

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1381/2015

CATCHWORDS

Domestic building – application under *s75 Victorian Civil and Administrative Act 1998* – relevant principles – sections 129 and 134 of the *Building Act 1993* – amendment to Points of Claim after expiry of limitation period – application refused.

FIRST APPLICANT:	Owners Corp PS No.1 PS 519798G
SECOND APPLICANT:	Myer David
THIRD APPLICANT:	Lynette Dawn Lubransky
FOURTH APPLICANT:	Robert Joyce
FIFTH APPLICANT:	Jo Maindonald
SIXTH APPLICANT:	Marie Dawes
SEVENTH APPLICANT:	Jonathan Haugh
EIGHTH APPLICANT:	Maria Reitano
NINTH APPLICANT:	Donald Hayes
TENTH APPLICANT:	Lily Hayes
ELEVENTH APPLICANT:	Glen Casey
FIRST RESPONDENT	Ms Victoria May
SECOND RESPONDENT:	Danlaid Contracting Pty Ltd (ACN 079 777 914)
THIRD RESPONDENT:	Full Stop Australia Pty Ltd (ACN 096 773 698)
FOURTH RESPONDENT	Lucky Kikidoloulos
FIFTH RESPONDENT:	Russell Fogarty t/as Formpro (ABN 548 360 976 25)
SIXTH RESPONDENT:	Mark Lipinski
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing

DATE OF HEARING 2 March 2016
DATE OF ORDER 17 March 2016
CITATION Owners Corporation PS No. 1 PS 519798G v
May [2016] VCAT 399

ORDER

1. The respondent's application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. The first and third applicants have leave to withdraw their claims insofar as they rely on special condition 14 in the contracts of sale.
3. The sixth applicant has leave to amend paragraph 72 (and any other relevant paragraph) of the Amended Points of Claim so that it refers to Lot 7.
4. **This proceeding is listed for a further directions hearing before Deputy President Aird on 14 April 2016 at 12pm at which time directions will be made for its further conduct - allow 1 hour.**
3. Liberty to apply.
4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicants Mr D Triaca of Counsel
For Respondents Mr N Phillipott of Counsel

REASONS

- 1 In or about 2003 the first respondent (Ms May) entered into a contract with Phillips Constructions Group (Aust) Pty Ltd (the original builder) for the construction of a three storey apartment building, comprising 9 residential apartments, with carpark. On or about 18 April 2005 the original builder was placed into administration. The works were completed by Ms May as an owner builder and an Occupancy Permit was issued on 25 October 2005.
- 2 These proceedings were commenced on 13 October 2015, 9 days before the expiry of the 10 year limitation period for the commencement of building actions as set out in s134 of the *Building Act 1993* (the Building Act). The applicants are the Owners Corporation (the OC) and the owners of 6 of the 9 apartments. Ms May owns the remaining three apartments. In the Points of Claim attached to the application, the applicants seek damages for the cost of rectification of alleged defects. They also make a claim under s16 of the *Water Act 1989* (the Water Act) claiming loss and damage arising from alleged unreasonable flow/s of water.
- 3 In the Points of Claim (POC) filed with the application, the applicants rely on the warranties under s8 of the *Domestic Building Contracts Act 1995* (the DBCA) which are implied into every domestic building contract, and set out a number of alleged breaches of the building contract by Ms May. Further, they allege that in breach of the building contract and the implied warranties, the building works are defective.
- 4 Further, or alternatively, the applicants allege that Ms May owed them a duty of care in breach of which she failed to carry out the works with reasonable skill and care. The OC claims \$1,062,158.50 for rectification of defects to the common property. The owners of 6 of the apartments claim for the cost of rectification of defects in their apartments. The total claim, including the OC's claim, is approximately \$1.2m.
- 5 At the first directions hearing before me on 1 December 2015, the respondent foreshadowed an application under s75 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act), primarily on the basis that the applicants were unable to rely on the s8 warranties as Ms May was not the builder under the original building contract. The applicants sought, and were granted, leave to file and serve Amended Points of Claim.
- 6 By 'Application for Directions Hearing or Orders' dated 1 February 2016 (the Application) the respondent seeks the following orders:
 1. That pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* the Applicants' Application made on 13 October 2015 be summarily dismissed.
 2. Costs
 3. Such further or other orders as to this Tribunal seem appropriate.

7 It is impossible to discern from the Application or the supporting affidavit by Darren Noble, the respondent's solicitor, dated 1 February 2016, the basis upon which the Application is made. In his affidavit, Mr Noble simply sets out:

- a) the history of the building work, including the date of the building contract, the price and the date on which the original builder was placed into external administration;
- b) progress claims invoiced and payments made to the original builder;
- c) the state of the works at the time the original builder was placed into external administration;
- d) that the respondent then entered into a contract with a project manager to project manage the completion of the works;
- e) that the Occupancy Permit was issued on 25 October 2015;
- f) reference to a letter dated 24 November 2015 to the applicants' solicitors in which he sets out various issues and concerns with the POC, and then states:

Please then confirm that by 4.00pm this Thursday, 26 November 2015, that your client shall file and serve amended points of claim which have the effect of:

- abandoning all claims alleged against our client based on the Building contract, whether in contract or in tort; and
- Include proper particulars of both the alleged defects and alleged loss and damage so as not to include items of work performed by the [original] Builder under the Building Contract.

If we do not receive a positive reply to this letter within the time stated, we put you on notice that we will make application at the directions hearing on 1 December 2015 for your clients'

- g) that leave was sought and granted at the directions hearing on 1 December 2015 for the applicants to file and serve APOC;
- h) a request for documents and requests for particulars of defects;
- i) in relation to the second applicant, that the relevant contract of sale does not include special condition 14;
- j) in relation to the third applicant, that the respondent did not sell to them in 2009, but rather that she sold Lot 4 to a different purchaser in 2005;
- k) that the fifth applicant purchased from the first respondent by contract dated 1 March 2008;
- l) that references to Lot 5 in the paragraphs concerning the claim made by the sixth applicant are a mistake as other paragraphs refer to Lot 7

which is the lot purchased by the sixth applicant from the first respondent; and

m) in relation to the Water Act claim, that the alleged flow of water from the first respondent's property had been known to the first applicant [the OC] since at least 2009.

8 At the commencement of the directions hearing on 2 March 2016, Mr Phillipott, counsel for Ms May, handed up a written Outline of Submissions. Mr Triaca, counsel for the applicants, advised that the first notice he had of the basis upon which the s75 application was being made, was in a discussion with Mr Phillipott the previous afternoon. Mr Triaca also handed up written submissions together with an affidavit by the applicants' solicitor, Xavier James McLaurin sworn 1 March 2016.

9 Mr Triaca confirmed that he was in a position to respond to the application.

10 In circumstances where this application was foreshadowed at the directions hearing on 1 December 2015 and orders made for it to be filed with any supporting material by 1 February 2016, it is unsatisfactory that the basis upon which the application is being made was not made known to the respondent until shortly prior to this directions hearing.

THE AMENDED POINTS OF CLAIM

11 Amended Points of Claim (APOC) dated 23 December 2015 have been filed and served. The applicants now allege that after the original builder was placed into administration, the balance of the building works were carried out by Ms May as owner builder. Further, they seek to rely on special condition 14 in the contracts of sale under which the owners¹ purchased their apartments which relevantly provides:

- (a) As an owner-builder and in accordance with her statutory obligations under section 137C of the Building Act 1993 and the regulations made thereunder the vendor HERBY warrants that:
 - (i) All domestic building work carried out in relation to the construction of the development the subject of the building permit was completed in a proper and workmanlike manner;
 - (ii) All materials used in the domestic building work were good and suitable for the purpose for which they were used and that those materials were new; and
 - (iii) The domestic building work was carried out in accordance with all laws and legal requirements, including the Building Act 1993 and the Building Regulations made thereunder.
- ("the Respondent's Warranties")

¹ Except for the second and fifth applicants as will be discussed below.

Particulars

The Warranties were in writing and set out in each of the contracts at Special Condition 14 and were alternatively implied into the contracts pursuant to s. 137B of the DBCA.²

12 The OC then alleges that Ms May has breached the Respondent's Warranties, and that in breach of the sale contracts and the Respondent's Warranties *the works are defective and have caused or contributed to the defects at the property.*³

13 The OC's claim in negligence has also been amended to include a new paragraph 15(f):

Further, by the provision of the Respondent's Warranties set out in Special Condition 14 of the contracts, the Respondent Assumed Responsibility to and represented to the Purchasers that it would, ensure that all works performed at the property were:

- (i) performed in accordance with the law and legal requirements;
- (ii) performed in a proper and workmanlike manner and in accordance with the plans and specifications;
- (iii) performed by persons exercising reasonable care, skill and diligence and due care so as to prevent financial loss and damage to the Owners Corporation and the subsequent owners of the lots.

14 A breach of the duties of care is then pleaded. Then at paragraph 19 the OC pleads:

As a result of the breaches of the contracts and the Respondent's warranties and the Respondent's negligence, the Owners Corporation suffered and will suffer loss and damage [the cost to rectify the defects].

15 Similar amendments have been made in the APOC for each of the owners' claims.

The second applicant

16 Mr Triaca conceded on behalf of the second applicant that special condition 14 was not included in his contract of sale. Accordingly, leave is granted to the second applicant to withdraw his claim insofar as it relies on special condition 14.

² The applicants advise the reference to the DBCA is a typographical error and that the relevant Act is the *Building Act 1993*.

³ Paragraph 13 APOC.

The third applicant

17 It is also conceded that there is no contract of sale between Ms May and the third applicant. Accordingly, leave is granted to the third applicant to withdraw their claim insofar as they rely on special condition 14.

The sixth applicant

18 Mr Triaca confirmed that the reference to Lot 5 in paragraph 72 of the APOC is a typographical error and consistent with the other paragraphs in relation to their claim should refer to Lot 7. Leave is granted to amend paragraph 72.

SECTION 75

19 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.

20 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*⁴ 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

⁴ [2005] VCAT 306.

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]

21 Justice Garde in considering a s75 application in *Owners Corporation No. 1 PS537642N v Hickory Group Pty Ltd (Building and Property)* [2015] VCAT 1683 helpfully referred to 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.

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.

Ms May's position

22 Ms May contends that in relying on alleged breaches of warranties contained in (or implied into) the contracts of sale, the applicants are seeking to bring new claims against the first respondent which, she contends, is statute barred by s134 of the Building Act.

23 Section 134 of the Building Act provides:

Despite anything to the contrary in the Limitations of Actions Act or in any other Act or Law, a building action cannot be brought more than ten years after the date of issue of the occupancy permit in respect of the building work...(emphasis added).

24 'Building action' is defined in s129 of the Building Act as:

an action (including a counter-claim) for damages for loss or damage arising out of or concerning defective building work

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

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

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 Part 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 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.

CAN THE OWNERS CORPORATION RELY ON THE WARRANTIES IN THE CONTRACTS OF SALE?

29 Ms May contends that the OC is unable to rely on the warranties contained in or implied into in the contracts of sale, as the OC was not a party to the contracts. Further, that the warranties contained in s137C of the Building Act are only provided to a purchaser or any subsequent purchaser of a property and cannot, because of a lack of privity of contract, apply to the OC (or any other party).

30 Section 137C of the Building Act provides:

- (1) The following warranties are part of every contract to which section 137B applies which relates to the sale of a home—
 - (a) the vendor warrants that all domestic building work carried out in relation to the construction by or on behalf

of the vendor of the home was carried out in a proper and workmanlike manner; and

- (b) the vendor warrants that all materials used in that domestic building work were good and suitable for the purpose for which they were used and that, unless otherwise stated in the contract, those materials were new; and
 - (c) the vendor warrants that that domestic building work was carried out in accordance with all laws and legal requirements, including, without limiting the generality of this warranty, this Act and the regulations.
- (2) In addition to the purchaser under a contract to which section 137B applies, any person who is a successor in title to the purchaser may take proceedings for a breach of the warranties listed in subsection (1) as if that person were a party to the contract.
 - (3) A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in subsection (1) is void to the extent that it applies to a breach other than a breach that was known or ought reasonably to have been known to the person to exist at the time the agreement or instrument was executed.

31 In *Body Corporate St James Apartments v Renaissance Assets Pty Ltd*⁶ Mandie J said:

- 38. ...The lot owners when the plan of subdivision is registered are the first members of the body corporate and the lot owners are the members of the body corporate while they are owners. A body corporate is not simply an agent of those lot owners – it is an entity “consisting of” the lot owners with powers of its own. The body corporate has power to deal with a lot owner’s share in the common property in accordance with the regulations. A body corporate can dispose of the fee simple in all or part of any common property and may purchase or otherwise obtain land for inclusion in, or to become, common property (subject to a unanimous resolution of the members). However, it is specifically provided that a body corporate cannot mortgage common property (a prohibition which arguably would be unnecessary if the body corporate were not the registered proprietor).
- 39. When a lot owner disposes of his or her lot, the interest of that lot owner in the common property is automatically transferred when the transfer of the lot is recorded in the Register. ...[authorities deleted].

32 In my view, it is arguable that the OC has the same rights as a purchaser to rely on the contractual warranties. The owners acquired a beneficial interest in the common property and the OC became the legal owner of that owner’s

⁶ (2004) 11 VR 41, [2004] VSC 438

interest in the common property upon settlement of the relevant contract of sale.

DUTIES OF CARE

- 33 Under the heading *Duties of Care* in the submissions handed up at the commencement of the directions hearing, Ms May complains that despite numerous requests by her lawyers, the applicants have failed to particularise which alleged defective works were performed by her. Rather, they simply rely on the expert reports of Tim Gibney dated 4 March 2013 and Buildspect dated 26 March 2015. Exhibited to Mr Noble's affidavit are assessments of the works performed by the original builder before it went into liquidation. Ms May contends that any alleged defects in the works carried out by the original builder cannot be claimed against her in this proceeding. By reference to a table detailing the works said to have been completed by the original builder it is submitted on behalf of Ms May that as a matter of law any alleged defects in those works cannot be claimed against her.
- 34 Mr Triaca confirmed that the applicants are relying on special condition 14 of the contracts of sale. He contends that the warranties given under special condition 14 are wider than those set out in s137C of the Building Act and that by those warranties Ms May has accepted responsibility for **all** work carried out under the building work, not just the work completed after the liquidation of the original builder.
- 35 In my view, the extent or scope of the warranties given under special condition 14 is a matter to be properly determined at the final hearing of the proceeding. I am not persuaded that the applicants' claims insofar as they rely on special condition 14 are *misconceived* as contended by Ms May.

THE WATER ACT CLAIM

- 36 Ms May contends that the applicants were aware of the loss and damage arising from a flow of water since 22 June 2009 when 'The Grout Doctor' provided a letter to the OC's manager identifying water leaks. Accordingly, the claim is statute barred, being subject to the 6 year limitation period set out in s5 (1) of the *Limitations of Actions Act 1958*.
- 37 Mr Triaca submits that each unreasonable flow of water is a new 'event' for the purposes of s5(1) and a claim under s16 of the Water Act.
- 38 In my view, Ms May's position is in the nature of a defence to be determined at the final hearing when the evidence has been heard and tested. If she requires further particulars of the alleged unreasonable flows of water, she can, of course, request further and better particulars of this claim.

DISCOVERY

39 In his affidavit accompanying the Application, Mr Noble complains about not having been provided with various documents which he has requested. I note that there has been no order for discovery, nor are any orders for discovery sought in the Application. I only mention it here for the sake of completeness, noting it has been addressed in the applicants' submissions. If the parties are unable to resolve this issue, it can be raised at the next directions hearing when directions will be made for the further conduct of the proceeding. However, I note in passing that any request for discovery must be reasonable, and it is surprising that Ms May's request for documents provided to the experts as set out in her solicitor's letter dated 20 November 2015 includes commonly available documents such as the *Guide to Standards and Tolerances 2002, Building Code of Australia 2004 Volume 1, Australian Standards AS3958.1:1991 Part 1 and AS3727.1:1993*.

CONCLUSION

40 Being mindful of the cautious approach to be adopted by the tribunal in considering a s75 application, Ms May's application is refused.

DEPUTY PRESIDENT C AIRD