VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP473/2017

CATCHWORDS

DOMESTIC BUILDING – application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* – relevant principles – sections 129 and 134 of the *Building Act 1993* – arguable that a claim against a developer is a *building action* – amendments to Points of Claim after limitations period expired – application refused.

FIRST APPLICANT:	Owners Corporation PS 542601Y
SECOND APPLICANT:	Mr Raymond Jackson
THIRD APPLICANT:	Mrs Fay Jackson
FOURTH APPLICANT:	Mr Peter Cahill
FIFTH APPLICANT:	Mrs Yvonne Cahill
SIXTH APPLICANT:	Ms Susan Inglis
SEVENTH APPLICANT:	View Street Properties (Vic) Pty Ltd (ACN 134 116 117)
FIRST RESPONDENT:	Phenix Holdings Pty Ltd (ACN 102 604 008)
SECOND RESPONDENT:	Mr Mark James Coffey
THIRD RESPONDENT:	Mark Coffey Constructions Pty Ltd (ACN 064 095 370)
FOURTH RESPONDENT:	Regional Building Surveying Services Pty Ltd (ACN 100 573 831)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	20 July 2017
DATE OF ORDER	10 August 2017
CITATION	Owners Corporation PS 542601 Y v Phenix Holdings Pty Ltd (Building and Property) [2017] VCAT 1235

ORDER

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

2 Costs reserved. I direct the principal registrar to list any application for costs for hearing at a directions hearing before Deputy President Aird with one hour allocated.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Applicants:	Ms S. Kirton, of Counsel
For the First Respondent:	Mr D. Colman, of Counsel
For the Second and Third Respondents:	Mr L. Connolly, of Counsel
For the Fourth Respondent:	Mr A. Brennan, Solicitor

REASONS

3 In or about 2006, the first respondent developer engaged the second and/or third respondent builder to carry out building work, comprising the renovation and extension of existing ground floor shops in Bendigo ('the property'). This work included the construction of four residential dwellings above the shops and all associated and incidental building work. The second to sixth applicant owners all entered into contracts to purchase their units from the developer before the works were completed. The first applicant owners corporation came into existence, and became the owner of the common property, upon registration of the Plan of Subdivision on 21 March 2007. The works were completed on or about 27 March 2007 and Certificates of Occupancy were issued by the fourth respondent building surveyor on 4 April 2007.

4 These proceedings were commenced by the owners corporation and the individual lot owners on 4 April 2017, claiming damages of $436,826 for the rectification and/or replacement of alleged defective works.

5 By Application for Directions Hearing or Orders, dated 16 June 2017, Phenix makes application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* for the summary dismissal of the lot owners' claims ('the s75 application').

6 Following receipt of the Application, the applicants filed draft Amended Points of Claim ('the APOC') and it is those to which I will refer in considering the s75 application.

7 Mr Colman of counsel appeared on behalf of the developer, and Ms Kirton of counsel appeared on behalf of the lot owners. Counsel for both parties spoke to their written submissions.

SECTION 75

8 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.

9 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*[1] 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 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]

10 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd*[2] 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'.

[1] [2005] VCAT 306.
[2] [2015] VCAT 1683

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.

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 CONTRACTS OF SALE

11 It is helpful to set out the relevant special conditions in the contracts of sale. A copy of the Contract for Sale for Lot 10 is exhibited to the affidavit of the respondent's solicitor, Matthew James Barkla affirmed 16 June 2017, the terms of which are consistent with each of the applicable Contracts.

> 12.
>
> 12.1 The Purchaser acknowledges that:
>
> (a) The Vendor is not a builder as defined by the Act; and
>
> (b) This Contract is not a Building Contract to which the Act applies.
>
> 12.2 The Purchaser acknowledges that the builder building the residence may or the Vendor may direct the builder at any time to make or cause to be made (without reference to the Purchaser) any minor alterations or variations that the Vendor may deem necessary to be made to the residence. The Vendor agrees to notify the Purchaser in writing of any proposed

changes to the works relating to the residence which will directly, substantially and detrimentally affect the residence.

12.3 Subject always to special conditions 12.2 & 12.5 the works to the residence will be executed by the builder substantially in accordance with the Project Specifications relating to the residence. The Purchaser acknowledges having received a copy of the Project Plans and Specifications prior to entering into this Contract of Sale from the builder.

12.4 The works will be deemed to be completed by the builder and the builder and the Vendor shall be discharged from any obligations under special conditions 12.2 & 12.3 upon production of an Occupancy Permit for the Property.

12.5 The Vendor or the builder concerned without reference to the Purchaser may make any change to the Project Specifications they deem necessary or which becomes necessary as a consequence of the unavailability of or unreasonable increase in price or failure to meet the Vendor's or the builder's standard of any item, fixture, fitting, or produce referred to in the Project Specifications (**unavailable product**). In making any change to the Project Specifications the Vendor will ensure the builder replaces any unavailable produce with an item, fixture, fitting or product of equal or similar quality and standard to the unavailable product.

12 Although not specifically referred to by either party, I note that special condition 11 of the Contract of Sale provides:

> The Vendor agrees to *arrange for the completion of the residence on the property* and will hand to the Purchaser at or prior to settlement the following documents in respect of the residence erected on the Property:-
>
> (a) Occupancy Permit;
>
> (b) Certificate of Insurance as required by the Building Act 1993 (**the Act**)
>
> The Vendor *will do all things reasonable to ensure the completion of the residence on the property as quickly as practicable*. If the said residence is not completed by 31 March 2007 (completion to mean that the documents (a) and (b) immediately above in this Special Condition being available to hand to the purchaser at settlement (the Vendor aor Purchaser may at any time after 31 March 2007 but before both of the said documents are available to hand to the Purchaser at settlement, avoid this sale. [emphasis added]

THE ALLEGATIONS

13 The individual lot owners make the following allegations which include allegations against the developer in the draft APOC (the allegations pleaded in paragraphs 16(c), (d) and (e) in respect of the claims by the

second and third applicants are adopted by the other applicants in paragraphs 18 and 20):

…

(c) The Second and/or Third Respondents and/or the First Respondent may make minor alterations or variations to the residence but if so the First Respondent must notify the Second and Third Applicants in writing of the proposed changes which will directly, substantially and detrimentally affect the residence;

(d) The works were deemed "complete" by the provision of an Occupancy Permit, whereupon the Second and Third Respondents and/or the First Respondent were discharged from any further obligations in respect of the completion of the works. This term does not relieve the First Respondent from any contractual obligation in respect of completed works that are not in accordance with the Plans and Specifications in circumstances where the changes are not minor, or where it has not notified the Second and Third Applicants in writing of the changes;

(e) The First Respondent would arrange for the Second and/or Third Respondent to rectify any minor works not completed if notified to it within 3 months from the date of issue of the Occupancy Permit. There is no express terms limited the liability of the First Respondent for incomplete works that are not "minor".

…

48 In breach of the Lots 8 Contract:

(a) the First Respondent [the developer] failed to ensure that the work to Lot 8 was executed by the Second and/or Third Respondents substantially in accordance with the Plans and Specifications.

(b) The First Respondent and/or the Second and/or Third Respondents made major alterations and variations to the Building Works;

(c) The changes directly, substantially and detrimentally affect the residence and the First Respondent failed to notify the Second and Third Applicants in writing of the proposed changes

The same allegations are pleaded in 50(a) and 52(a) in relation to the contracts of sale for lots 8,9 and 10):

ARE THE LOT OWNERS' CLAIMS STATUTE BARRED?

Are the lot owners' claims a 'building actions'

14 The developer contends that the lot owners' claims against it, as set out in the draft APOC, are in contract, and that in circumstances where the

Certificates of Occupancy were issued on 4 April 2007, the 6 year limitation period expired on 4 April 2013. The lot owners contend that their claims constitute *building actions* as defined in s129 of the *Building Act 1993* ('the BAct') and accordingly were commenced within the 10 year limitations period for building actions as set out in s134 of the BAct.

15 The definitions of *building action* and *building work* are found in s129 of the BAct:

> *building action* means an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work;
>
> *building work* includes the design, inspection and issuing of a permit and respect of building work.

16 I am satisfied that the definition of *building action* in s129 is wide enough for it to be arguable that the lot owners' claims against the developer constitute *building actions*. Each of the lot owner's claim is a claim *arising out of or concerning defective building work.*

17 Further, this is an unusual situation where the second respondent is a director of the developer and the third respondent building company. The precise role of the developer, and whether, indeed, it carried out any building work, or falls within the definition of *builder* in the *Domestic Building Contracts Act 1995* ('DBCA') is a matter that can only be determined after all of the evidence has been heard.

Are the claims in the draft APOC a 'new' cause of action?

18 The developer contends that if I find the lots owners' claims against it are building actions, the 'new' claims made against it in the draft APOC constitute new causes of action which are statute barred, having been made after the expiration of the 10 year limitations period.

19 The developer relies on *Austructures Pty Ltd v Makin*[3] ('*Austructures*'). *Austructures* where leave to amend a claim for compensation under s1317K of the *Corporations Act 2000* to include new claims for compensation for breach of statutory obligations under that Act was refused. However, reliance on *Austructures* is, in my view, to misunderstand the definition of *building action* in s129 of the BAct. The *cause of action* contemplated by s129 is a *building action* – it matters not how the claim is pleaded. The 10 year limitations period set out in s134 of the BAct relates to the bringing of a *building action* – a claim for loss or damage arising out of or in connection with defective building work. It matters not whether the claim is founded in contract or tort – the limitations period is concerned with the bringing of a *building action*. The situation here is entirely analogous to that in *Owners Corporation PS No. 1 PS 519798G v May*[4] where I said:

[3] [2014] VSC 544
[4] [2016] VCAT 399

25 Therefore, the question is whether in amending their POC to rely on the contracts of sale, the applicants have brought a fresh cause of action that is statute barred under s134 of the Building Act. In my view, the lodging of the claim for the cost of rectification of alleged defects within the 10 year period was sufficient to enliven the tribunal's jurisdiction. It would have been enough for the applicants to have simply filed an application with POC to follow. It is in the POC that a party sets out the basis for their claim. However, even if the cause of action changes, this does not mean they have commenced a new building action, as defined in s129. Similarly, it is not unusual in the Supreme Court, for instance, for a plaintiff to lodge a Generally Indorsed Writ within a limitation period to protect its interests, and then to file a Statement of Claim at some later period, frequently after the limitations period has expired.

26 Mr Triaca referred me to the decision of the Victorian Court of Appeal in *Agtrack (NT) Pty Ltd v Hatfield*[5]. Mr Triaca's summary of *Agtrack* is helpful:

> In ***Agtrack***, the respondent was the widow of a man who was killed when a Cessna 210, in which he was a passenger on a sight seeing tour in the Northern Territory crashed. Ms Hatfield had brought an action against the appellant which had contracted to carry Mr Hatfield, originally in negligence and in breach of statutory duty. There was no dispute that the proceedings were validly issued. Ms Hatfield later became aware that a claim was only available under Part IV [of] the *Civil Aviation (Carriers Liability) Act 1959* and sought to amend to plead a claim under that Act even though the time limit for bringing such an action had expired.

27. In *Agtrack* Ormiston JA said at [77]:

> The present case, however, is not a case where a completely new claim, said to have been extinguished by the Act, is sought to be added by way of amendment where no likely claim previously was asserted. As I have previously sought to explain, all that the amendments in the present case sought to achieve was to add to an existing claim, which was already on foot, certain (effectively) jurisdictional allegations, together with an allegation that the proceeding was brought pursuant to Pat IV of the Act.

His Honour continued at [83]

> What is here in issue is an amendment seeking to add or vary a few minor details and to give the existing claim a new characterisation, closely akin and by no means remote from the subject matter of the original claim. That is a true amendment and the very kind, which the

[5] (2003) 7 VR 63, [2003] VSCA 6 - aaffirmed on appeal by the High Court in *Agtrack (NT) Pty Limited v Hatfield* (2005) 223 CLR 251, [2005] HCA 38.

> Court ought to be free to give effect to. It affects only an action already on foot
>
> 28. Similarly, in this proceeding, the applicants filed an application within the 10 year limitation period set out in s134 of the Building Act claiming the cost of rectification of alleged defective building work. The basis of the claim, whether it be the s8 warranties or the s137C warranties is irrelevant. In amending the POC to rely on the warranties contained in or implied into the contracts of sale, I am satisfied it is arguable that their claim has not changed, and that they have not sought to commence a 'new' building action as defined in s129 of the Building Act in filing the APOC.

Whether the lot owners' claims have no real prospect of success

20 The developer contends that the allegations against it have no real prospect of success which I interpret, within the context of s75, as a contention that they are misconceived and lacking in substance, as they simply cannot be made on a plain reading of clause 12.3 of the Contract. Further that clause 12.4 constitutes a complete release in its favour.

The release

21 The lot owners contend that whilst the release in clause 12.4 of the contract relieves the developer of liability in relation to the completion of the works, this clause does not relieve it of liability in respect of completed works where changes from the Plans and Specifications are not minor, or where it has not notified the lot owners in writing of the changes.

22 The lot owners further submit that to have constituted a complete release, clause 12.4 should have been in the following terms: *the works will be deemed to be completed and be in accordance with the Plans and Specifications, whether or not the purchasers have been advised of any changes, upon production of the Occupancy Permit.* Further, that whilst the developer has limited its liability to rectify any minor defects to three months, it has not sought to limit its liability to rectify non-minor defects.

23 I am satisfied that the lot owners' interpretation is open and arguable, and that any determination of the meaning and extent of clause 12.4 is properly a matter for the final hearing. Further, if it becomes apparent that the developer did carry out work and is found to be a builder as defined in the DBCA, then any purported release would be void pursuant to s10 of the DBCA.

The wording of the allegations

24 The developer contends that the allegations in paragraphs 48(b), 50(b) and 52(b) of the draft APOC; that the developer *and/or the Second or Third Respondents made major alterations … to the works* do not accurately reflect the wording of the relevant clauses of the Contracts, in particular

cause 12.2 and as such are, in effect, lacking in substance. It contends that the allegations should be framed to include a positive assertion that the developer directed the builder to make alterations.

25 The lot owners do not concede there is any requirement for them to plead that the developer directed the builder, or even for the developer to have directed the builder to make alterations. Moreover, whether the developer directed the builder to make any changes is a question of fact that ought not be determined when considering a s75 application. I agree. In considering a s75 application I need only be satisfied whether a claim is arguable. Further, the Tribunal is not a court of pleadings. As I observed in *Wood v Calliden Insurance Ltd & Ors*[6] 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]:
>
> > 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]

CONCLUSION

26 I am therefore satisfied that the lot owners' claims as set out in the draft APOC are open and arguable. The developer's s75 application will be dismissed, with costs reserved.

DEPUTY PRESIDENT C AIRD

[6] [2008] VCAT 1339