VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D397/2002

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building, s75 of the *Victorian Civil and Administrative Tribunal Act 1998*, quantum meruit, sufficiency of pleadings, particularisation of pleadings, striking out part or all of pleadings.

APPLICANT	J G King Pty Ltd (ACN 006 627 210) T/as J G King
RESPONDENT	Barbara J Evans
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	14 November 2005
DATE OF ORDER	18 November 2005
CITATION	[2005] VCAT 2590

ORDER

1. The application under s75 is dismissed.

2. The Applicant must file and serve fully particularised Amended Points of Claim which plead, in one document, the whole of the Applicant's claim including loss and damage by 7 December 2005.

3. **The proceeding is adjourned for a directions hearing before me on Tuesday 13 December at 2.15 pm.**

4. Costs reserved – both parties have liberty to apply regarding costs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr E Riegler of Counsel
For the Respondent	Mr A Herskope of Counsel

REASONS

1 On 21 October 2005 Solicitors for the Respondent wrote to the Tribunal, saying (omitting the formal parts):

> "We hereby advise that at the return of this matter on 28 October 2005 we will be making an application that the Applicant's Points of Claim dated 27 May 2003 be struck out as they are embarrassing and do not disclose a cause of action".

2. At the hearing of 28 October 2005 it was deemed that the application had been made and it was adjourned to a date to be fixed by the principal registrar.

3. The matter came on for argument on 14 November 2005 where Mr Herskope for the Respondent submitted that the Applicant had failed to comply with Order 1 of the directions of 6 February 2003 that "by 20 February 2003 the Applicant must file and serve Points of Claim setting out fully the claims made and any losses alleged".

4. Mr Herskope also alleged that the Applicant failed to comply with Order 1 of 19 May 2003 which required:

> "By 26 May 2003, the Applicant must file and serve Points of Claim detailing all the claims made, loss and damage alleged and any relief or remedy sought".

5. On 28 May 2003 the Applicant filed its Points of Claim. The document was filed two days after the date for doing so under the directions of 19 May 2003 and is brief in the extreme. It pleads the incorporation of the Applicant, that the Applicant has performed domestic building work at the request of the Respondent at the Respondent's property and that "the Applicant is entitled to the fair and reasonable value of the building work performed based upon a quantum of merit" [sic]. The final item pleaded is

that the Respondent has neglected, failed or refused to pay the Applicant. The amount sought is $36,844.00.

6. Mr Herskope remarked that a quantum meruit is only available where there is no contract or the other party has repudiated the contract. It is noted that the learned authors Dorter & Sharkey [*Building and Construction Contracts in Australia*, Law Book Co, paragraph 1.970] say of quantum meruit:

> "The obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable".

7. Mr Herskope quoted Chief Justice Warren in *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 at paragraph 867 where she said, (omitting the citations):

> "In the assessment of a claim brought on by quantum meruit, a court is usually concerned to assess that which is fair and reasonable for the value of the work performed. The assessment of a reasonable sum in the context of a building case would usually be to assess the degree of completion of the work and the value of the work so completed. There is an obligation on the party claiming on a quantum meruit in a building context to establish the work performed and its value and, further, that it was performed with proper skill. The Claimant must also establish that the work was completed within a reasonable time".

8. It is noted that in Kane Constructions the Plaintiff claimed quantum meruit on the basis that it was the innocent party that had accepted a repudiation. The issue dealt with by Her Honour in the passage quoted appears to be assessment of the amount of quantum meruit, rather than determination of whether a party is entitled to it. It is found that the party seeking a quantum meruit must, at least, plead in a manner which demonstrates why they say they are entitled to it.

9. Mr Herskope further referred me to the affidavit of Mr Noble of his instructing solicitors which exhibited a letter from Noble Lawyers to Solicitors for the Applicant of 18 October 2005. The letter said in part:

> "We now turn to the issue which we consider needs to be urgently addressed by your client, namely the state of the pleadings upon which your client brings its claim.
>
> It is clear that the pleading is embarrassing, in that it fails to disclose any proper cause of action.
>
> Further, the Further and Better Particulars provided in response to the request made by our client's former solicitors gives no assistance whatsoever in distilling what the case is that is put against our client.
>
> If your client proposes to make a claim in contract, it should be properly pleaded. Alternatively, if your client proposes to make a quantum meruit claim, then all of the relevant elements of such a claim should be pleaded out."

10. The letter concluded with notice that the letter would be produced to the Tribunal on the question of costs. The issue of costs is noted and may be dealt with later.

11. Mr Riegler said that his client did not intend to rely on the contract, but on quantum meruit. He submitted that in accordance with *Brenner v First Artists' Management Pty Ltd* [1993] 2 VR 221, the Points of Claim pleaded services and materials provided at the request of the Respondent, reasonable value of the work and non-payment. At page 257 of Brenner, Byrne J said:

> "The circumstances in which the law considers it unjust to accept the benefit without payment are to be discerned from the principles to be extracted from the decided cases. For the present purposes these indicate that an obligation will not arise where there is a subsisting enforceable contract between the parties for the performance of the services in question."

12. Both parties agree that there was an enforceable contract dated 23 October 1997. There is disagreement about whether, to what extent, and why it ceased to be enforceable.

13. Surprisingly, given the nature of the application, Mr Herskope did not press for summary dismissal of part or all of the Applicant's Points of Claim under s75 of the *Victorian Civil and Administrative Act* 1998 ("VCAT

Act"), but reminded me of the Tribunal's capacity to give directions and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding under s80 of the VCAT Act. In particular, Mr Herskope did not make submissions about the application of s75 to the facts he asserted, a step that a party seeking such an order should usually take. He suggested that the Tribunal should strike out the Applicant's Points of Claim of its own motion, given the Respondent's assertion of non-compliance with directions by the Applicant. In answer to a question from Mr Riegler, Mr Herskope said that the Respondent's application was either under s75, or a "pleading application". Mr Riegler's submission is accepted, in accordance with the decisions in *West Homes (Australia) Pty Ltd v Crebar Pty Ltd & Ors* [2001] VCAT 46 and *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 that the Tribunal is not a court of pleadings and that there are ample provisions under the VCAT Act without the need for anything in the nature of a pleading summons.

14. Mr Riegler noted that s75 of the VCAT Act only comes into operation if a preceding or part of that proceeding is, in the opinion of the Tribunal, frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process.

15. I was referred to the reply and Points of Defence to Amended Defence and Counter-claim of 1 April 2005 which does plead that the parties had abandoned the Contract and that the Respondent had repudiated the Contract which repudiation was accepted by the Applicant. It therefore follows that there is an arguable case for quantum meruit.

16. In accordance with Mr Riegler's submission supported by the decision in *State Electricity Commission of Victoria v Rabel* [1998] 1V.R. 102 at page 109, the pleading of the Applicant's case is, collectively, not "absolutely hopeless" or "so clearly untenable that it cannot possibly succeed". I am

also assisted by the decision of Deputy Presidnet McKenzie in *Norman v Australian Red Cross Society* (1998) 14 VAR 243 where she said:

> "(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**. (emphasis added) 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."

18. I therefore I decline to strike out the Points of Claim under s75.

17. Nevertheless, the Respondent cannot be said to reasonably understand the case put against her from the collective pleadings. In particular, the Reply and Points of Defence to Amended Defence and Counter-claim, 8(a), (d), (f) and (g) assert important matters which must be particularised:

> "8 (a) Completion of the works was prevented or delayed by acts, matters, causes and things beyond the control of the Applicant.
>
> …
>
> (d) The Respondent interfered with the performance of the building work and gave directions to the Applicant's workers and sub-contractors.
>
> …
>
> (f) Thereafter the parties abandoned the contract; and
>
> (g) Further or alternatively by reason of the matters aforesaid the Respondent repudiated the Contract, which repudiation was accepted by the Applicant."

18. The application under s75 is dismissed, however in consequence of the inadequacy of the Applicant's current pleadings, the Applicant must file and serve fully particularised Amended Points of Claim which plead, in one document, the whole of the Applicant's claim including loss and damage, by 7 December 2005.

19. The question of costs is reserved and both parties have leave to apply for them.

SENIOR MEMBER M. LOTHIAN