

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP513/2014

CATCHWORDS

s. 75 and s. 77 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* – application to have proceeding struck out as frivolous vexatious or lacking in substance or, alternatively, to have proceeding struck out and referred to the County Court as the more appropriate forum – application dismissed.

APPLICANT	Ausecon Developments Pty Ltd
RESPONDENT	Mr Sertac Kamil
WHERE HELD	Melbourne
BEFORE	Judge S. Davis, Vice President
HEARING TYPE	Hearing of s 75 and s 77 applications
DATE OF HEARING	4 September 2015
DATE OF ORDER	16 September 2015
CITATION	Ausecon Developments Pty Ltd v Kamil (Building and Property) [2015] VCAT 1474

ORDER

Application under sections 75 and 77 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* is dismissed.

Her Honour Judge Davis
Vice President

APPEARANCES:

For Applicant	Mr P. Lithgow of Counsel
For Respondent (Mr Kamil)	Mr A. Collins

REASONS

THE APPLICATION

- 1 By application dated 10 August 2015, Mr Kamil, who is the respondent in the Victorian Civil and Administrative Tribunal (“the VCAT”) proceeding BP513/2014 (“the VCAT proceeding”), applies under sections 75 and 77 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (“the VCAT Act”) to have the proceeding struck out as frivolous, vexatious, misconceived or lacking in substance, or, alternatively, to have the proceeding struck out and referred to the County Court as the more appropriate forum.
- 2 Ausecon Developments Pty Ltd (“Ausecon”) resists the applications made.

THE VCAT PROCEEDING

- 3 The VCAT proceeding is well advanced. Ausecon filed its Points of Claim on 14 October 2014, and the matter is listed for a 5-8 day hearing to commence on 12 October 2015. In addition, Ausecon has filed and served an expert report of a surveyor.
- 4 Ausecon’s claim may be summarised as follows:
 - Mr Kamil approached Mr Abdullah, who is his cousin and the sole director of Ausecon, in January 2010 and asked to deposit \$243,000 into Ausecon’s bank account, to be repayable upon request together with interest.
 - Mr Kamil made the deposit.
 - In early 2011, Mr Kamil asked Ausecon to build him a house at Lot 397 The Esplanade Caroline Springs (“Lot 397”). The agreement was not written, but was partly oral and partly implied. Orally, Mr Kamil and Mr Abdullah agreed that Ausecon would build a three level dwelling with garage and studio with the price being calculated at cost plus 20% and the \$243,000 previously deposited into Ausecon’s account was to be applied as part payment for the works.
 - The house at Lot 397 was largely constructed by Ausecon but was completed by Mr Kamil as an owner builder after he repudiated the agreement and changed the locks on the dwelling.
 - Ausecon completed works to the value of approximately \$540,672.50 on Lot 397 and, taking into account the \$243,000 already received, claims the balance outstanding on account of the works of \$297,672.50; alternatively, damages on a quantum meruit basis, plus interest and costs.

- Ausecon's expert surveyor has concluded that the value of the work performed by it on the house at Lot 397 is \$642,195 (excluding GST).
- 5 Mr Kamil's response, as outlined in his Points of Defence dated 25 February 2015, may be summarised as follows:

- There were a number of investment agreements entered into between Mr Kamil and Ausecon or between the 'respective interests of Mr Kamil and Mr Abdullah' for investment into building projects including projects to be conducted by Ausecon, alternatively Mr Abdullah.
- OS Developments Pty Ltd as trustee of the OS Developments Unit Trust ("OS Developments") was the joint venture vehicle for property development set up in around April 2011 between Mr Abdullah, Mr Kamil and Mr Kamil's parents. The construction on Lot 397 by Ausecon was only one of the construction projects envisaged by the investment agreements.¹ OS Developments was also to perform construction works at other properties including Lot 245, Garretty Road, Caroline Springs and Lot 396, The Esplanade, Caroline Springs.
- The construction works on Lot 397 were undertaken for OS Developments and not for Mr Kamil personally. Accordingly, OS Developments is liable to Ausecon for any amount owing in respect of the works. OS Developments has been in liquidation since 8 October 2014.
- There was no agreement between Ausecon and Mr Kamil that Mr Kamil would pay any amount to it for the construction of the house on Lot 397.
- In the context of the investment agreements, it was agreed that the costs of constructing a house on Lot 397 would not exceed \$250,000, and that the payment of those construction costs would reduce the total amount owing to Mr Kamil by Ausecon, alternatively Mr Abdullah, by 50% of the amount of the construction costs.²
- There was no arrangement which ever came into existence between Ausecon and Mr Kamil which entitles Ausecon to claim, as damages or otherwise, any amount from Mr Kamil in respect of the alleged works at Lot 397.

¹ See paragraphs 15-21 of the Points of Defence dated 25 February 2015

² See paragraphs 21(i) and 22 of Points of Defence dated 25 February 2015

THE COUNTY COURT PROCEEDING

6 Mr Kamil instructed new solicitors in late June 2015. On 26 August 2015, his solicitors filed a Writ in the County Court. The Indorsement of Claim reads as follows:

Nature of the claim

1. The Plaintiff is the cousin of the First Defendant. The Second Defendant is the alter ego of the First Defendant.
2. In or around January 2010 the Plaintiff invested money, by way of a loan, with the First Defendant, or alternatively with the Second Defendant for the purpose of acquiring land in Caroline Springs, Victoria.
3. The Plaintiff refers to and relies on an agreement (the Agreement) entered into between him the First Defendant, or alternatively between him and the Second Defendant, in or around June 2012 to the effect that:
 - (a) the First Defendant, or alternatively the Second Defendant, agreed that it would either:
 - (i) pay the Plaintiff a sum of \$476,500 by 30 June 2013; or
 - (ii) by 30 June 2013:
 - (A) arrange for certain construction services to be performed at Lot 397, the Esplanade, Caroline Springs 3023 in favour of the Plaintiff;
 - (B) arrange for the transfer of property at Lot 245 Garretty Road Caroline Springs to the Plaintiff; and
 - (C) pay the Plaintiff a sum of money which would be the difference between \$476,500 and the value of the construction services and transfer of land ultimately undertaken or executed to the benefit of the Plaintiff.
 - (b) the Plaintiff agreed to forebear his contractual rights against the First Defendant, or alternatively the Second Defendant, in relation to the property at Lot 271, The Esplanade, Caroline Springs 3023.
4. In breach of the Agreement, the First Defendant or alternatively the Second Defendant, has neither:
 - (a) paid the Plaintiff a sum of \$476,000; nor
 - (b) provided the Plaintiff with construction services and a cash sum to the combined value of \$476,500.

SUBMISSIONS

7 Mr Kamil's submissions in support of his application are set out in the Statement of Facts and Legal Contentions filed on 2 September 2015.

- 8 Ausecon's submissions are set out in the Applicant's Facts and Contentions filed on 3 September 2015.
- 9 Oral submissions were also made on behalf of each party.

Application for order under Section 75 of the VCAT Act

- 10 Mr Kamil submits that Ausecon's claims in the VCAT proceeding are "misconceived, lacking any basis in law, without even a remote possibility of success and have been filed, maliciously, against the wrong party".³ Mr Kamil submits that OS Developments was the building owner of Lot 397 for the purposes of the *Domestic Building Contracts Act 1995* (Vic) ("the DBC Act") and is the appropriate respondent in the VCAT proceeding. Further, he submits, even it were found that he, and not OS Developments, entered into the agreement pleaded by Ausecon, the agreement would be unenforceable because it infringes sections 13(1) and 31(1) of the DBC Act.

Application for order under Section 77 of the VCAT Act

- 11 Mr Kamil submits, through his solicitor, that his claims in the County Court proceeding, which will be fully articulated once the Statement of Claim is drafted, are complex but essentially contractual, that the domestic building works in the VCAT proceeding arise out of the other dealings between the parties which are contractual in nature, and that the VCAT does not have jurisdiction to deal with such contractual claims nor with any set-off claims by Mr Kamil or by Mr Abdullah or Ausecon. The County Court, on the other hand, has jurisdiction to hear both Mr Kamil's claims against Mr Abdullah and Ausecon, as well as Ausecon's claims against Mr Kamil. As there is a common underlying set of factual issues, it is inappropriate for the matters arising in each proceeding to be dealt with separately and undesirable that there may be inconsistent findings in each proceeding. There would be no real delay if the VCAT matter were transferred to the County Court and consolidated with the proceeding there. All of the work done to date in the VCAT proceeding would not be wasted.
- 12 Ausecon's submissions can be summarised as follows.
- 13 The VCAT proceeding is the quintessential domestic building dispute within the meaning of section 54(1)(a) of the DBC Act.
- 14 In the Supreme Court proceeding involving the liquidation of OS Developments, Mr Kamil deposed in his affidavit to the effect that when he purchased Lot 397 in around March 2011:

"...Mr Abdullah, through Ausecon, offered to build a house for me on land I purchased at Lot 397..... which I had purchased with the intention of constructing a house as owner builder...There was no

³ See paragraph 11 of Statement of Facts and Legal Contentions dated 1 September 2015

written building contract between Mr Abdullah or Ausecon and me in relation to Lot 397...”⁴

“The arrangements between Mr Abdullah and me in relation to the Lot 397 were that Ausecon would charge approximately \$250,000 to construct the house....I then changed the locks to Lot 397 on or about 11 August 2014...I have subsequently progressed and undertaken further works at Lot 397.”⁵

- 15 OS Developments was placed into liquidation by Order of the Supreme Court made 8 October 2014. The liquidator is now dealing with issues from various building projects undertaken by OS Developments and the potential claims of Mr Abdullah and Mr Kamil in relation to those building projects. It has never been suggested, either in the liquidation or in the Supreme Court proceedings, that the building works at Lot 397 are relevant in the liquidation.
- 16 The matters raised by Mr Kamil in his Points of Defence and in his Statement of Facts and Legal Contentions, can be dealt with as a set off to Ausecon’s claim in the VCAT proceeding as the relationship can be described as a consumer and trader dispute pursuant to section 182 of the *Australian Consumer Law and Fair Trading Act 2012 (Vic)* (“ACL”), and can be determined by the VCAT, pursuant to sections 184 and 224 of the ACL. Alternatively, those matters can be resolved by the liquidator of OS Developments, or dealt with in the County Court proceeding.
- 17 Ausecon agrees that the DBC Act prohibits builders from entering into cost plus contracts, and agrees that the contract between Ausecon and Mr Kamil cannot be enforced by the builder, but relies on section 13(3)(b) of the DBC Act which provides that the VCAT may award the builder the cost of carrying out the work plus a reasonable profit if the VCAT considers that it would not be unfair to the building owner to do so.
- 18 The filing of a Writ in the County Court so recently, accompanied by a largely unintelligible Indorsement of Claim but nevertheless one that included the domestic building dispute, in circumstances where the VCAT hearing is due to commence in a month’s time, is an attempt by Mr Kamil to derail the VCAT proceeding. This should not be countenanced by the VCAT.

LEGAL PRINCIPLES

- 19 For a strike out application to succeed under section 75 of the VCAT Act, the proceeding must be obviously hopeless, must be obviously unsustainable in fact or in law, can on no reasonable view justify relief, or must be bound to fail.⁶ A claim would be regarded as frivolous or vexatious

⁴ Paras 33-35 of Mr Kamil’s affidavit

⁵ Paragraphs 53-54 of Mr Kamil’s affidavit

⁶ *State Electricity Commission v Rabel* [1998] 1 VR 102 at p.110; *Forrester v AIMS Corporation* [2004] VSC 506, [25] per Kaye J.

or misconceived if it is obviously groundless,⁷ made by a person without standing, or in respect of a matter which lies outside the VCAT's jurisdiction.⁸ A claim might be regarded as lacking in substance if an applicant cannot possibly succeed in establishing its claim, or the respondent has a complete defence.⁹ The power to strike out should be exercised with great caution.¹⁰

20 Section 77(1) of the VCAT Act provides:

(1) At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.

21 Several principles, relevantly, emerge from the cases.

22 The VCAT is likely to exercise its power under section 77 if: (a) there is some doubt about whether it could grant an aspect of the relief sought by a party; or (b) there are related proceedings already on foot in a court, and there is a risk of inconsistent findings. But the VCAT is not bound to transfer a proceeding just because there are related court proceedings on foot.

23 In determining whether to exercise its powers under section 77, the VCAT may have regard to the following matters, among other things:

- the distance the proceeding has travelled in the VCAT, particularly when compared with the distance any corresponding proceeding has travelled in another forum;
- the fact that the VCAT is considered to be, or is almost, the “first port of call” for the type of proceeding in question;¹¹ and
- whether the applicant's choice of forum is seen as an attempt to gain an inappropriate tactical advantage.

FINDINGS AND REASONS

24 The application for an order under section 75 of the VCAT Act relied on the matters already outlined above. On the material before me, I consider that there is no basis upon which I could properly conclude that the VCAT proceeding is frivolous, vexatious, misconceived or lacking in substance. It appears to be common ground that a house, in which Mr Kamil now resides, was built on Lot 397 for Mr Kamil by Ausecon, pursuant at the very least to an agreement between Mr Kamil and Ausecon. Leaving aside

⁷ *Cabot v City of Keilor* [1994] 1 VR 220 per Gobbo J.

⁸ For example, *Smeaton v Worksafe Victoria* [2010] VCAT 1437 [17] per Deputy President McNamara.

⁹ See *Billing v De Kretser* [2013] VCAT 785.

¹⁰ *Lay v Alliswell Pty Ltd* [2001] VSC 385 [14] per Balmford J, adopting the test of the High Court in *Fancourt v Mercantile Credits Pty Ltd* [1983] HCA 25 [27] (joint judgment); *Towie v State of Victoria* [2008] VSC 177 [30] per Kyrou J.

¹¹ *Harrison v Merkat Investments Pty Ltd* [2013] VCAT 1499.

whether the agreement was in the nature of a costs plus contract or a major domestic building contract, the dispute centres around whether or not the builder has been paid in full for the works performed on that construction. The builder says that he has not; Mr Kamil appears to be arguing that, if one has regard to the complex investment relationship between the parties, the builder has been compensated for the construction work on Lot 397. There is a genuine issue in dispute, which is sought to be tried. The Points of Defence relied upon by Mr Kamil are not a complete defence such as to warrant a finding, without hearing evidence, that the claim by Ausecon is lacking in substance.

- 25 I therefore dismiss the application insofar as it seeks orders under section 75 of the VCAT Act.
- 26 In relation to the application for orders under section 77 of the VCAT Act, I consider it appropriate to dismiss the application for the following reasons:
- 27 First, on the limited facts before me, the dispute between Ausecon and Mr Kamil is a quintessential domestic building dispute, for which the VCAT is undoubtedly the first port of call.
- 28 Second, the VCAT proceeding is well advanced. The matter is listed for a 5-8 day hearing to commence on 12 October 2015. Ausecon has retained the services of an expert surveyor, and filed his report with the VCAT.
- 29 Third, the matters raised by Mr Kamil in his Points of Defence, that is, the set off claimed by virtue of the complex investment agreements between Ausecon/Mr Abdullah and OS Developments/Mr Kamil, are matters which fall within the definition of a consumer and trader dispute pursuant to section 182 of the ACL, and the VCAT therefore has jurisdiction to determine these matters under sections 184 and 224 of the ACL.
- 30 Fourth, the Writ filed recently in the County Court is accompanied by an Indorsement of Claim which is difficult to comprehend. However, in its terms it acknowledges an agreement for construction works to be conducted by Ausecon on Lot 397, and the VCAT is the appropriate forum for the determination of that dispute.

Her Honour Judge Davis
Vice President