VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D916/2006

CATCHWORDS

Strike-out application – s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 – relevant considerations – 'open and arguable' case – application for further and better particulars

APPLICANT/FIRST RESPONDENT TO COUNTERCLAIM	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT/ APPLICATION BY COUNTERCLAIM	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	27 October and 6 November 2008
DATE OF ORDER	12 December 2008
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 2541

ORDER

1. The applicant's application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 dated 15 September 2008 is dismissed.
2. The applicant must file and serve answers to the Request for Further and Better Particulars dated 29 June 2007 insofar as it relates to paragraphs 7.6A

and 8 of the Further Amended Points of Claim dated 28 May 2008 as follows:

(i) insofar as they relate to requests for particulars of the loan facility – by 27 January 2009; and

(ii) insofar as they relate to the alleged incomplete and defective works – by 11 March 2009.

3. This proceeding is referred to a further directions hearing before Deputy President Aird on 19 December 2008 at 10:00 a.m. at 55 King Street Melbourne at which time directions will be made for the further conduct of the proceeding. No application for costs will be heard at this directions hearing.

4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr E. Riegler of Counsel
For First, Second and Third Respondents	Mr B. Reid of Counsel
For the Second Respondent to Counterclaim:	Mr G. De Simone in person
For the Third and Fourth Respondents to Counterclaim,:	Excused

REASONS

1 The applicant ('Seachange') entered into a major domestic building contract with the first respondent ('Bevnol') for the construction of 11 units being the first stage of a retirement village development being carried out by Seachange. In its Amended Points of Counterclaim served 23 May 2008 Bevnol alleges that the parties entered into an agreement which has been described as a Development Agreement whereby Bevnol was to be the project builder and would be engaged to construct 136 units. It is alleged that Bevnol would be paid approximately $22,176,105.

STRIKE-OUT APPLICATION

2 Seachange seeks orders that paragraphs 31-35 of the Counterclaim (relating to the 'Development Agreement') be struck out under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998. Although further Particulars have been provided in relation to the allegations in paragraphs 31-35 in the consolidated Points of Counterclaim filed on 22 October 2008, there have been no amendments to the substantive allegations. Because of their length I have included the substantive allegations but not the Particulars in these Reasons:

> 31. Further and or alternatively, during October and November 2005, Seachange entered into an agreement with Bevnol whereby Seachange agreed to engage Bevnol to construct for it all of the Seachange works, being 136 aged care units (down from an initially planned 160 aged care units and aged care centre) and associated works, and by way of consideration, Seachange agreed to pay Bevnol the sum of approximately $22,176,105 ("the Development Agreement").
>
> **Particulars**
>
> The Development Agreement was partly written, partly oral and partly implied.
>
> A. Insofar as it was written it is constituted by:
>
> (i) Marketing brochures and information issued by Seachange and its agents;
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> …
>
> B. Insofar as it was oral it is constituted by meetings during October, November and December 2005 between Mr B Jamieson and or Mr Allain for and on behalf of Bevnol and Mr De Simone and or Mr J Bosancic, project manager, for and on behalf of the First Respondent. The relevant substance of the meetings was to the effect that Mr J Bosancic and or Mr De Simone stated to Mr B Jamieson that Bevnol was to be awarded the contract to construct 136 units and associated works of the Seachange development, the first stage was to construct 11 units.
>
> C. Insofar as it was to be implied it is implied from
>
> i. the matters in A. and B. above;

ii. the parties actions in accordance with the development agreement;
iii. the promotion of Bevnol as the builder for the Seachange development by the First Respondent; and
iv. the operation of law.

…

32. There were terms of the Development Agreement inter alia:
    a) Bevnol would assist Seachange in the development of the Seachange Village Development by providing Seachange with commercial assistance and advice on the design and buildability of all components of the Seachange Village project including;
    b) Provision by Bevnol detailed pricing for all components of the Seachange Village project; (sic)
    c) Bevnol would maintain sufficient capacity to undertake all required construction work for the Seachange Village for the anticipated 3-year project development period;
    d) Bevnol and Seachange would enter into Domestic Building Contracts for the construction of each residential component of the Seachange Village project on a staged basis as each stage was released for construction, being the whole of the Seachange residential development;
    e) Bevnol would, if requested by Seachange enter into construction contracts with Seachange for the non-residential components of the Seachange Village project;
    f) Bevnol would attend all required meetings with Seachange's management and or its design consultants.
33. Between November 2006 and November 2007, Bevnol performed its obligations under the Development Agreement.

…

34. In breach of the Development Agreement, Seachange informed Bevnol that it would not enter into Domestic Building Contracts or into commercial building contracts with Bevnol for the other stages of the works or at all.

…

35. By reason of the matters referred to above, Bevnol has and continues to suffer loss and damage.

…

3 Seachange relies on four grounds in support of its strike-out application:

(i) It contends that the Development Agreement constitutes a major domestic building contract and that as it is not in writing signed by the owner and the builder it is unenforceable by virtue of s31(2) of the *Domestic Building Contracts Act* 1995 ('the DBC Act')

(ii) If the Development Agreement does not constitute a domestic building contract it is void as it offends s132 of the DBC Act as an 'agreement that seeks to exclude, modify or restrict rights conferred by the Act in relation to domestic building work'.

(iii) There is no breach of the 'Development Agreement'

(iv) There is no contract at common law.

It is convenient for reasons which will become apparent to consider these in different order after first confirming the test to be applied by the tribunal for a strike out application to succeed.

4 Section 75 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('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.

5 It is well established that caution must be exercised in determining whether a proceeding should be struck out pursuant to the provisions of s75. In *Norman v Australian Red Cross Society* 1998 14 VAR 243 where, after considering the judgment of the Court of Appeal in *Rabel v State Electricity Commission of Victoria* [1998] 1 V.R. p.102 Deputy President McKenzie said:

> (a) The application is for the summary termination of the proceedings. It is not the full hearing of the proceeding.
>
> (b) The Tribunal may deal with the application on the pleadings or submissions alone, or by allowing the parties to put forward affidavit material or oral evidence. The Tribunal's procedure is in its discretion and will depend on the circumstances of the particular case.
>
> (c) If the Complainant indicates to the Tribunal that the whole of his or her case is contained in the material placed before the Tribunal, the Tribunal is entitled to determine whether the complaint lacks substance by asking whether, on all the material placed before it, there is a question of real substance to go to a full hearing. However, if a Complainant indicates to the Tribunal that there is other evidence that he or she can call to

support the claim and the Tribunal, on the application, does not permit that evidence to be called, then the Tribunal cannot determine the application on the basis that the Complainant's material contains the whole of his or her case.

(d) An application to strike out a complaint is similar to an application to the Supreme Court for summary dismissal of civil proceedings under RSC r23.01 (see also commentary on this rule Williams, Civil Procedure Victoria). Both applications are designed to prevent abuses of process. However, it is a serious matter for a Tribunal, in interlocutory proceedings which would generally not involve the hearing of oral evidence, to deprive a litigant of his or her chance to have a claim heard in the ordinary course.

(e) The Tribunal should exercise caution before summarily terminating a proceeding. It should only do so if the proceeding is obviously hopeless, obviously unsustainable in fact or in law, or on no reasonable view can justify relief, or is bound to fail. This will include, but is not limited to a case where a complainant can be said to disclose no reasonable cause of action, or where a Respondent can show a good defence sufficient to warrant the summary termination of the proceeding. (emphasis added)

…

6 As I recently observed in *Wood v Calliden Insurance Lts & Ors* [2008] VCAT 1339 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. There should not be a trial before a trial. (emphasis added)

7 For the following reasons I am satisfied that the allegations made by Bevnol in paragraphs 31-35 of the Consolidated Points of Counterclaim are open and arguable, and that the matters raised by Seachange are essentially its defences to the claims. I note that the matters raised in support of its strike

out application were first raised by Seachange in its Points of Defence to Counterclaim dated 27 July 2007.

8 The primary basis on which Bevnol opposes the application is that it contends this is a factual dispute, the determination of which cannot occur without the tribunal hearing all the evidence. I accept this. On the face of the pleadings Bevnol's claim in relation to the 'Development Agreement' does not appear to be very strong, but whether or not there was a concluded agreement between the parties and the terms and conditions of such agreement, is a factual dispute which can only be determined after hearing the evidence.

9 Seachange's application is supported by an affidavit from its solicitor, Peter Lustig in which he deposes:

> I am instructed that no agreement between Seachange and Bevnol or any other entity to construct the 136 aged care units exists or ever existed…

Although the tribunal is not bound by the rules of evidence, it is a matter for the tribunal as to the weight afforded to hearsay evidence. I do not consider this 'evidence' to be compelling. He simply deposes to his instructions. There is no affidavit material filed by an officer or employee of Seachange with direct knowledge of the matters in dispute. Whilst his 'instructions' could be tested under cross examination the veracity of those instructions could not, and even if they could be, it is still a matter for the hearing. These 'instructions' confirm there are factual issues to be determined after a hearing of all the evidence.

Does the Development Agreement constitute a domestic building contract/is there a contract at common law?

10 On the one hand Seachange contends that the Development Agreement is a major domestic building contract because it imposes an obligation on Bevnol to carry out domestic building work, and that pursuant to the provisions of s31(2) of the *Domestic Building Contracts Act* 1995, it is unenforceable as it is not in writing signed by the parties. Section 31(2) provides:

> A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).

11 On the other hand, it contends that the Development Agreement is an 'agreement to agree' and as such is unenforceable. Further, that neither Seachange nor Bevnol can be bound to a future building contract because:

1. there is 'no definitive price, concluded drawings or specification, and
2. the scope of work has not been determined;
3. it is unknown whether future stages of the development will be released.

12 Although one might well expect, as submitted by counsel for Seachange, '*some form of instrument to have been prepared and signed by the* parties', the absence of a written, signed agreement does not mean there is no agreement between the parties. If there is any agreement it is in the nature of a commercial arrangement between the parties as to their intentions in relation to this development. Clearly there is not a domestic building contract which is defined in s3 of the DBC Act as meaning:

> a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor

13 Nor does the 'Development Agreement', if there is an agreement, have the essential characteristics of a major domestic building contract; characteristics which Seachange contends are essential for a finding that there is a common law contract. For instance, there is no reference to plans and specifications, to construction periods, to price (other than a loose reference to a total consideration of 'approximately $22,176,105'). Seachange contends that it is unknown whether future stages will be released, although from the limited material before me it seems the intention was always that 132 units would be built.

14 Bevnol relies on *Masters v Cameron* (1954) 91 CLR 353 in support of its contention that the Development Agreement is a 'contract to contract' rather than 'an agreement to agree'. Bevnol contends that it was agreed between the parties that it was the project builder, and as each stage was released, building contracts would be entered into under which it would be paid a total consideration of approximately $22,176,105 with the final price to be determined as each stage was released. However, for the reasons discussed above, until the evidence has been heard it is impossible to determine whether there is a concluded agreement between the parties, or the terms and conditions of any such agreement.

15 In any event, I am not aware of the circumstances surrounding the entering into of the building contract for the first stage of the works, for instance whether Bevnol was required to formally tender for the works, and, if so, whether tenders were sought and obtained from other builders. These are, of course, all matters of evidence.

Does the Development Agreement offend s132 of the DBC Act?

16 Section 132 of the DBC Act provides:

> (1) Subject to any contrary intention set out in this Act—
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.

(2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act.

17 I do not accept Seachange's submission that the 'Development Agreement' offends s132, or that agreements of this type could be used to circumvent the provisions of the DBC Act. As is apparent from the contract for the first stage of the works, it seems that the parties contemplated that a major domestic building contract, in writing and signed by the parties, would be entered into for each stage of the works.

18 Further, it is impossible to determine whether the 'Development Agreement', assuming for a moment there is a concluded agreement, offends s132 of the DBC Act until the terms and conditions of any agreement have been identified.

19 In any event, if the 'Development Agreement' imposes the contractual obligations as alleged, this dispute clearly falls within s107(1) of the *Fair Trading Act* 1999 and relief can be granted under s108 even though it has not been specifically pleaded.

No breach of the agreement

20 Seachange contends that there can be no breach of the 'Development Agreement' because the condition precedent for the entering into the building contracts for the next stage of the works has not been met: the next stage works have not been released 'for construction'. However, I note the allegation in paragraph 34 of the Amended Points of Counterclaim is that the breach of the 'Development Agreement' arose when Seachange advised Bevnol it would not enter into contracts with it for the other stages of the works, relying on an email from Mr De Simone dated 21 December 2006 advising *'that Bevnol would 'not be asked to bid on the balance of the project' and that they could kiss $25,000,000 of work goodbye'*.

21 Once again, this is a defence, the merits of which cannot be determined until after the evidence is heard. I repeat my earlier comments.

'Quantum meruit' or claim for expectation loss/damages?

22 Bevnol sets out in paragraph 35 of its Amended Points of Counterclaim the loss and damage it is claiming. This includes a claim of $181,740 for works carried out by Bevnol (with further particulars to be provided prior to the hearing) and $4,435,000 for loss of expected profit.

23 In its written submissions Bevnol raises for the first time a quantum meruit claim for loss of future profits, as distinct for its claim for loss and damage as set out in paragraph 35 of its Amended Points of Counterclaim (for loss of opportunity/expectation damages). As a quantum meruit claim for loss of future profits has not been pleaded it is unnecessary for me to rule on it in the context of this application. However, the following observation might be of assistance. As a quantum meruit claim is a restitutionary claim

I have serious reservations that it would be found to be open and arguable in relation to the loss of profits for future contracts, which have not been entered into.

24 Of course a claim for expectation damages/loss of opportunity can only arise if there is an enforceable contract which is a matter for the hearing.

REQUEST FOR FURTHER AND BETTER PARTICULARS

25 When the proceeding first came before the tribunal on 24 January 2007 directions were made for its further conduct including:

> 3. By 23 February 2007 the Applicant must file and serve Points of Claim which shall include fully itemized particulars of the claim, loss and damage claimed, and the relief or remedy sought

and

> 8. Where experts are retained:
>
> (a) they must prepare their reports in accordance with Practice Note VCAT 2: Expert Evidence; and
>
> (b) copies of their reports must be filed and served:
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> (i) by the Applicant, by 16 April 2007;
>
> (ii) by the Respondent, by 14 May 2007.

Orders were also made referring the proceeding to a compulsory conference on 29 May 2007. Regrettably the parties have still not had the benefit of any of the alternative dispute resolution processes offered by the tribunal, the conduct of the proceeding having been overtaken by an unusually large number of interlocutory applications.

26 In mid March 2007 Bevnol sought further and better particulars of Seachange's Points of Claim. It seems that after an exchange of correspondence between the solicitors, Seachange filed and served Amended Points of Claim dated 31 May 2007. Bevnol then filed and served a request for further and better particulars of the Amended Points of Claim dated 29 June 2007.

27 On 12 July 2007 the tribunal ordered:

> 10. By 6 August 2007 the Applicant will file and serve the Further and Better Particulars sought in the request of the First Respondent dated 29 June 2007

28 On 26 May 2008 Seachange filed and served Further Amended Points of Claim which it contends contain the particulars. However, I accept that further and better particulars of paragraphs 7.6A, and 8 remain unchanged, and Bevnol continues to seek the particulars of those paragraphs as sought in the request dated 29 June 2007.

29 The claims in paragraphs 7.6A relate to alleged defective and incomplete works. As Judge Bowman observed in *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2005] VCAT 2710:

> … Section 98 of the [VCAT] Act requires this Tribunal to conduct each proceeding with as little formality and technicality, and to determine each proceeding with as much speed as the requirements of the Act and the enabling enactment and a proper consideration of the matters before it permit. This Tribunal is not bound by the rules of evidence or any practices or procedures applicable to courts of record except to the extent that it adopts such rules, practices and procedures. The second reading speech of the Minister delivered when the *Victorian Civil and Administrative Tribunal Bill* was introduced refers to the establishment of a system which is modern, accessible, efficient and cost effective. Certainly, as I have earlier stated, in appropriate cases documents akin to pleadings will be ordered and more formal case management structures put in place. That has occurred in the present case. However, the basic aim remains the disposal of matters with such speed and with such lack of formality and technicality that can be achieved consistent with compliance with the rules of natural justice and the obtaining of a fair result in accordance with the substantial merits of the case – see s.97. It is important that each party understands the case which it is to meet. However, this does not mean that matters should become enmeshed in a web of technicalities. The fact remains that this Tribunal is not a court of pleadings. Whilst a party must know and understand the case it has to answer, this does not mean that exhaustive particulars must be given for every allegation.

30 Counsel for Seachange submitted that it was unable to provide further and better particulars of paragraph 7.6A because the request was unclear, and he was unsure of the 'detail' which should be provided. However, Seachange has not responded at all to the request for further and better particulars of those paragraphs. Whilst some objections to the request for further and better particulars were raised in correspondence between the solicitors for Seachange and Bevnol, as exhibited to the affidavit of Peter Lustig dated 5 April 2007, these preceded the Amended Points of Claim dated 31 May 2007, and the request for further and better particulars dated 29 June 2007. Further these objections were before the tribunal when the orders were made on 12 July 2007.

31 I am not persuaded that Seachange has any reasonable excuse for its failure to respond to the Request. Although the orders of 12 July 2007 require Seachange to provide the 'Particulars' sought, the Reasons dated 23 July 2007 make it clear that:

> …In relation to the answers of the Request for Further and Better Particulars these merely come down to whether they are correct and proper requests, again evidence of the behaviour of the parties has little or no bearing on whether any such requests should be answered. [8]

32 Seachange is not required to do anything more than answer the Request. If it does not understand the request, or is unable for whatever reason to provide the further and better particulars it should respond to the Request in those terms.

33 In relation to paragraph 7.6A, Seachange should provide particulars of any documents or standards, including the contract documents, on which it relies in support of those claims. Otherwise, it seems to me that reference to an expert report identifying the incomplete and defective works will suffice.

34 In relation to paragraph 8 further and better particulars are sought of the 'loan facilities and interest calculations' and rectification costs. I agree that particulars must be provided of each and every loan facility, including but not necessarily limited to the term, the applicable interest rate, whether it is simple or compound and calculation of the interest of approximately $20,900 per week which Seachange claims it has continued to pay.

35 As to the estimated cost of rectification of $660,000 and the cost of completion claimed to be $1,125,591.50 – a total of $2,126,591.50 giving a claimed cost over-run of $316,763.70, it seems extraordinary that Bevnol would seek further and better particulars of the 'amount comprising the *'balance of the Contract Price''*. The contract price is set out in paragraph 5 of the Further Amended Points of Claim as $1,809,827.80 inclusive of GST. It is a simple calculation to determine the balance of the contract price – subtracting the contract price from the total claimed for rectification and completion costs, which on my calculations equals $316,763.70 – the amount claimed as the cost over-run.

36 Counsel for Seachange said that the expert engaged to provide an updated expert report including calculations as to the cost of rectification and completion works has indicated that his report will not be available until late February 2009. I accept that until this report is received Seachange is unable to provide further and better particulars of those costs. Providing the cost of rectification and completion are fully itemised, and rectification and completion works clearly distinguishable I see no reason why Seachange should be required to do any more than file and serve a copy of that expert report.

37 I note with concern Seachange's failure to obtain an expert report on which it could rely as previously ordered by the tribunal. As noted above, the orders of 24 January 2007 required the applicant to file and serve its expert reports by 16 April 2007. The BSS report was attached to the Amended Points of Claim dated 23 May 2007. However, this report did not contain any costings. Notwithstanding the orders of 12 July 2007 it has steadfastly failed to respond to the request for further and better particulars of the rectification and completion costs, and did not engage an expert to provide those costings until some time between the hearing on 27 October 2008 and

its continuation part-heard on 6 November 2008. As noted above, the expert report will not be available until late February 2009.

38 Accordingly, I will order that Seachange provide answers to the Request for Further and Better Particulars dated 29 June 2007 insofar as it relates to paragraphs 7.6A and 8 of the Further Amended Points of Claim dated 26 May 2008. I will order the answers insofar as they relate to the request for particulars of the loan facility to be provided by 27 January 2009 taking into account the Christmas break, and the particulars insofar as they relate to the alleged incomplete and defective works to be provided by 11 March 2009 taking into account that its expert report is not expected to be available until late February 2009. Having regard to ss 97 and 98 of the VCAT Act, I am not persuaded that I should make a self-executing order as suggested by Bevnol.

DEPUTY PRESIDENT C. AIRD

Note: A request for a further hearing for the return of a Subpoena to produce documents was received from Bevnol's solicitors on 11 December 2008. In the absence of leave having been granted to the parties to make further submissions this request was denied. The parties are referred to *Rumpf v Mornington Peninsula Shire Counci*l [2000] VSC 311 at [76].