

Marshall v Lindeman (Owners Corporations) - [2016] VCAT 362

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATION LIST

VCAT REFERENCE NO.OC2437/2015

CATCHWORDS

Applicant seeks to withdraw proceeding under s 74 of the [Victorian Civil and Administrative Tribunal Act 1998](#); Respondent seeks to intervene in that application by seeking summary dismissal under s 75 of the [Victorian Civil and Administrative Tribunal Act 1998](#); Respondent's motive is to claim costs; Philtom Developments Pty Ltd v Vero Insurance Ltd [2005] VCAT 75; whether a self-represented litigant who happens to be a barrister has any costs to claim; Winn v Garland Hawthorn Brahe [2007] VSC 360 and Murphy v Legal Services Commissioner [2013] QSC 253.

FIRST APPLICANT: Isma May Marshall (by her attorney under power Barry Marshall)

SECOND APPLICANT: Philip Mayers

THIRD APPLICANT: Alexandra Gronow

FIRST RESPONDENT: Joseph Edward Bounader - Withdrawn from proceedings 8 March 2016

SECOND RESPONDENT: Anton Frances Lindeman

WHERE HELD: Melbourne

BEFORE: Deputy President I. Lulham

HEARING TYPE: Preliminary hearing established under the order made 21 January 2016

DATE OF HEARING: 8 March 2016

DATE OF ORDER: 9 March 2016

DATE OF REASONS: 9 March 2016

CITATION: Marshall v Lindeman (Owners Corporations) [2016] VCAT 362

ORDER

1. The Applicants are granted leave to withdraw their application against the Second Respondent and that application is withdrawn.
2. No order as to costs.

APPEARANCES:

For Applicant Mr L Stanistreet of Counsel

For Second Respondent In person

REASONS

1. By consent as between the Applicants and the First Respondent, the Applicants' proceeding against the First Respondent has been withdrawn with no order as to costs. I have made an Order in Chambers to that effect.
2. The Tribunal's file contains the Applicants' Application for Leave to Withdraw [\[1\]](#), dated 3 March 2016. The form requires the Applicant for leave to give details of the basis of the application. The Applicants' explanation was as follows:

The issues which brought on the action, whilst not altogether resolved, are now being handled within the managing company structure. VCAT proceedings no matter what the outcome will not resolve the fundamental relationship issues. The Applicants who are all either owners or occupiers wish to peruse [sic] a more harmonious relationship.

[\[1\]](#) Leave is required under section [74\(1\)](#) of the [VCAT Act](#). Under section [74\(2\)\(b\)](#), the Tribunal may order the Applicant withdrawing the proceeding to pay other parties' costs

3. On 4 March 2016 the Applicants, through their legal practitioner, wrote to the Second Respondent serving a copy of their Application for Leave to Withdraw, stating, "If you want to proceed as to costs please advise if you intend to do so on (8 March 2016) or on separate time".
4. The Applicants' reference to a potential application for costs indicates that the Second Respondent had raised the issue at some stage.
5. The Second Respondent did not consent to the Applicants withdrawing their application against him. By email dated 4 March 2016 to the Tribunal, and copied to the Applicants' legal practitioner, the Second Respondent advised the Tribunal that he would be seeking an order for costs flowing from the withdrawal of the proceeding. As a separate matter, he referred to [s 75](#) of the [VCAT Act](#), and it is appropriate to quote this passage of his email:

As will be observed from the attached correspondence, it is my submission that in addition to the reservation of costs made at the last hearing, namely, due to the Applicant's [sic] failure to comply with the VCAT order for service of their amended grounds, on the Respondents; [s 75](#) of the [VCAT Act](#) has been enlivened due amongst other things to the fact that, in my submission, the

Applicants' action against me personally was "frivolous, vexatious, misconceived, lacking in substance" or "otherwise an abuse of process" (s75(5)). Accordingly, I will be seeking both the reserved costs and additional legal costs ...". *Emphasis added*

6. The position confronting the Tribunal at the hearing today was as follows:

- (a) The Applicants applied for leave to withdraw the proceeding against the Second Respondent and they opposed an application by the Second Respondent for costs;
- (b) The Second Respondent opposed the Applicants' application for leave to withdraw, not in order to force the Applicants to continue with their legal proceeding, but instead to enable him to seek his costs of the proceeding; and
- (c) The Second Respondent sought to obtain an order under s 75 of the [VCAT Act](#), *before the Applicant's application for leave to withdraw was heard*, summarily dismissing the proceeding against him and awarding him compensation under s [75\(2\)](#) in respect of his "costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding".

7. I consider the Second Respondent's position to be quite artificial and unmeritorious.

8. First, despite solicitors having written to the Tribunal on 14 January 2016 stating that they "have received instructions to act on behalf of the First Respondent and also the Second Respondent (and that they) request that all further correspondence to the First and Second Respondents from the Tribunal be directed to our office", the Second Respondent said that he had never instructed those legal practitioners to act for him. The Second Respondent was a self-represented litigant in these proceedings.

9. At the directions hearing on 21 January 2016, the Second Respondent had signed the appearance sheet and had circled the description "Counsel". True it is that the Second Respondent is a barrister, but the fact remains that he was a self-represented litigant. The typed Order made at the directions hearing recorded that the Second Respondent had been represented by "Mr A Lindeman, of counsel" but I have no doubt that the clerk typed those words because the clerk accepted the appearance sheet at face value. It does not alter the fact that the Second Respondent was a self-represented litigant.

10. This fact disposes of the Second Respondent's application for costs flowing from the withdrawal of the proceeding. A self-represented litigant does not incur costs. Business people, for example, incur overheads and the lost value of their time when appearing for themselves at hearings. The fact that the Second Respondent happens to be a barrister places him in no different position than any other person.

11. I note that Counsel for the Applicants helpfully referred to the cases of [Winn v Garland Hawthorn Brahe](#) [2007] VSC 360 and [Murphy v Legal Services Commissioner](#) [2013] QSC 253. I do not propose to refer to these cases in any detail but I note that in *Winn* Kaye J said the following [\[2\]](#).

There has now been a long-standing rule of practice that a solicitor who is admitted to practice in a jurisdiction is entitled to an award of costs where that solicitor has acted for himself or herself as a litigant and succeeds in the litigation ... On the other hand, it is well-established that a litigant in person other than a solicitor is not entitled to costs including costs arising from time spent in preparing for the case.

[2] [\[2007\] VSC 360](#) at paragraphs 4 and 5. His Honour cited High Court and English authorities

12. Because there are no costs that could be awarded to the Second Respondent flowing from the Applicants withdrawal of the proceeding against him, there is no reason why the Tribunal would not grant leave to withdraw and make no order as to costs. I will make an order to that effect.
13. Secondly, the Second Respondent's attempt to secure an order for summary dismissal under s 75 of the [VCAT Act](#) before the Tribunal could hear the Applicants' application for leave to withdraw cannot succeed. The Second Respondent has not filed an application under s 75 of the [VCAT Act](#). Such an application should be made by filing an Application for Directions or Orders in accordance with Practice Note PNVCAT1. Instead, the Second Respondent has referred to the section, and asserted that it is "enlivened", in an email sent four days before today's hearing (two of which days were a weekend). A section does not enliven itself and it is incumbent upon a party to bring a proper application under s 75 of the [VCAT Act](#) if they intend to do so. I do not consider that there is an application under s75 of the VCAT before me.
14. In [Philtom Developments Pty Ltd v Vero Insurance Ltd](#) [2005] VCAT 751 Philtom, a builder, sought to review two decisions of Vero, an insurer. Underlying that application were allegations by the owner that the builder's work was defective. Negotiations took place between the builder and the owner which resulted in the builder purchasing the dwelling from the owner. The builder then sought to withdraw its VCAT application, and Vero indicated that it would consent to the builder withdrawing the VCAT application if it paid Vero's costs. When the builder did not offer to pay those costs, Vero cut across the application for leave to withdraw and applied for an order summarily dismissing the proceeding under s 75 of the [VCAT Act](#). The Tribunal stated that in circumstances such as these, "where an Applicant seeks to withdraw a claim, it is inappropriate for another party to refuse to consent to such withdrawal and instead seek summary dismissal under s 75." [3]. Whilst [Philtom](#) is not binding authority on me in this proceeding, I concur with the view expressed in that case.

[3] [\[2005\] VCAT 751](#) at paragraph 7.

15. In any event, an application under s 75 would have to focus on the Amended Points of Claim filed by the Applicants pursuant to the Order made on 17 December 2015. That "pleading", signed by Counsel on behalf the Applicants and running to 49 paragraphs, was filed and served on the Second Respondent. The Tribunal is required, in a section 75 application, to assume that the facts

asserted in such a pleading are proven, and then ask whether the proceeding was hopeless or doomed to fail. In paragraph [10](#) of the Amended Points of Claim the Applicants state that the matters they raise in the proceeding are neighbourhood matters within the meaning of the [Company Titles \(Home Units\) Act 2013](#), and that the matters raised constitute a dispute as to whether obligations imposed by the terms of a service agreement have been met. The pleading refers to 3 quotations having been obtained for painting works on the relevant building (in which the Applicants reside or have a right of occupation pursuant to a company title scheme of ownership). They allege that 2 quotations expired, and only 1 remained open for acceptance, at the time of an Extraordinary General Meeting conducted in 2015. They allege that the directors of the service company did not comply with resolutions passed in a previous ordinary general meeting relating to these quotations, by in effect allowing two of the quotations to expire before they could be considered in the Extraordinary General Meeting.

16. In the hearing before me, the Second Respondent relied on some written submissions, paragraphs 1 - 20 of which respond to paragraphs in the Amended Points of Claim. For example, in paragraph 2 the Applicants' allegation that the Second Applicant is a shareholder in the service company which affects the building is denied; in paragraph 6 of the submission, the allegation in paragraph 9 of the Amended Points of Claim is denied; and in paragraph 10 of the submission the text of the minute referred to in paragraphs 17 and 18 of the Amended Points of Claim is said to have been inaccurately quoted. There are other examples. These paragraphs of the submission show that there are disputes as to the facts, and those disputes would be properly determined at a final hearing, not by striking out a pleading. It follows in my view that if there was before me an application under [s 75](#) of the [VCAT Act](#), the application would have to be dismissed.
17. Finally, I am not persuaded on the material before me that in this case the Second Respondent can distinguish between compensation under [s 75\(2\)](#) in respect of his "costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding", and "costs" under [section 74\(2\)\(b\)](#). The Second Respondent has only referred to his fees as a barrister. He has not filed any material in relation to inconvenience or embarrassment. Again, the Second Respondent is a self-represented litigant. He has not delivered a brief to himself. He has not made any cost disclosure to himself under the Legal Profession Uniform Law (Victoria). He does not have an instructing solicitor. With respect the Second Respondent's position is an artificial one.
18. In the circumstances, I will make an order granting leave to the Applicants to withdraw their application against the Second Respondent with no order as to costs.

I. Lulham
Deputy President

9 March 2016