

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATION LIST

VCAT REFERENCE NO. OC2441/2020

CATCHWORDS

Application under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* for summary dismissal. Application under section 165(1)(ba) of the *Owners Corporation Act 2006* to act on behalf of the Owners Corporation. Validity of contract between the owners' corporation and the managers.

APPLICANT	Michael Abbet
FIRST RESPONDENT	Myecho Investments Pty Ltd
SECOND RESPONDENT	Owners Corporation PS 428647
WHERE HELD	Videoconference
BEFORE	Member T. Petranis
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	19 July 2021, 23 November 2021, 10 May 2022
DATE OF ORDER	3 August 2023
CITATION	Abbet v Myecho Investments Pty Ltd (Owners Corporations) [2023] VCAT 902

ORDER

- 1 Under section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998*, proceeding OC2441/2020 is struck out.
- 2 No order as to costs.

T. Petranis
Member

APPEARANCES:

For Applicant	Mr Abbet
For First Respondent	Mr T Cunningham, Solicitor, LSF Legal
For Second Respondent	No appearance

REASONS

The Claim

- 1 In this case Mr Michael Abbet, a lot owner with an 8.33% lot entitlement is bringing a claim against Myecho Investments Pty. Ltd. ('Myecho'), the managers for Owners Corporation PS 428647 ('OC'). Mr Abbet also brings a claim against the OC.
- 2 In summary, Mr Abbet seeks that (a) the management contract between Myecho and the OC, so far as it is valid, be declared void, (b) the Tribunal appoint a new entity to manage the OC, and (c) that he be awarded compensation for various expenses and costs.
- 3 Before being able to proceed with the application, Mr Abbet requires an order authorising him to institute the proceeding on behalf of the OC in accordance with section 165(1)(ba) of the *Owners Corporation Act 2006* (Vic) ('OC Act').
- 4 Myecho, has made an interlocutory application, seeking orders pursuant to section 75 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') summarily dismissing or striking out Mr Abbet's application.
- 5 The proceeding was listed before me to hear both Mr Abbet's authorising order application and Myecho's strike out and summary dismissal application.
- 6 At the hearing Mr Abbet was adamant that he was not, and would not be, seeking an authorising order and so I have dealt with Myecho's strike out application as the preliminary matter.
- 7 The OC was not represented and no member of the OC, other than Mr Abbet, attended the hearing.

Evidence and Submissions

- 8 Over the course of the matter coming to hearing and the various adjournments, Mr Abbet has continued to file many documents and refine and add to his arguments. Mr Abbet, being a self-represented litigant, was afforded every opportunity to address the Tribunal and present any material he thought relevant. He was also given the opportunity to seek legal advice.
- 9 Given the volume of material filed, at the end of the hearing it was determined that the Tribunal would rely mainly on Mr Abbet's final Affidavit sworn on 14 March 2022 and received by the Tribunal on 29 April 2022.
- 10 It should be noted that at the time of the commencement of this proceeding, the relevant legislation upon which this application is based is authorised version no. 18 of the OC Act which was in effect as at 29 March 2021. This Act was amended on 1 December 2021.

The Law

- 11 In summary, Myecho claims that the application brought by Mr Abbet fails to have the support of the other lot owners and he otherwise has no standing to make the claim.
- 12 An application to summarily dismiss or strike out the application relies on the provisions of section 75 of the VCAT Act which states:

Summary dismissal of unjustified proceedings

- (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 subsection (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.
- 13 The power under section 75 is discretionary. It is well established that the Tribunal must act with great caution in exercising this discretion. It has been said that the party making the application under section 75 has a very high threshold to meet before VCAT can summarily dismiss or strike out all or part of a proceeding.¹
 - 14 In *Wynden Pty Ltd and Others v Colliers International Residential (Victoria) Pty Ltd and Another*² Senior Member Vassie sets out the relevant principles of law to be applied in applications such as these:

“The principles governing the disposition of an application under section 75 of the VCAT Act for summary dismissal are well known and are not in dispute. It is a very serious matter to dismiss a proceeding summarily and thus to deprive an applicant of its ordinary right to ventilate its claim, call its evidence and argue its case at a full hearing of the proceeding. So the Tribunal is obliged to act with great caution before doing so, and should not exercise that drastic power of summary dismissal unless it is quite clear that the applicant’s claim is absolutely hopeless, unsustainable in fact or law and bound to fail.”

Applicant’s Claim as to Invalidity of Contract between the OC and Myecho

- 15 The Applicant’s claim centres on there being no valid contract between Myecho and the OC.

¹ *Towie v Victoria* [2008] VSC 177 at [9].

² (Civil Claims) [2010] VCAT 1683 at [14].

- 16 According to Mr Abbet, the problems with the managers of this OC started for him when he asked for a copy of the management contract, prior to settlement of the purchase of the lot, and was refused by Myecho who cited privacy concerns as he was not yet the owner of the lot. After settlement he continued to agitate for the current and past contracts to be provided to him. He asserts that there is no valid contract currently in force and the first and last contract that was entered into between Myecho and the OC was in 2014 which he argues is, in any event, invalid. Therefore, according to Mr Abbet, Myecho are not lawfully appointed managers of the OC.
- 17 Mr Abbet states that he and the OC have been misled by Myecho by acts of dishonesty and by their failure to perform their functions with due care and diligence. He states he would never have purchased the lot had he been aware that the management contract in place was the one formed in 2014. This was not revealed to Mr Abbet until 4 June 2021, after the VCAT proceeding had commenced. According to Mr Abbet, over the course of a year, Myecho produced three different management contracts stating that each was the current contract.
- 18 These problems were compounded, in Mr Abbet's view, by the majority of the OC members taking no interest in the management of the common property over an extended period of time. He claims that when he did invite the other lot owners to take a greater interest in the management of the OC's affairs and advised them of the need to ensure that a proper management contract was in place, he was totally ignored.³
- 19 With no valid contract to begin with, Mr Abbet claims that Myecho had no right to and could not:
- (i) act as proxy for lot owners,
 - (ii) act as managers for the OC,
 - (iii) form a management contract or
 - (iv) call subsequent Annual General Meetings (AGM) of the OC from 2014.
- 20 Mr Abbet says this led to Myecho making void, false, and misleading resolutions of appointment.
- 21 Further, Mr Abbet alleges that Myecho concealed that a properly executed contract between itself and the OC did not exist. Or, alternatively, there has not been a valid management contract since 18 August 2014 which was the first contract entered into between the OC and Myecho. He says that any resolutions passed since then were invalid because they breached sections 87(4) and 119(3) of the OC Act. Mr Abbet says there have been no valid resolutions passed since 2014.

³ Affidavit of Mr Abbet, sworn 31 May 2021 p2.

- 22 Further Mr Abbet alleges that although Myecho formed a new management contract in 2020, that contract was not properly executed. He further alleges that Myecho did not at any time advise the lot owners that they were still working under the original 2014 contract. Mr Abbet also takes issue with a request made to lot owners to provide electronic signatures without the lot owners actually witnessing the application of the common seal.

The First Respondent's strike out application

- 23 Myecho's strike out application, is premised on Mr Abbet not having the requisite standing to bring the claim.
- 24 Myecho states that Mr Abbet only holds an 8.33% lot entitlement, holding 100 shares out of a total lot entitlement of 1200 and therefore does not represent the OC.
- 25 It says that the actual contract is between the OC and Myecho, and Mr Abbet is not a party to that contract and that Mr Abbet lacks the support of the other lot owners who comprise the OC.
- 26 Myecho states that 91.67% of lot owners are agreeable to the management contract that was entered into in 2014 between Myecho and the OC continuing. It claims that the lot owners do not want to involve themselves in expensive litigation. Moreover, it submits that Mr Abbet's proceeding exposes the OC to legal costs that may be incurred by Myecho in defending its position.
- 27 Myecho holds the view that the application is "frivolous, embarrassing and misconceived" and requests that the Tribunal makes an order summarily dismissing or striking out the application against it. It also requests that the Tribunal orders Mr Abbet to pay compensation to Myecho for its costs, expenses, loss, inconvenience and embarrassment resulting from these proceedings.

Does Mr Abbet have Standing to bring these proceedings?

- 28 At the initial directions hearing of this matter the Tribunal allowed Mr Abbet the opportunity to make an application for an authorising order under section 165(1)(ba) of the OC Act which he did in May 2021.
- 29 Section 165(1)(ba) of the OC Act prior to the 2021 amendment⁴ allowed VCAT, in determining an owners corporation dispute, to make an order authorising a lot owner to institute, prosecute, defend or discontinue specified proceedings on behalf of the owners corporation where VCAT considered it was fair.

⁴ That provision was replaced by s 169I & s 169J from 1.12.2021. These provisions enable a lot owner to apply to VCAT for an order that authorises the lot owner to commence, prosecute, defend or discontinue a specified proceeding on behalf of the owners corporation.

- 30 Myecho opposes any application for an order under section 165(1)(ba) arguing that Mr Abbet has failed to provide VCAT with a proper basis as to why the Tribunal should allow him to bring the application on behalf of the OC. If Mr Abbet was to be granted an authorising order to prosecute the application, the application must be considered misconceived because the application would be the OC against the OC and therefore be struck out.
- 31 Mr Abbet in his latest documentation denies that he wishes to bring an application under section 165(1)(ba) to be authorised to bring proceedings on behalf of the OC but states he is applying to VCAT under section 163(1)(b) as a lot owner.
- 32 Section 163(1)(b) states that: “Any of the following persons may apply to VCAT to resolve an owners corporation dispute- (b) a lot owner or former lot owner....”
- 33 The second respondent, the OC, was not represented at the hearings.
- 34 Mr Abbet states that he is not bringing a claim against the OC. He also states that he does not need authority to act on behalf of the OC. He is not seeking money from the OC. He is giving the OC the opportunity to object and is including it because he has its support.
- 35 However, the Tribunal notes that there is a distinction in that the OC has been joined as a respondent, not as a joint applicant and not as an interested party.
- 36 Mr Abbet states that if he can't get the other lot owners to attend meetings or agree to sign a management contract, then they need to be aware that they must come to VCAT every year to appoint a manager.
- 37 It is clear that Mr Abbet has named the OC as a respondent to attempt to galvanise the lot owners into action and make them aware and pay attention to the fact that in his view there is no valid management contract in place, and something needs to be done urgently. In his mind he has joined the OC as a respondent to inform the lot owners that all parties must comply with law.
- 38 Myecho states that Mr Abbet cannot seek to act on behalf of the OC, and at the same time make an application against it. Myecho states that the application is misconceived. The OC cannot sue the OC (itself). Mr Abbet cannot purport to both represent the OC and sue the OC.
- 39 It is abundantly clear that the application against the OC is misconceived. There is no order that the Applicant seeks to have made against the OC, and it has been joined simply as a means by which to have the other lot owners informed about the process. I agree that joining the OC in this manner to achieve this outcome is misconceived as there is no order being sought against the OC and it is, in effect, an abuse of process.
- 40 Mr Abbet has made it clear that he does not seek any authorising order. In any event, any such application for authorisation to bring proceedings on

behalf of an owners' corporation must persuade the Tribunal that it ought to be made, including the degree of support of other lot owners⁵. Apart from bold assertions from Mr Abbet that he has support, contradicted by later assertions made about the lot owners disinterest, there is otherwise no evidence of support for Mr Abbet to bring these proceedings.

- 41 Even if Mr Abbet was granted an authorising order to bring proceedings on behalf of the OC, it would create the absurd situation where the OC would be bringing a claim against itself as the second named respondent. A party cannot bring a claim against themselves. Mr Abbet cannot both seek to represent the interests of the OC and also bring a claim against the OC.⁶
- 42 While making the application for an authorising order at the previous directions hearing, Mr Abbet has subsequently withdrawn that application and is adamant it is not an order he seeks. He says that the OC is not complying with the OC Act in ignoring his alleged issues with the management contracts. Initially he was seeking an authorising order for him to implement the requirements of the OC Act and to ensure the OC managed its affairs in accordance with the OC Act.
- 43 In his final affidavit Mr Abbet asserts that he is not bringing these matters on behalf of the OC, but as a lot owner. He is not seeking to represent the OC and the OC has not brought legal proceedings under section 18 of the OC Act.⁷ If he is not seeking to represent the OC in this proceeding then he is suing the OC as an individual and needs to state his claim and provide grounds for it. It cannot be that he simply wishes to impose his will on the other lot owners to take issue with the managers.
- 44 As Mr Abbet is not bringing a claim against the OC, then there is no basis for pursuing the action against the OC.
- 45 Section 75(1) of the VCAT Act expressly confers a power to strike out part of a proceeding.
- 46 Therefore, for the above reasons, I order that the application as against the OC is struck out as it is misconceived, or otherwise an abuse of process, and has no prospect of success.

⁵ *Grima & Quantum United Management Pty Ltd* [2016] VCAT 1960.

⁶ Senior Member Vassie commented in *Noonan v Owners Corporation No 2 PS 409115E and Anor* (Owners Corporations) [2011] VCAT 1934 at [86] that "It does not seem right that an applicant who is making a claim "on behalf of" an owner's corporation should express that claim as one against the owners corporation.

⁷ Section 18 of the OC Act:

Power to commence legal proceeding

- (1) Subject to subsection (2), an owners corporation must not commence any legal proceeding unless it is authorised by special resolution to do so.
- (2) If a matter is within the civil jurisdictional limit of the Magistrates' Court and an owners corporation is authorised to do so by ordinary resolution, the owners corporation may commence any legal proceeding in—
 - (a) the Magistrates' Court; or
 - (b) VCAT or any other tribunal; or
 - (c) a court of another State or a Territory that corresponds to the Magistrates' Court.

Does Mr Abbet have standing to bring the application against Myecho?

- 47 In his latest documents Mr Abbet states that he does not represent nor has he any wish to represent the OC. He states he is not making any application to represent the OC. He, as a lot owner, simply wants to ensure that there is a valid contract between the OC and Myecho, that the OC members are aware which is the relevant contract and that Myecho acts appropriately to ensure the OC Act is upheld. If Myecho is found not to have a valid contract or not to uphold the law, then VCAT must remove them as managers and appoint new managers.
- 48 If this is indeed Mr Abbet's position, then the Tribunal cannot but find that Mr Abbet has no standing to bring this application against Myecho for a number of reasons.
- 49 As pointed out by Myecho, Mr Abbet is not a party to the contract between Myecho and the OC. The general rule in contract law is that only parties to a contract have rights or liabilities under that contract. Mr Abbet cannot sue Myecho as an individual but only as an authorised representative for the OC because the contract is between Myecho and the OC.
- 50 Mr Abbet is a minority lot owner with an 8.33% holding, who does not have the support of any other lot owner.
- 51 For these reasons I find Mr Abbet has no standing to bring an action against Myecho as there is no privity of contract between Mr Abbet and Myecho. Mr Abbet has no contract personally with Myecho and no support from the other lot owners and the proceeding is bound to fail and should be summarily struck out under section 75(1) of the VCAT Act.
- 52 In case I am wrong or I have misunderstood Mr Abbet's current position,⁸ I will also look at Mr Abbet's position from the viewpoint that Mr Abbet still seeks an authorising order under section 165(1)(ba) of the OC Act to enable him to prosecute the proceeding against the management company, on behalf of the OC.
- 53 Myecho strongly opposes any authorising order, stating that Mr Abbet lacks standing to bring such an application. They argue that Mr Abbet holds a mere 8.33% lot entitlement and does not have the support of the other constituent members of the OC and accordingly seek a strike order under section 75 of the VCAT Act.
- 54 Myecho refers to the case of *Bianca Aluce Sciuto v TNSKBMC Pty Ltd* ('Sciuto')⁹ where the Tribunal refused an application for an authorising order under section 165(1)(ba) of the OC Act that Ms Sciuto be authorised to prosecute the proceeding against the manager of the OC.

⁸ In his affidavit sworn 29 May 2021, Mr Abbet makes application under section 165(1)(ba) of the OC Act for an order authorising him to institute proceedings on behalf of the OC.

⁹ [2021] VCAT 862.

- 55 In this case the OC did not pass special resolutions under section 18 of the OC Act authorising the commencement of legal proceedings against the managers of the OC.
- 56 Senior Member Warren (as he then was) referred to the decision of *Grima Quantum United Management Pty Ltd*¹⁰ ('Grima') where the Tribunal observed that:
- “an application for an authorising order under S165(1)(ba) is not simply an optional alternative to the fulfilment of the requirement for a special resolution in accordance with s18(1) and it is not granted as a matter of course. The applicant for the authorising order must persuade the Tribunal that it ought to be made and that the applicant is not seeking to subvert the responsibility that the owners corporation has under the Act to achieve a special resolution before being able to begin a proceeding. In the exercise of its discretion to grant or refuse the application for the authorising order the Tribunal will consider, first, the reason why no special resolution was obtained or (as in the present case) attempted; secondly, the degree of support amongst the other members of the owners corporation for the application, even though the degree of support is less than the 75% support that would have achieved a special resolution; thirdly, what benefit there would be for the owners corporation as a whole if the order were made, and what disadvantage it might suffer if the order were not made; fourthly, whether the proceeding for which authority is sought has a prospect of success, or, at the very least, is not bound to fail. That list of factors that might be considered is not exhaustive.”
- 57 In *De Vincentis v SDJ Property Fifth Pty Ltd*¹¹ Senior Member Vassie, referring to the above paragraph, said, “It is important to appreciate that the above list of factors does not amount to a list of conditions precedent to the granting of the application. That is to say, if the applicant’s evidence in relation to one or more of the factors is not persuasive that does not mean that the application must fail. From the first to the last the exercise of the discretion will depend upon the particular circumstances of the case”.
- 58 In this case there is no evidence before the Tribunal in relation to the calling or holding of a meeting or ballot to attempt to obtain a special resolution of the OC’s members to commence a proceeding against the OC managers.
- 59 Mr Abbet submitted that he wrote to the other members in 2020 advising them that for several years the OC had repeatedly failed to enter into a management contract with Myecho and that there was currently no management contract in place. Mr Abbet offered to witness the affixation of the OC’s common seal on a new management contract. However no other lot owner contacted Mr Abbet to arrange a meeting to witness the affixation of the common seal.¹² Myecho also sent correspondence to the lot owners in

¹⁰ [2016] VCAT 1960 at [18].

¹¹ [2021] VCAT 233 at [19].

¹² Mr Abbet’s affidavit sworn 16 November 2021 p3 para 7.

relation to forming and executing a new management contract, but no responses were received.

- 60 At no point did Mr Abbet attempt to obtain a special resolution to bring proceedings under section 18 of the OC Act.
- 61 The other members of the OC do not appear to share Mr Abbet's view in relation to the conduct of the OC's managers and they seem to be content to allow things to move forward as they are, provided the necessary bills are being paid and basic maintenance is attended to. There is no evidence that the OC or any of its other members have any issues or are in dispute with Myecho, as OC manager.
- 62 In this instance there would be no basis on which to grant an authorising order, as the other 91.67% of the lot owners do not appear to perceive that there is any problem or dispute with the OC managers and the other lot owners do not support Mr Abbet.
- 63 For these reasons it is my view that if Mr Abbet were seeking an authorising order, it would not be granted by the Tribunal should this matter proceed to hearing, and as such his claim against Myecho is misconceived as he has no standing to bring it and should also be struck out in its entirety under section 75(1) of the VCAT Act.

COSTS

- 64 Myecho seeks an order that Mr Abbet pay compensation for their costs, expenses, loss, inconvenience and embarrassment resulting from these proceedings.
- 65 Mr Abbet states no costs should be awarded against him because he was forced to bring the matter to VCAT as a result of the repeated failure of Myecho to comply with the OC Act and because they made no effort to rectify those breaches.
- 66 Section 75(2) of the VCAT Act empowers the Tribunal, where it has made an order under section 75(1), to order the applicant to pay "*an amount to compensate any other party for costs expenses loss inconvenience and embarrassment resulting from the proceeding*".
- 67 It is obvious to the Tribunal that Mr Abbet feels very strongly about these issues and he is deeply concerned that the provisions of the OC Act are upheld and complied with. He has taken the time to ensure that, as he sees it, the interests of the OC are protected and advanced.
- 68 In *Ingram v McLennan & Associates Pty Ltd*¹³ the striking out of a misconceived application might be considered less likely to lead to an award under section 75(2) than the striking out of a claim that was clearly frivolous or vexatious. As I have noted, Mr Abbet was convinced that the provisions of the OC Act were being breached and an OC he was involved

¹³ [2014] VCAT 142 at [5].

in was acting unlawfully. Yes, Mr Abbet's proceeding was misconceived but the proceeding was issued in good faith. Mr Abbet did not issue the proceeding to be vexatious or frivolous. It cannot be said that Mr Abbet should have known that his application was bound to fail.¹⁴ In fact had Myecho provided Mr Abbet with the documents he was seeking at the initial stages of his enquiries this proceeding may have been avoided. Mr Abbet's complaint is that for seven years Myecho failed to disclose that the 2014 contract was in place.

- 69 Myecho made Mr Abbet a Calderbank offer by letter dated 23 February 2021. Mr Abbet claimed that he did not receive the offer within the time frame and besides as a self-represented litigant he did not understand the meaning of it. The offer was never accepted by Mr Abbet.
- 70 I accept Mr Abbet's evidence that he did not receive the offer until after the time for acceptance had lapsed and that he did not understand the full significance of the offer. Moreover, the offer was for an insubstantial monetary amount and failed to address the substance of Mr Abbet's complaint.
- 71 In *Boek v Australian Casualty and Life Ltd*¹⁵ VCAT noted that the rejection of a Calderbank offer should not "automatically result" in a costs order against the party that did not accept the offer.
- 72 I note also that the hearing scheduled on 23 November 2021 was adjourned because Myecho served a number of documents on Mr Abbet prior to the hearing, not allowing adequate time for Mr Abbet to absorb and address the issues raised in these documents.
- 73 Focussing on the circumstances in this case¹⁶ I am not prepared to make an order for costs against Mr Abbet and I refuse the same.

**T. Petranis
Member**

¹⁴ *Taylor v Third Szable Holdings Pty Ltd* [2001] VCAT 2219.

¹⁵ [2002] VCAT 92 at [23].

¹⁶ *National Italian Australian Foundation v Herald & Weekly Times Pty Ltd* [2006] VCAT 1060.