VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D449/2010

CATCHWORDS

Section 75 of the Victorian Civil and Administrative Tribunal Act 1998 – strike out application - whether adequate particulars given.

APPLICANTS	Jud Roderick & Di Roderick
RESPONDENT	SACS One Pty Ltd (ACN 131 115 403)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	18 January 2012
DATE OF ORDERS	18 January 2012
DATE OF REASONS	23 January 2012
CITATION	Roderick v SACS One Pty Ltd (Domestic Building) [2012] VCAT 72

REASONS

This matter came before me on 18 January 2012 upon the hearing of an application to strike out the Respondent's amended *Points of Claim and Counterclaim*. The application was dismissed with costs. The Applicant has requested written reasons, which are attached hereto.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	Mr Thapliyal, solicitor.
For the Respondent	Mr Pumpa of counsel.

REASONS

1. On 18 January 2012, I heard and dismissed an application made by the applicants to strike out the respondent's amended *Points of Defence and Counterclaim*. I further ordered that the hearing of the proceeding, which is listed to commence on 6 February 2012, be confirmed. Mr, Thapliyal, solicitor, who appeared on behalf of the applicants, has requested written reasons which I now provide.

The application

2. The applicant's application filed on 16 January 2012 is made pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act* 1998 (**'the Act'**). That section states:

> 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.

3. Mr Thapliyal referred me to a number of authorities concerning applications made pursuant to s.75 of the Act. In *Worldwide Enterprises Pty Ltd v Westpac Banking Corporation*,[1] his Honour Judge Misso, Vice President, set out the relevant principles relevant to an application made pursuant to s.75 of the Act:

> The authorities disclose the following principles which are relevant to this application:
>
> - The onus is on the respondent to establish that the discretion should be exercised in its favour to either summarily dismiss or strike out all or any part of the proceeding.
> - In the discharging of that onus the respondent must establish that there is no real question to be tried or where the tribunal is satisfied that the proceeding is undoubtedly hopeless, obviously unsustainable in fact or in law or bound to fail.
> - The standard which the respondent must achieve in the discharge of the onus has been variously described as requiring the exercise of great care, it being "clear" that there was no question to be tried; that "great caution" should be exercised by the tribunal in determining whether there is no real question to be tried; that such an application is "a serious matter" and the onus is "a heavy one"; that the tribunal should be satisfied that it is "very clear indeed" that the claim is hopeless, unsustainable and bound to fail, and that the onus is a "high one".

[1] [2010] VCAT 1125

- The tribunal is obliged to proceed on the assumption that the applicants will be able to prove each fact alleged in their claim
- The application is interlocutory in nature. The tribunal, therefore, should not proceed to entertain an application pursuant to section 75 unless the applicants indicate that the whole of their case is contained in the material which they have put before the tribunal.
- If the application is based upon the applicants defective formulation of the claim, then the tribunal must consider that the tribunal is not a court of pleading. A failure to particularise a claim does not of itself give foundation to a finding that the proceeding is frivolous, vexatious, misconceived or lacking in substance or is otherwise an abuse of process.

4. The essence of the submissions made by Mr Thapliyal is that the amended *Points of Defence and Counterclaim* fail to properly layout the respondent's defence and counterclaim with *any degree of clarity* such that the claim and defence is lacking in substance. The primary criticism of the amended *Points of Defence and Counterclaim* focuses on what the applicant says is a complete lack of particulars. Mr Thapliyal points to various paragraphs in the amended *Points of Defence and Counterclaim* to substantiate that submission.

Are the *Points of Defence and Counterclaim* lacking in substance?

5. I do not accept that the amended *Points of Defence and Counterclaim* are so lacking in particulars such that it fails to adequately inform the applicants of the case that they are required to meet. Further, I am of the opinion that a lack of adequate particulars, in itself, would not ordinarily justify striking out a claim, especially if the claim is capable of being understood in the absence of adequate particulars and is not otherwise bad in law. In my view, the proper course to adopt where a party believes that a claim or defence has not been adequately particularised is to request further and better particulars of the relevant document, rather than making an application for summary judgement.

6. Indeed, the Tribunal has published *Practice Note PNDB1(2007)*, which sets out guidelines for the making of a request for further and better particulars. This course of action was not adopted by the applicants.

7. In my view, any deficiency in the particulars provided by the respondent would in all likelihood, be remedied by the provision of witness statements and witness statements in reply, which are yet to be filed and served in accordance with previous orders made by the Tribunal. In that regard, I refer to the judgement of Byrne J in *Fluor Australia Pty Ltd v Sherritt International Pty Ltd*,[2] where his Honour stated:

[2] [2002] VSC 203

> … that extensive battles over particulars at an early stage are often of little value to the parties or to the trial judge. The complaint is often heard from counsel, as in this case, that the pleadings do not disclose the case which their client must address. Very often the party knows very well what the case is. A feature of building cases arising out of major projects is that they are usually commenced after extensive negotiation involving exchanges of position between the parties. Furthermore, insofar as the claims concern technical matters, the litigants are usually well resourced in terms of technical input. Moreover, by the time the case comes to trial, mediation will have been conducted and expert and other witness statements will have delivered. All of this has the consequence that the particulars provided early in the litigation process often cease to play a very significant role. This is not to say that particulars should be put to one side; cll 16 and 18 of the Building Cases Practice Note makes this clear. It means only that arguments about the sufficiency must be approached in a practical and pragmatic way.

8. In my view, the comments made by his Honour have application to proceedings conducted in the Tribunal. In particular, s.98(d) of the Act provides that the *Tribunal must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit*. Naturally, that does not mean that a party has no obligation to adequately spell out its defence or claim. However, in my view pleadings summonses should not be encouraged in circumstances where the defence or claim, read as a whole, adequately informs the other party of the case that it must meet.

9. In *Barbon v West Homes Australia* Pty Ltd,[3] Ashley J stated:

> I would not want it thought for a moment, because the Tribunal is not a court of pleading, and because the Act encourages a degree of informality in proceedings, that Rafferty's Rules should prevail. They should not. Any party, perhaps particularly a party facing a long, drawn-out hearing in the Tribunal - and I note in this case an estimate that the Tribunal hearing would extent for some nine weeks - is well entitled to know what case it must meet before the hearing commences. That is not to say that the case must be outlined with exquisite particularity. It is not to say that the defendants are entitled to evidence rather than particularisation.
>
> Having said the party is entitled to know the case they must meet in a tribunal proceeding, I do not wish it thought the party to such a proceeding should be entitled or encouraged to conduct a lengthy

[3] [2001] VSC 405 at [16]

applications of a pleadings type. Such applications should not be encouraged in proceedings before the Tribunal.

10. In my view, the application made by the applicants pursuant to 75 of the Act is misconstrued. It is misconstrued because the application was argued principally on the ground that the allegations set out in the amended *Points of Defence and Counterclaim* lacked adequate particularisation, rather than failing to disclose a cause of action or lacking in substance. Having considered the amended *Points of Defence and Counterclaim* against the submissions made by Mr Thapliyal, I find that the particulars provided are, by and large, adequate to reasonably inform the applicants of the case that they are to meet.

11. Further, I find that where the particulars were *arguably* deficient, such deficiency did not, in my opinion, render the principal allegation meaningless or lacking in substance, albeit that more detail of the circumstances surrounding the allegation might have given the allegation more colour. As I have already indicated, the proper course was not to make an application for summary judgement, but rather request from the respondent further and better particulars. This was not done.

12. For the sake of completeness, what follows are my comments and findings concerning the principle criticisms raised by Mr Thapliyal of the respondent's amended *Points of Defence and Counterclaim*.

Paragraphs 10, 21and 25 of the Points of Defence.

13. The respondent alleges that *by reason of the owners breaches, the works were delayed*. Mr Thapliyal submits that no particulars of the alleged breaches have been provided. I do not accept that submission. Paragraph 46 of the document sets out the allegations concerning the breaches on the part of the applicants giving rise to the alleged delay in the building work. Further, particulars are also provided by making reference to three written extension of time notices, including details of the period of delay claimed relating to each of those extension of time notices.

Paragraph 5 of the Points of Defence.

14. The respondent alleges that it was authorised to carry out variations requested by the applicants in accordance with *clause 26.1 of the relevant building contract.* Mr Thapliyal submits that no particulars of the allegation had been provided. I do not accept that this is entirely correct. Particulars are provided by making reference to a number of written variation forms dated 6, 11 and 12 October; and 12 and 13 November 2009. I accept that particulars have not been provided as to when the request giving rise to the variation notice was made or the circumstances surrounding that request; however, these are matters that

will be flushed out in the witness statements to be provided by the parties. I do not consider that the failure to provide those particulars prevents the applicants from understanding the case they must meet.

15. Paragraph 5 further alleges that the applicants had agreed that they *would not reside in the property for the whole of the works and did not leave the property when requested*. Mr Thapliyal submits that no particulars have been provided. I accept that no particulars of the allegation have been provided. However, I do not consider that this prevents the applicants from understanding the case they must meet. Further, it is likely that further details will be provided in the witness statements to be filed by the parties.

Paragraphs 10, 21 and 25 of the Points of Defence

16. The respondent alleges that the applicants were in breach of the contract. Paragraphs 10 and 21 relate to breaches occasioning delay. For the reasons already stated, I am of the opinion that the particulars adequately set out the case that the applicants must meet. In relation to paragraph 25, the respondent alleges that the applicants were in substantial breach of the contract at the time when they purported to terminate the contract. No particulars of the substantial breach of contract are given. In my view, those particulars should be provided. However, the failure to provide those particulars does not, in my view, mean that the defence should be struck out. As I have already indicated, the proper course is to request particulars where it is thought particulars are deficient.

Paragraph 46 of the Points of Counterclaim

17. It is alleged that the applicants orally requested variations but then refused to sign variation notices or pay for the variations. Mr Thapliyal submits that *no particulars are provided of the oral requests, the authorisations or the refusals*. I do not totally accept that submission. Particulars are provided of the variation notices generated by the respondent in response to the oral requests for variation. Although it is correct that no particulars are provided of the refusal or the authorisation, those are matters which, in all likelihood, will be elaborated on in the witness statements to be filed by the parties. I do not consider that the failure to provide such particulars prevents the applicants from understanding the case they must meet. As I have repeatedly said, it was always open for the applicants to request further and better particulars, which they did not do.

18. Mr Thapliyal submits that no particulars have been provided of the allegation that the applicants *prevented the works from proceeding by refusing to make selections*. I do not accept that submission. The particulars subjoined to paragraph 46 make it clear that selections were requested by the respondent which resulted in the respondent generating variation notices. The respondent says that the variation

notices were not signed by the applicants and as a result, it was unwilling to proceed with the work. It is obvious from the particulars provided that the parties were in dispute as to whether the selections were within the agreed scope of the work under the contract or alternatively, constituted a variation. Clearly this lead to an impasse, which resulted in the respondent ceasing further work. Ultimately, who is legally responsible for the impasse is a question to be determined at trial. Nevertheless, I am of the opinion that the particulars subjoined to paragraph 46 adequately inform the applicants of the case they must meet. The degree of particularisation sought is not justified. Nevertheless, as I have already indicated, it was open for the applicants to request further and better particulars if they felt that it was necessary.

19. Mr Thapliyal contends that the *Points Defence and Counterclaim* allege that the applicants prevented the respondent from completing the contracted scope of works by failing to make selections while at the same time, alleging that the selections made by the applicants constituted variations of the contracted works. Mr Thapliyal submits that the allegation *is a complete contradiction of the earlier allegation that the applicants refused to make selections*. I do not accept that submission. What is said in the particulars is that the selections were not made within the contracted scope of works, but rather selections which then constituted variations for which the applicants refused, either rightly or wrongly, to sign a variation form permitting the respondent to proceed with the work. Details of those "disputed" variations are found in the variation notices referred to in the particulars subjoined to paragraph 46 and in *Attachment A* annexed to the *Points of Defence and Counterclaim*. *Attachment A* contains a list of all variations and ascribes a price next to each single variation claim. In my view, the particulars are adequate and do not contain a contradiction.

20. Mr Thapliyal relied on *Barbon* in support of the applicant's application. In my view, the decision in *Barbon* does not support the application made by the applicants. In particular, that case, like the present case, focused on the lack of adequate particulars as a basis to strike out the claim pursuant to section 75 of the Act. His Honour Ashley J stated:

> [9] There were disclosed to be, in argument, effectively some six matters of complaint. Most of them raised alleged deficiencies in particularisation. It was contended for the plaintiffs that the deficiencies were such that the claim raised against the plaintiffs was bad in law. I do not accept that submission. The difficulties that the submission faced are in my opinion demonstrated by analysing the matters that were raised.

> [11]… The complaint, in so far as there could be one, is that the particulars subjoined to paragraph 32 do not extend to all of the pleaded representations. That may be said to be a deficiency, a matter calling for further particularisation. But unless further particularisation was sought and provided in a form that demonstrated that some of the representations were not in truth alleged to be false, I do not consider that the deficiency could possibly lead to a conclusion that the proceeding or part thereof should be struck out or dismissed. [emphasis added]

21. As I have already indicated, any deficiency in the amended *Points of Defence and Counterclaim* is confined to a complaint that insufficient particulars have been provided. I am not satisfied based on the affidavit material filed in support of the applicant's application and the submissions made by Mr Thapliyal that any such deficiency leads to a conclusion that the claim or the defence is bad in law, lacking in substance or otherwise an abuse of process justifying an order that the claim and defence be struck out pursuant to s.75 of the Act. Consequently, the application is dismissed.

Costs of the application

22. Following my order dismissing the application to strike out the respondent's amended *Points of Defence and Counterclaim*, Mr Pumpa of counsel, sought an order that the respondent's costs of and associated with this application be paid by the applicants. That application was granted.

23. In my view, the application to strike out the respondent's *Amended Points of Defence and Counterclaim* was without merit and made prematurely. In particular, the application was grounded principally on the contention that the document lacked adequate particulars. As I have indicated, the proper course to adopt in circumstances where a defence or claim lacks particulars is to request further and better particulars in accordance with the procedure set out in PNDB1 (2007).

24. The applicants did not pursue that course, with the result that the respondent has been disadvantaged in having to answer an unmeritorious interlocutory application.

25. Consequently, I am satisfied that it would be fair to make an order for costs in favour of the respondent, having regard to s.109(3)(c) and (e) of the Act.

SENIOR MEMBER E. RIEGLER