIRST RESPONDENT	Victor Skinner
SECOND RESPONDENT	Mornington Peninsula Shire
THIRD RESPONDENT	Hatson Pty Ltd (ACN 006 824 399)
FOURTH RESPONDENT	Victor Montgomery Skinner
FIFTH RESPONDENT	Susan Kay Park
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	13 May 2009
DATE OF ORDER	10 June 2009
CITATION	Mathers v Skinner & Ors (Domestic Building) [2009] VCAT 975

ORDER

1 The application by the first and fourth respondents, that the paragraphs in the applicants' Points of Claim dated 11 August 2008 which allege or rely on a building contract between the first and third respondents be struck out, is dismissed.

2 The application by the first and fourth respondents for leave to amend their Points of Defence is refused.

3 The application by the first, fourth and fifth respondents for disclosure of the terms of settlement between the applicants and the second respondent is refused.

4 The hearing date of 27 July 2009 is confirmed.

5 Liberty to the parties to apply by consent for this proceeding to be referred to a compulsory conference.

6 Costs reserved – liberty to apply. I direct any application for costs to be listed for hearing before Deputy President Aird.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants	Mr E Riegler of Counsel
For Respondents	Mr B Carr of Counsel

REASONS

1 During the period October 1998 to May 2000, Mr Skinner, who is a registered domestic and commercial building practitioner, constructed a new home on land owned by Hatson Pty Ltd in Mornington. In February 2005 Mr and Mrs Mathers ('the owners') purchased the home from Hatson Pty Ltd. Mr Skinner and Ms Park (now Mrs Skinner) were the co-directors of Hatson Pty Ltd which has been de-registered since the commencement of this proceeding. The owners commenced this proceeding in August 2008 alleging the house was not constructed in accordance with the approved plans, and that there are significant defects. Mr Skinner is the first and fourth respondent to the claim (as the builder and a director of Hatson respectively). Ms Park is the fifth respondent as a director of Hatson. Claims were also made against the Mornington Peninsula Shire (the third respondent) with which the owners have recently settled. All interlocutory steps having been completed, the final hearing is scheduled to commence on 27 July 2009 with an estimated hearing time of five days.

2 On 22 April 2009 the solicitors for Mr Skinner filed an application for orders/directions seeking the following orders:

1) That the First and Fourth Respondents [Mr Skinner] be granted leave to file and serve Further Amended Points of Defence of the First and Fourth Respondents dated 1st April 2009.

2) That such parts of the Applicants' Points of Claim dated 11th August 2008 that allege and rely on an alleged building contract made by the First Respondent [Mr Skinner] with the Third Respondent [Hatson Pty Ltd] ("the building contract") and the alleged warranties contained in the building contract be struck out.

3) That the Applicants make discovery of any agreement evidencing the resolution of the Applicants' claim against the Second Respondent [the council].

This application was supported by an affidavit from Mr Skinner's solicitor. Written submissions were also received from both parties. At the hearing of the application, the owners were represented by Mr Riegler of Counsel, and Mr Skinner was represented by Mr Carr of Counsel.

The application for leave to amend the defence and the s75 application

3 These applications are inextricably linked and it is convenient to consider them together.

4 In paragraph 2 of their Points of Claim the owners describe the first respondent (Mr Skinner) as 'the Builder'. This is admitted by Mr Skinner in his Points of Defence dated 7 November 2008, and the Amended Points of Defence dated 25 November 2008. The application for leave to amend his defence does not include any proposed amendment to paragraph 2.

5 The land was owned by Hatson of which Mr Skinner was one of the directors. Mr Skinner was a registered domestic and commercial building practitioner. This application was made following finalisation of all of the interlocutory steps including the filing of witness statements. It is contended on behalf of Mr Skinner that, in the absence of any evidence of a written or oral agreement constituting a building contract between him and Hatson, all paragraphs in the Points of Claim which allege or rely on a building contract between Mr Skinner and Hatson should be struck out under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 as being misconceived and/or lacking in substance. In particular, paragraph 8 states:

> During the period 15 October 1998 and 29 May 2000 the Builder undertook domestic building work within the meaning of that term as defined in the Act [the *Domestic Building Contracts Act* 1995 ('the *DBC Act'*)] comprising the construction of a residential dwelling, garage and pool on the property ('the Works') pursuant to an agreement between the Builder and the Vendor ('the Building Contract').
>
> PARTICULARS
>
> The owners are unable to provide particulars of the Building Contract until after the parties have made discovery.
>
> Insofar as the Building Contract is to be implied, it is to be implied by the operation of law, by virtue of the operation of the Act and in order to give the arrangement between the Builder and the Vendor the business efficacy that they intended such arrangement to have.

6 In his Points of Defence dated 7 November 2008, and the Amended Points of Defence dated 25 November 2008 in response to the allegations in paragraph 8 Mr Skinner:

> …admits that in his capacity as a builder he undertook domestic building work on the property at …comprising the construction of a residential dwelling, garage and pool, but otherwise denies the contents of paragraph 8.

Mr Skinner now seeks leave to amend paragraph 8 of his defence as follows:

> He admits that in his capacity as <u>an owner builder</u> he undertook domestic building work on the property …comprising the construction of a residential dwelling, garage and pool, but otherwise denies the contents of paragraph 8. <u>He denies that he entered into any agreement or building contract with the Third Respondent</u> [Hatson].

He also seeks leave to amend other paragraphs of his defence which rely on there being a building contract between him and Hatson. These proposed amendments include the withdrawal of certain admissions, principally that the warranties contained in s8 of the *DBC Act* apply.

7 Section 75 of the *VCAT Act* relevantly 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.

8 It is well established that caution must be exercised in determining whether a proceeding should be struck out pursuant to the provisions of s75. In *Norman v Australian Red Cross Society* 1998 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. p.102 Deputy President McKenzie said:

(a) The application is for the summary termination of the proceedings. It is not the full hearing of the proceeding.

(b) The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.

(c) If the Complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a Complainant indicates to the Tribunal that there is other evidence that he or she can call to support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the Complainant's material contains the whole of his or her case.

(d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a

serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.

(e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding. (emphasis added)

…

9 Whilst it is true that the witness statements which have been filed by and on behalf of the owners do not contain any evidence of a written or oral building contract between Hatson and Mr Skinner, this is not, in my view, sufficient to support an application under s75. It must be remembered that the allegation is that, to the extent it is necessary, the building contract is to be implied *'by the operation of law, by virtue of the operation of the Act and in order to give the arrangement between the Builder* [Mr Skinner] *and the Vendor* [Hatson] *the business efficacy they intended such arrangement to have.* If I am satisfied that paragraph 8 discloses and '*open and arguable'* case, then this application must fail.

10 It was submitted on behalf of Mr Skinner that as a matter of commonsense one could not expect a company to enter into an agreement with its own director as this would effectively mean that the director was entering into a contract with himself. However, in my view, where there are two related entities – a company and an individual - the allegations of an oral or implied contract is open and arguable. It is premature to determine whether there are any documents evidencing a written agreement between Mr Skinner and Hatson – that will only become apparent after the hearing and testing of the evidence, and a consideration of any documents which are tendered in evidence.

11 The submissions in support of the s75 application are, in part, founded on leave being granted for the proposed amendments to Mr Skinner's defence, and in particular to paragraph 8. Further they are somewhat inconsistent, and do not accurately reflect the proposed amendment to paragraph 8 of the Points of Defence. On the one hand, it is contended that Mr Skinner applied for the building permit as an owner builder because it was his intention to live in the home when it was built – which he did with his family for two periods before it was sold to the Mathers. Mr Skinner then relies on s17 of the *Building* Act 1993 which provides that application for a building permit may be made *'by or on behalf of the owner of the building or the owner of the land, in or on which the building work is to be carried*

out'. It is submitted that when Mr Skinner applied for the building permit as an owner builder, he did so as a director, or alternatively as agent for Hatson, and that when a building permit was issued in his name as owner builder, it was issued in one of those two capacities, and accordingly Hatson was the owner builder. However, this is not reflective of the draft amendments to paragraph 8 of the Points of Defence in which it is stated that Mr Skinner carried out the construction works as an *owner builder* not, as it appears is now contended, as agent for or a director of the owner builder: Hatson. The 'evidence' and the interpretation placed on it by counsel for Mr Skinner is not conclusive as to Mr Skinner's intentions when he applied for the building permit, or the capacity in which he did so.

12 It would, in my view, be entirely inappropriate, and a denial of natural justice and procedural fairness, to decide whether there was an agreement, actual or implied, between Mr Skinner and Hatson, on the papers. I have not heard any evidence. The evidence set out in the witness statements filed on behalf of the parties has not been tested. As I recently observed in *Wood v Calliden Insurance Ltd & Ors* [2008] VCAT 1339 at [15]:

> It must be remembered that in considering an application under s75 I am not required to consider or be satisfied as to the likely success of the Woods' claim. I am required to consider whether the allegations are *'frivolous, vexatious, misconceived or lacking in substance'*, in other words, whether they are doomed to fail. This does not contemplate a detailed consideration of the evidence. As Senior Member Cremean observed in *Johnston v Victorian Managed Insurance Authority* [2008] VCAT 402 at [15-17]:
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> > 15. …. I do not think Parliament intended that the Tribunal should be functioning as a court of pleadings. From time to time, of course, and contained within the Sixth Respondent's submissions, it is expressly disclaimed that the Tribunal is a court of pleadings. And that remains the reality: the Tribunal is not a court in the normal sense of that word and is not, most definitely, a court of pleadings.
> > 16. There is also this point. The primary function of the tribunal, apart from alternative dispute resolution, is to conduct hearings. A hearing is a trial of the action. <u>There should not be a trial before a trial</u>. (emphasis added)

13 I will therefore dismiss the s75 application.

14 Similarly, for the reasons set out above, the application by the first and fourth respondents for leave to file and serve Further Amended Points of Defence is refused save for paragraph 5 which identifies that the third respondent was de-registered on 26 September 2008.

15 Even had I been satisfied that the proposed amendments to the Points of Defence were intelligible, and consistent with what was described as Mr Skinner's position in the submissions, I would have been reluctant, on the material before me, to grant leave for him to amend his defence. Withdrawal of admissions which have been made is a matter requiring

serious consideration. It should not be granted lightly. There can be little doubt if leave were granted that this would be prejudicial to the owners. They have completed all interlocutory steps on the basis of the defences which have already been filed: defences which included admissions that Mr Skinner was the builder. Further, it should not go unremarked that the third respondent, Hatson, which it is now suggested, although not pleaded, was the owner builder, was de-registered in September 2008.

Are the terms of settlement discoverable?

16 Counsel for the owners confirmed that settlement had been reached with the second respondent. However, terms of settlement as at the date of the hearing of this application had not been executed. He confirmed his instructors were seeking to obtain consent from the second respondent's solicitors as to whether they consented to copies of documents *evidencing the resolution of the applicants' claim against the second respondent* being provided to the solicitors for the first fourth and fifth respondents. However, that is a matter between the owners and the second respondent.

17 I am not persuaded that the Terms of Settlement or any supporting documentation evidencing the settlement are discoverable. I respectfully concur with and adopt the comments by Hansen J in *McAskell v Cavendish Properties Ltd & Ors* [2008] VSC 328 where he said at [25]:

> As to that, the principle in Boncristiano is applicable, but it only arises if and when the builders are held to be liable. If that occurs, it may be that any amount recovered by the plaintiffs in the settlement will need to be taken into account when entering judgement against the builders, but at present there is no issue between the parties as to double recovery, so the terms of settlement are irrelevant and not discoverable.

18 The second respondent remains a party to this proceeding for the purposes of a possible apportionment of responsibility under Part IVAA of the *Wrongs Act* 1958 – not liability. The terms of any settlement between the applicants and the second respondent are not relevant to the apportionment of responsibility. Although the first fourth and fifth respondents might be interested in, and curious about, the terms of any settlement, they must make their own assessment of the likely apportionment of responsibility in determining their future conduct of this proceeding.

19 Costs will be reserved with liberty to apply. I will also grant the parties liberty to apply for the proceeding to be referred to a compulsory conference prior to the hearing which I note is scheduled to commence on 27 July 2009.

DEPUTY PRESIDENT C. AIRD