VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST **VCAT REFERENCE: D1177/2013**

CATCHWORDS

Summary dismissal of proceeding – *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 75(1) – Principles to be applied – Disputed issues of fact and law – Issue of public importance – Costs of unsuccessful summary dismissal application under s 75.

FIRST APPLICANT:	Owners Corporation 1 PS537642N
SECOND APPLICANT:	Owners Corporation 2 PS537642N
FIRST RESPONDENT:	Hickory Group Pty Ltd
SECOND RESPONDENT:	Freyssinet Australia Pty Ltd
THIRD RESPONDENT:	Caelli Constructions Pty Ltd
FOURTH RESPONDENT:	KLN Electrical Service Pty Ltd
JOINED PARTY:	Massey Pty Ltd
WHERE HELD:	Melbourne
BEFORE:	Justice Greg Garde AO RFD
HEARING TYPE:	Hearing
DATE OF HEARING:	27-28 October 2015
DATE OF ORDER:	28 October 2015
CITATION	*Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd (Building and Property)* [2015] VCAT 1683

ORDER

1 By 11 November 2015, the first respondent must make discovery of the following documents, if they are in their possession:

(a) the site meeting minutes; insofar as they are referable to the identity of the roofing subcontractor;

(b) site diary entries, insofar as they are referable to the identity of the roofing subcontractor; and

(c) contract documentation, invoices and purchase orders that relate to Cruise Commercial Pty Ltd or any person or persons responsible for undertaking the roof plumbing works.

2 By 11 November 2015, the applicants must make discovery of the following documents, if they are in their possession: all documentation pertaining to the insurance claim made to the relevant insurer in respect of Plumbing Industry Commission Compliance Certificate No. 3721299.

3 The following persons are joined to the proceeding as the third to thirty-third applicants:

> [The names and details of the joined parties are not included in this published version.]

4 By 10 November 2015, the applicants will file and serve Further Amended Points of Claim.

5 With regard to the dates within the orders of Senior Member Walker made 28 October 2014,

(a) Order 5 be extended to 27 November 2015;

(b) Order 7 be extended to 18 December 2015;

(c) Order 8 be extended:

i in the case of the first respondent, to 22 April 2016; and

ii in the case of the other respondents and joined party, to 3 June 2016;

(d) Order 10 be extended to 18 July 2016; and

(e) Order 13 be extended to 14 July 2016.

6 The applicants will file and serve any further expert report(s) in relation to defects by 18 December 2015.

7 The applicants will file and serve any further expert report(s) in relation to quantum by 12 February 2016.

8 The matter is listed for hearing on an estimate of twenty to twenty-five days commencing on 24 October 2016.

9 Save as otherwise provided by these orders, the first respondent's application of 7 April 2015 is dismissed.

10 The applicants' costs of the first respondent's application of 7 April 2015 are reserved.

11 The second respondent and joined party's costs of the first respondent's application of 7 April 2015 (if any) are reserved.

12 No order as to the first respondent and third respondent's costs of the first respondent's application of 7 April 2015.

13 Liberty to apply.

Justice Greg Garde AO RFD
President

APPEARANCES:

For the First and Second Applicants:	Mr B.A Toby Shnookal QC with Mr Benjamin Reid of counsel
For the First Respondent:	Mr Craig Harrison QC with Mr Adam Rollnik of counsel
For the Second Respondent:	Mr Ryan Lee, solicitor
For the Third Respondent:	Mr Richard Harris of counsel
For the Fourth Respondent:	No appearance
For the Joined Party:	Mr Cameron Horvat, solicitor

REASONS

1 By application dated 7 April 2015 the first respondent and cross claimant, Hickory Group Pty Ltd ('Hickory'), seeks to strike out the claim made by Owners Corporation 1 and 2 ('the applicants') and (subject to their successful joinder) 31 unit owners listed in the applicants' Further Amended Points of Claim dated 22 October 2015. In the event, the parties were able to reach agreement regarding the proposed joinder. Directions were also largely agreed, and insofar as they were disputed, they were resolved orally during the hearing on 28 October 2015. I will not discuss them in these reasons. Regarding the other matters, I will deal with the facts on a preliminary basis as I understand them from the affidavits.

2 The claim before the Tribunal is for the rectification of defects in a development at 100 the Esplanade, Torquay VIC 3228, known as Resort Torquay ('the development'), constructed by Hickory and containing a mix of apartments and other facilities, and also commercial businesses. There are 129 apartments in the development.[1] 45 apartments are said to be of a conventional type.[2] They are located on the third and fourth floors of the development. There are, or at least were on construction, 84 'dual key' apartments on the first and second floors,[3] with two entry points. Subsequently, I am informed that 15 apartments which were dual key have had the 'dual key' aspect removed. These apartments have become two bedroom apartments.

3 I am informed that the principal allegations of defects relate to common property, including the roof, cladding, services and structure.[4] There are also claims of defective balconies, balustrades and other problems.[5]

4 The roof structure is common property and is situated on top of the two levels of apartments. There have apparently been water leaks in the common property, affecting the properties below.

5 The applicants say that the residential component of the development is subject to the *Domestic Building Contracts Act 1995* (Vic) ('the Act'). Hickory denies that any part of the development is subject to the Act. The Hickory strike out submissions rely on three grounds. First, Hickory says the contract between Hickory and Massey Pty Ltd (the original owner and developer of the land on which the works were constructed) ('Massey') is not a domestic building contract. As a result, the Act does not apply. Secondly, it relies on various exclusions in the Act. For example, Hickory submits that if the Act does apply, it does not apply to the apartments rented for short term use. Thirdly, it says that the application should be struck out

[1] Affidavit of Megan Lisbeth Calder sworn on 7 April 2015 [10(b)] ('Calder affidavit').
[2] Hickory Group Pty Ltd Submissions on Application to Strike Out the Applicant's Claim dated 7 April 2015, [34] ('Hickory strike out submissions').
[3] Calder affidavit [10(c)].
[4] Hickory Strike Out submissions [87].
[5] Ibid.

because the unit owners are not parties to the proceeding. As mentioned above, this last point no longer arises due to the joinder of the unit owners.

6 Section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act') provides:

> 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.

7 Hickory submits that the application is misconceived or lacking in substance.

8 In *Forrester v AIMS Corporation*,[6] Kaye J considered the principles applicable to s 75(1) applications.[7] Before a proceeding can be summarily dismissed:

(a) it must be 'very clear indeed' that the action is 'absolutely hopeless';[8] or

(b) the action must be 'so clearly untenable that it cannot possibly succeed'.[9]

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';[10] and

(d) the respondent to a complaint has the onus of showing 'that the complaint is undoubtedly hopeless'.[11]

9 In *Ausecon Developments Pty Ltd v Kamil*,[12] 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

[6] [2004] VSC 506.
[7] Ibid, see [17]-[28].
[8] Ibid [23] (citations omitted).
[9] Ibid (citations omitted).
[10] Ibid [25].
[11] Ibid.
[12] [2015] VCAT 1474.

> complete defence. The power to strike out should be exercised with great caution.[13]

10 In *Fancourt v Mercantile Credits Pty Ltd ('Fancourt')*,[14] 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.[15]

11 In *Lay v Alliswell Pty Ltd*,[16] Balmford J accepted that the High Court's observations in Fancourt are applicable to applications under s 75 of the VCAT Act.[17] The same principle was also adopted by Kyrou J in Towie v Victoria.[18]

12 In an application under s 75 of the VCAT Act, it is appropriate to assume that the applicant will be able to prove each fact alleged in the claim in question.[19] A proceeding should not be dismissed or struck out under s 75 if the ultimate fate of the proceeding depends upon contested questions of fact that could be established or eliminated by cross-examination.[20] In the present case, I am presented with numerous folders of factual material. It was even suggested that I should go on a view to better understand the condition of the development. Not only are there contested issues of fact in this proceeding, there are also disputed issues of law.

13 Hickory relies on the case of *Kane Constructions Pty Ltd v Sopov*,[21] where Warren CJ said:

> Even so, the *Domestic Building Contracts Act* could only have application to those parts of the project intended for domestic residential use. Those parts of the development intended to be used "for business purposes" are expressly excluded from the operation of the Act by virtue of s.6(c).[22]

14 Hickory contends that the decision of Judge Davey in *Maclaw No. 651 Pty Ltd v HIH Casualty and General Insurance Ltd*[23] is incorrect, despite refusal of leave to appeal by the Court of Appeal on the basis that the decision of the Tribunal is not attended by sufficient doubt to warrant the grant of leave to appeal by the Court of Appeal.[24] It also submits that the decision of Byrne J in *Port Phillip City Council v Domain Hill Properties*

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[13] Ibid [19] (citations removed).
[14] (1983) 154 CLR 87.
[15] Ibid 99.
[16] [2001] VSC 385.
[17] Ibid [14].
[18] [2008] VSC 177 [30].
[19] *Noonan v Owners Corporation No. 2 PS409115E* [2011] VCAT 1934 [17].
[20] *Evans v Douglas* [2003] VCAT 377 [9].
[21] [2005] VSC 237.
[22] Ibid [892].
[23] [1999] VCAT 24 ('*Maclaw*').
[24] *HIH Casualty and General Insurance Ltd v Maclaw No. 651 Pty Ltd* [1999] VSCA 217.

Pty Ltd,[25] where he held the type of a building is determined by the 'physical characteristics and intended use of the building rather than its actual use',[26] should not be followed. Hickory says that there are legitimate grounds for challenging the view of Judge Davey in *Maclaw*, that the design of the relevant building determines its purpose, and that the better view is that the intended purpose of the building (not the design at large) is decisive. Hickory contends that is it Massey's purpose as the developer which is relevant. Massey's intention was to build the development and resell it for a profit.

15 The recent decision of the Supreme Court in *Burbank Australia Pty Ltd v Owners Corporation PS447493*[27] is also important. Its significance will be the subject of submissions in the final hearing.

16 Senior Counsel for Hickory also submitted that the residential component of the development is not a 'home' as defined in s 3 of the Act because it is 'a residential part of licensed premises' under the *Liquor Control Reform Act 1998* (Vic). The building contract between Hickory and Massey was made on or about 1 December 2005. Two and a half years later, on 8 April 2008, liquor licence no. 36114174 was granted authorising the supply of liquor by way of room service to residents and guests of the development or of the apartments within the development. It would also appear that at about this time, on premises licence no. 32290368 was obtained relating to the development. The plans approved under this licence show the extent of the alcohol serving area. Section 3(1) of the Act was amended by Act No. 74/2000 to refer to the *Liquor Control Reform Act 1998* (Vic) ('the Reform Act'). Residential licences which had formerly existed under the *Liquor Control Act 1987* (Vic) were abolished under the Reform Act.

17 In my view, this submission is not a 'knockout' point as was contended. There are issues in dispute relating to the date of the building contract, and the dates of the licences, the area covered by the licences at different times, whether the licences were valid or properly obtained, and the construction of exception (d) of the definition of 'home' having regard to rules of construction that apply to statutory exceptions. Certainly, it is not possible on a s 75 application to arrive at a conclusion with any confidence as to the prospects of success of Hickory's submission concerning the application of exception (d) to the definition of 'home' on the facts presently before the Tribunal.

Conclusion

18 In this proceeding, there are contested issues of fact and important and disputed issues of law going as to the interpretation of the Act. These issues are of public importance, relating to the standards to which major domestic and mixed use developments are to be constructed in Victoria. The case

[25] [1998] VSC 35.
[26] Ibid [12].
[27] [2015] VSC 160.

involves important decisions as to the extent of consumer protection available to unit owners in Victoria under the Act. In my view, a s 75 application is not the place for such issues to be decided.

19 It is not desirable or appropriate for me to discuss the issues that arise in this proceeding at any length. The issues are substantial and are simply not appropriate for resolution by an application under s 75 of the VCAT Act.

20 In *Body Corporate Plan No. PS509946A v VM Romano Construction Group Pty Ltd*,[28] Deputy President Aird dealt with an application concerning the application of the operation of s 6(c) of the Act and whether it prevented a claim being made. Aird DP held that the Tribunal was not required to determine the issue on an interlocutory application.[29] I agree with this decision.

21 I will make orders accordingly.

Costs

22 The applicants seek their costs of the s 75 application. Having heard argument from the parties as to the considerations in s 109(3) of the VCAT Act, I would order that the applicants' costs of the first respondent's application dated 7 April 2015, including any reserved costs, be assessed by the Costs Court on the Supreme Court scale with a certificate for two counsel and paid by the first respondent; except for the fact that the first respondent intends to submit at the final hearing that the Tribunal has no jurisdiction to hear and determine this proceeding.

23 It is not appropriate for me to make any order for costs in circumstances where the jurisdiction of the Tribunal is under question and is yet to be determined. I will therefore reserve costs for determination by the division of the Tribunal that ultimately hears and determines this proceeding. While I have considered each of the matters listed in s 109(3) of the VCAT Act, it is my view under s 109(3)(c) that the relative merits and prospects of success did not justify the first respondent making an application under s 75 of the VCAT Act. There was insufficient basis in fact and law for such an application.

24 I will not make any order reserving the costs of the first respondent or the third respondent, which supported the first respondent in the s 75 application. The costs of the second respondent and of the joined party of the s 75 application (if any) can be reserved for future consideration.

Justice Greg Garde AO RFD
President

[28] [2009] VCAT 1662.
[29] Ibid [12].