

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP863/2014

CATCHWORDS

Domestic building – standing of applicant developer to pursue contractual claim for loss of bargain, based in part on defects in common property – *Victorian Civil and Administrative Tribunal Act 1998 – s75(2)* – order for compensation in the nature of costs

APPLICANT	Mission Express Pty Ltd (ACN 086 078 319)
RESPONDENT	Hewcon Pty Ltd (ACN 070 289 011)
FIRST JOINED PARTY	Owners Corporation 1 Plan No 703939
SECOND JOINED PARTY	Owners Corporation 2 Plan No 703939
THIRD JOINED PARTY	Owners Corporation 3 Plan No 703939
HEARING TYPE	Directions Hearing
DATE OF HEARING	30 May 2016
DATE OF ORDER AND REASONS	6 June 2016
CITATION	Mission Express Pty Ltd v Hewcon Pty Ltd (Building and Property) [2016] VCAT 919 (6 June 2016)

ORDERS

1. Orders 1 and 2 of the Tribunal's orders dated 4 May 2016 are confirmed.
2. By 1 July 2016 the applicant must file and serve further amended Points of Claim having regard to the Tribunal's Orders and Reasons dated 4 May 2016, and these Orders and Reasons.
3. The date by which the respondent must file and serve Points of Defence is extended to 29 July 2016.
4. The date by which the Owners Corporations must send a copy of the orders to each of the Lot owners dated 4 May 2016 and thereafter file a proof of service is extended to 13 June 2016.
5. By 13 June 2016 the Owners Corporations must send a copy of these orders to each of the Lot owners, and thereafter file a proof of service.
6. Orders 4 and 5 may be complied with at the same time, with the orders of 4 May 2016 and these orders being sent to each Lot owner together providing it is clearly identified in the correspondence that there are two orders.

7. Under s75(2) of the *Victorian Civil and Administrative Tribunal Act 1998*, the applicant must pay the respondent compensation in the nature of costs, of and incidental to the respondent's application under s75 of that Act determined on 4 May 2016, fixed in the sum of \$3,505.95.
8. **I direct the principal registrar to send a copy of these orders to Tisher Liner FC Law, Level 2, 333 Queen Street, Melbourne 3000, the solicitors who appeared on behalf of the joined parties at the directions hearings, as well as to the joined parties.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr T Sedal of Counsel
For Respondent	Mr L Connolly of Counsel
For the Joined Parties	Ms N Wilde, solicitor

REASONS

- 1 The background to this proceeding are set out in *Mission Express Pty Ltd v Hewcon Pty Ltd*¹ (the earlier Reasons). Following a directions hearing on 31 March 2016, when the respondent builder's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998*² (the VCAT Act) was heard, I made orders striking out those paragraphs of the applicant developer's Amended Points of Claim concerning an owners corporation dispute and the developer's application under s165(1)(ba) of the *Owners Corporations Act 2006* (the OC Act). I also made orders striking out Items B³ and D⁴ in the Prayer for Relief.
- 2 In the earlier Reasons I indicated that I was prepared to make orders under s165(1)(ba) of the OC Act authorising the developer to bring proceedings on behalf of the Owners Corporations in relation to common property defects, on certain conditions. I listed the proceeding for a further directions hearing on 30 May 2016 to hear from the parties, including the Owners Corporations which did not appear at the directions hearing on 31 March 2016.
- 3 At the directions hearing on 30 May 2016 Mr Sedal of Counsel appeared on behalf of the developer, Mr Connolly of Counsel appeared on behalf of the builder, and Ms Wilde, solicitor appeared on behalf of the Owners Corporations.
- 4 At the commencement of the directions hearing, Mr Sedal indicated that there was a disagreement between the parties as to their interpretation of the earlier Orders and Reasons. Further, that having considered the Tribunal's proposed conditions as set out in the earlier Reasons, and additional conditions proposed by the Owners Corporations, the developer was no longer seeking an order under s165(1)(ba) of the OC Act. However, it wished to proceed with its contractual claims, including seeking orders under s53(2)(g) of the *Domestic Building Contracts Act 1995* (the DBCA) for the rectification of the common property defects.
- 5 To clarify, insofar as any clarification is necessary, it is open to the developer to bring a contractual claim for loss of bargain, partly based on there being defective works including in the common property. However, it cannot stand in the shoes of the OC to bring claims for or concerning the rectification of defects in the common property, unless authorised to do so by the Tribunal under s165(1)(ba) of the OC Act. Nor can the developer seek an order under s53(2)(g) of the DBCA compelling the builder to rectify the common property defects.

¹ [2016] VCAT 699

² That any claims by the applicant builder in respect of the rectification of common property defects be struck out, and further that any application by the applicant developer under s165(1)(ba) of the *Owners Corporations Act 2006* could not be made in the Amended Points of Claim.

³ By which an order was sought under s53(2)(g) of the *Domestic Building Contracts Act 1998* that the respondent rectify the common property defects

⁴ By which an order was sought under s165(1)(ba) of the

6 However, as set out in my earlier Reasons, claims in relation to the rectification of the common property defects were made in addition to the developer's contractual claims which I summarised in my earlier Reasons as follows:

31. At paragraph 8C the developer pleads that on or about 24 November 2015 the Superintendent:
 - (a) directed the Respondent that the Applicant elects to accept the non-complying work referred to in the Defects Notice... and
 - (b) provided the Respondent with the Superintendent's assessment of the deemed variation, in the amount of \$117,470.32 in accordance with clause 36.4 of the Contract.
32. At paragraph 8D the developer pleads that the sum of \$117,470.32 is therefore to be deducted from the contract sum.

7 As Mr Sedal correctly observed during the directions hearing on 30 May 2016, I was not addressed by either party during the hearing of the s75 application as to the developer's standing to pursue its contractual claims, insofar as they are referable to the common property defects. Accordingly, this issue was not determined by the earlier Orders and Reasons.

8 Whilst I have not heard detailed submissions on the point, having regard to *Alfred McAlpine Construction Ltd v Panatown Ltd*⁵, *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*⁶ and *Bannister and Hunter Pty Ltd v Transition Resort Holdings Pty Ltd (No 3)*⁷, I am satisfied that the developer's contractual claims insofar as they rely on the common property defects are arguable.

9 Ms Wilde, on behalf of the OCs, referred me to paragraph 41 of the earlier Reasons:

Although the developer has indicated it will not look to the OCs for any contribution to the cost of conducting the proceeding, and suggests that there is therefore no disadvantage to the OCs, I am concerned to ensure that the interests of the OCs are not adversely affected by any such order [under s165(1)(ba) of the OC Act]. Rectification to the common property defects, whether by the builder, or arranged by the developer, will require the co-operation of the OCs. For instance, access will be required to the common property to carry out any rectification works, and this can only be, and will need to be facilitated by the OCs, the majority of members of which seemingly lack interest in the rectification of the common property defects. However, if the developer were to be successful in its contractual claims in respect of the common property defects, the rights of the OCs to claim against the builder for these defects may be compromised.

10 These observations must be read in conjunction with those set out in paragraphs 42 to 44 of the earlier Reasons:

⁵ [2000] 3 WLR 946

⁶ [2012] NSWCA 184

⁷ [2013] NSWSC 1943

42. Further, I accept the submission on behalf of the builder, that it would not be fair to the OCs, if an order was made under s165(1)(ba) as any amount awarded as damages, could be set off against the outstanding contract sum, and there can be no certainty it will be used for the rectification of common property defects.
43. Therefore, subject to hearing from the parties and the OCs, I could only be satisfied it would be fair to exercise the tribunal's discretion under s165(1)(ba) if the developer were to agree to the following orders and conditions:
 - 1) Leave be granted to it under s74 of the VCAT Act to withdraw its contractual claims in respect of the common property defects, being the claim for damages for the cost of rectification and the claim for a declaration that \$117,470.32 is to be deducted from the contract. [underlining added]
 - 2) Any damages awarded in relation to the common property defects not be offset against the contract sum, but instead be paid into the OCs bank accounts to be used by the OCs for rectification of the common property defects.
 - 3) It undertake to be responsible for all costs of and incidental to this proceeding insofar as it concerns the common property defects.
44. However, I do not consider it fair or appropriate to make such orders without first hearing from the parties, and the OCs. I will order that a further directions hearing be listed so that I may hear from them, and also require the OCs to serve a copy of these Orders and Reasons on each of the lot owners together with a copy of the expert reports which have been filed.

- 11 I understand Ms Wilde's concerns that if the developer is successful in its contractual claim that the OCs might well be disadvantaged. However, that is not a reason for the developer's claims to be struck out. Rather, it is for the OCs to take whatever steps are necessary for them to protect their own interests.
- 12 Mr Sedal submitted that the developer should be permitted to seek relief under s53(2)(g) of the DBCA. The developer's standing to rely on s53 of the DBCA was considered and determined in the earlier Reasons, and Item B of the Prayer for Relief struck out.
- 13 Accordingly, the only orders now required (other than those made at the conclusion of the directions hearing) are for the filing and service of Further Amended Points of Claim by the developer, and Points of Defence by the builder.
- 14 I note that although the OCs were legally represented at this directions hearing, that a Notice of Solicitor Commencing to Act has not been received. Further, that the OCs have not complied with Order 5 of the Tribunal's Orders dated 4 May 2016, and accordingly I will allow an extension of time for that order to be complied with.

COSTS

- 15 The builder seeks an order that the developer pay its costs of and incidental to its s75 application, to be fixed in the sum of \$3,505.95. The developer opposes the application. Although not articulated as such, I am satisfied this application should be treated as an application under s75(1) of the VCAT Act which provides:

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.

- 16 In *Oakley Thompson & Co Pty Ltd*⁸ Judge Ross VP (as he then was) said at [29]

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. [underlining added]

- 17 I agree with, and adopt, his Honour's observations. Further, in my view, 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.
- 18 The builder contends that it had no alternative other than to bring the application, because the developer's claim,s as set out in the Amended Points of Claim, predicated on the developer's application under s165(1)(ba) of the OC Act was clearly misconceived. I agree. This was not an issue that could be left until the final hearing. It was appropriate that it be determined early in the proceeding. Further, I note that the developer has subsequently withdrawn its application under s165(1)(ba).
- 19 I am satisfied that it is appropriate to order compensation under s75(2) in the nature of costs. Mr Sedal conceded on behalf of the developer that the amount claimed was reasonable, in the event I was minded to exercise my discretion in favour of the developer. Accordingly, I will order the applicant to pay the respondent compensation fixed in the sum of \$3,505.95.

DEPUTY PRESIDENT C AIRD

⁸ [2008] VCAT 2074