VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D319/2011

CATCHWORDS

Magistrates' Court proceedings stayed under s57 the *Domestic Building Contracts Act* 1995 – application for joinder under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 after final orders made in principal proceeding – want of jurisdiction - costs

APPLICANT	Barwon Region Water Authority
RESPONDENT	Vibro-Pile (Aust) Pty Ltd (ACN 006 103 126)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	In Chambers
DATE OF ORDER	28 November 2011
CITATION	Barwon Region Water Authority v Vibro-Pile (Aust) Pty Ltd (Domestic Building) [2011] VCAT 2212

ORDER

1 The proceeding is struck out for want of jurisdiction.

2 The applicant must pay the respondent's costs of the proceeding up to and including 6 October 2011. In default of agreement such costs are to be assessed by the Victorian costs Court on County Court Scale 'D' up to and including 31 August 2011 and County Court Scale from 1 September 2011.

3 In addition to the costs ordered in order 2 hereof, the applicant must pay the respondent's costs of preparing its submissions on costs fixed in the sum of $750.

DEPUTY PRESIDENT C AIRD

REPRESENTATIVES

For Applicant	Mason Black Lawyers
For Respondents	HWL Ebsworth Lawyers

REASONS

1 By application dated 29 April 2011 the applicant applied to the tribunal under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') to be joined as a party to proceeding D188/2007 ('the principal proceeding'), or alternatively to be given leave to commence proceedings against the respondent alone. As proceeding D188/2007 had been resolved at a compulsory conference and final orders made on 3 March 2011, the tribunal treated the applicant's application as a new application. All parties to the principal proceeding were initially respondent to this proceeding, but by consent the proceeding concerning all other parties has been struck out.

2 The application was listed for a directions hearing before me as I had case managed the principal proceeding. For various reasons, the directions hearing was not held until 1 September 2011 when Mr Strauch of Counsel appeared on behalf of the application and Mr Graham, solicitor appeared on behalf of the respondent.

Background

3 In December 2006 Salta Constructions Pty Ltd was engaged by Solid Investments Australia Pty Ltd to carry out certain building works at a site in Geelong. The respondent was engaged as the piling contractor. The applicant owns certain assets adjacent to the subject property including a manhole located in the roadway, and a 150 millimetre diameter reinforced sewer line ('infrastructure'). The applicant alleges that the respondent is responsible for the damage to the infrastructure which is says occurred when the Secant Piling Works were being carried out. It claims damages of $82,192.48 for *remedial and repair and/or rectification works*, plus interest and costs.

Jurisdiction

4 At the commencement of the directions hearing I raied with the parties the question of the tribunal's jurisdiction to determine the application as the claim did not appear to be a 'domestic building dispute' as defined in s54 of the *Domestic Building Contracts Act* 1995 ('the DBC Act') or a consumer and trader dispute as defined in s107 of the *Fair Trading Act*1998.

5 Counsel indicated that the application initially commenced proceedings at the Geelong Magistrates' Court against the respondent in 2008. The Magistrates' Court proceeding was stayed on 25 August 2008 pursuant to s57 of the DBC Act upon application by the respondent because of the principal proceeding in the tribunal. He submitted that once the proceeding had been stayed by the Magistrates' Court the tribunal had jurisdiction to determine the claim irrespective of whether it would otherwise have jurisdiction.

6 I reject this submission. As I observed at the directions hearing, the tribunal is a creature of statute. It does not have any inherent jurisdiction. It can only exercise the powers given to it under the VCAT Act and the enabling enactments. As the principal proceeding not been finalised, any application for joinder by the applicant to that proceeding pursuant to the provisions of s60 of the VCAT Act, as a person who is or who ought to be bound by or have the benefit of an order of the tribunal, and who interests were affected by that proceeding,[1] might well have been successful.

7 Accordingly, I made the following orders:

1. This proceeding is referred to an administrative mention before Deputy President C. Aird on 3 November 2011 at which time the Applicant must advise the principal registrar and the Respondent in writing whether it seeks a ruling as to the Tribunals jurisdiction.
2. If the Applicant seeks a ruling as to the Tribunals jurisdiction its response to the administrative mention must be accompanied by written submission to be served on the Respondent contemporaneously.
3. The Respondent must file and serve its written submissions in reply no later than 21 days after it receives the Applicant's written submissions.
4. Thereafter I direct the principal registrar to refer the file to Deputy President C. Aird in chambers to determine jurisdiction on the papers unless either party seeks an opportunity to be heard at a directions hearing.
5. Liberty to apply.
6. Costs reserved.

8 The applicant subsequently applied to the magistrates' Court at Geelong to have the stay lifted. On 6 october 2011 the applicant's lawyers wrote to the tribunal requesting a written ruling on the question of jurisdiction and advising the applicant concedes:

1. The tribunal does not have jurisdiction to hear the matter on the basis that the subject matter does not fall within the DBC Act as they are not a domestic building dispute as defined;
2. As a result of the principal proceeding having been finalised there is no basis for the tribunal to join the applicant under section 60;
3. The tribunal ought property to strike out the application for want of jurisdiction;
4. The applicant concedes there should be an adverse costs order in favour of the respondent limited to the appearance of a solicitor on 1 September 2011. This had originally been listed as a directions hearing and the respondent had not prepared or filed any affidavit material or submissions.

[1] Section 60(1)(a) and (b)

What are the appropriate orders?

9 On 12 October the respondent's lawyers wrote to the tribunal advising they did not oppose the request by the applicant for the proceedings to be struck out but made a number of further submissions. After setting out the history of the Magistrates' Court proceeding and noting that the stay was granted after a contested hearing, the respondent submitted:

i It had been expected that the applicant would seek to be joined as a party to the substantive proceeding in a timely fashion;

ii With leave of the tribunal, previous counsel for the applicant appeared at the compulsory conference on 6 November 2008 but did not apply for joinder to the principal proceeding at that time;

iii Notwithstanding the stay order, the applicant issued a claim in the County Court of Victoria against Salta Constructions Pty Ltd on 19 June 2009. These proceedings were struck out on 23 March 2010.

iv The applicant did not foreshadow any application to join the principal proceeding under October 2010 when it served on the parties to the principal proceeding, an affidavit in support sworn on 16 September 2010. Yet the application was not made until 29 April 2011.

v The application to the Magistrates' Court in Geelong to have the stay lifted was made without the applicant first withdrawing this proceeding. This required an appearance by the respondent's legal representative, and it was only during the hearing in Geelong that the applicant first offered to withdraw these proceedings.

10 The respondent submitted that an order whereby the proceeding was struck out for want of jurisdiction was not the appropriate order. Rather, orders should be made under s75 of the VCAT Act summarily dismissing or striking out the proceeding on the basis that it is frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process. Further, that orders should be made under s75(2) that the applicant pay the respondent's costs of the proceeding on an indemnity basis, alternatively solicitor/client costs or alternatively on a party/party basis.

11 On 14 October 2011 I made orders in chambers for the filing of any further submissions by the parties, both as to the respondent's submission that the proceeding should be struck out pursuant to s75 and its application for costs, with such submissions to be filed by 3 November 2011. Thereafter the submissions were to be referred to me, so the application could be determined in chambers 'on the papers'.

12 Lengthy submissions have been filed by both parties. The applicant filed submissions dated 20 October in response to the respondent's submission that the proceeding should be struck out under s75 of the VCAT Act.

13 In summary, the applicant assets that it was always its intention to seek to be joined to the principal proceeding. And, in October 201 it had written to the parties in the principal proceeding seeking their consent to its joinder.

14 In attempting to explain the delay between the stay of the Magistrates' Court proceeding on 25 August 2008, and the application to join the principal proceeding dated 29 April 2011, it was submitted on behalf of the application that:

i. The applicant had relied on counsel's advice as to all steps it should take;

ii. It had received advice from counsel in late 2008 or early 2009 to pursue Salta Constructions Pty Ltd in the County Court of Victoria;

iii. The County Court proceedings were struck out after alternate counsel advised the applicant to return to the original VCAT proceedings to pursue its claims for relief;

iv. The County Court proceedings were struck out in March 2010.

15 However, there is no explanation as to the delay between October 2010 when the applicant sought consent from the parties to the principal proceeding to its joinder, and making the application dated 29 April 2011.

16 I note that the respondent did not raise the question of jurisdiction at any time between receiving notice of the application in May 2011 and the directions hearing on 1 September despite directions hearing listed for 27 July and 1 August having been adjourned.

17 Rather, the question of jurisdiction was raised by me at the commencement of the directions hearing on 1 September. In paragraph 25 of the applicant's submission it is stated that prior to me raising the issue of jurisdiction, the parties' discussions had been confined to appropriate directions for the exchange of materials moving forward in the proceedings.

18 Further, the application by the applicant was in the alternative. Either, to be joined as a party to the principal proceeding pursuant to s60 of the VCAT Act, or to be given leave to commence proceedings against the respondent alone. There is nothing before me to indicate that the applicant had been advised by any of the parties to the principal proceeding that it had been resolved, and final orders made. In circumstances where:

i The Magistrates' Court proceeding had been stayed pursuant to s57 of the DBC Act upon application by the respondent; and

ii The applicant had been granted leave to attend the first compulsory conference in November 2008 when it was represented by counsel; and

iii Final orders were made in the principal proceeding on 3 March 2011, some six months after the applicant sought consent from all parties to that proceeding to its joinder,

one might have expected that the respondent would have notified the applicant of the current status of that proceeding, and perhaps even invited it to attend the final compulsory conference.

19 Further submissions were received from the respondent's lawyers dated 26 October. It is suggested by the respondent that the applicant has acted improperly in applying to the Magistrates' Court to remove the stay whiles these proceedings remained on foot. Whether it was an abuse of process in the Magistrates Court is the matter for the court, not this tribunal.

20 It is clear the applicant does not have a cause of action which is justiciable in this tribunal and, in my view, the appropriate order is that the application be struck out for want of jurisdiction. I am not persuaded that the application was acting vexatiously or that it was an abuse of process when it filed its application. Once I indicated at the directions hearing on 1 September that I did not consider the tribunal had jurisdiction to determine its application, the application was in a difficult position because of the stay in the Magistrates' Court.

21 Whilst the applicant has applied for the stay to be listed, it seems from the correspondence received from the parties that the Magistrates' Court is not prepared to entertain the application until it receives a written ruling from this tribunal as to jurisdiction.

Costs

22 Under s109(1) of the VCAT Act each party bears its own costs unless the tribunal is satisfied it is fair to exercise its discretion under s109(2) having regard to the matters set out in s109(3). As noted above, the applicant concedes the respondent is entitled to its costs of the directions hearing on 1 September. The respondent seeks its costs of the proceeding, including as I understand it, the costs of its submissions.

23 I consider the appropriate order, having regard to the matters set out in s109(3), is for the applicant to pay the respondent's costs of this proceeding up to and including 6 October 2011 when the applicant advised the tribunal it sought a ruling on jurisdiction. With one exception, each party must bear their own costs of the proceeding after that date. The further submissions from the parties were only necessary because of the respondent's submission that the proceeding should be summarily dismissed or struck out pursuant to s75, and for its application for costs to be paid under s75(2).

24 However, because the applicant had only conceded that the respondent was entitled to costs of the directions hearing on 1 September it was appropriate there be submissions as to costs. I consider it fair that the applicant should pay the respondent's costs in relation to the preparation of the costs submissions fixed in the sum of $750.

DEPUTY PRESIDENT C AIRD