

# Insurance law update

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## CASE NOTE

## Dismissing or striking out claims of concurrent wrongdoing? Recent VCAT decision provides clarification

Recently, in *Parsons v Stat Bay Pty Ltd*<sup>1</sup>, the Victorian Civil and Administrative Tribunal (“**VCAT**”) considered the circumstances which will warrant the dismissal or striking out of claims of concurrent wrongdoing:

- a. for want of prosecution under section 76 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (“**VCAT Act**”); and
- b. for engaging in conduct that causes a disadvantage to another party to a proceeding under section 78 of the *VCAT Act*.

### FACTS

Individual lot owners (“**Owners**”) made claims in respect of alleged defective works against a builder. The builder joined the building surveyor, plumber and electrician as concurrent wrongdoers, claiming they were proportionately liable under Part IVAA of the *Wrongs Act 1958* (Vic).

The **Owners** then ‘piggybacked’ on the builder’s Part IVAA defence, pleading that they were entitled to damages against each joined respondent in an amount proportionate to their respective liabilities.

### THE SURVEYOR’S APPLICATION

The building surveyor applied to VCAT for orders that the builder’s claim against it be dismissed or struck out for want of prosecution, or alternatively, for engaging in conduct which disadvantaged the surveyor.

In support of its application, the building surveyor relied upon the following:

- a. the builder had repeatedly failed to comply with VCAT’s orders, including attending hearings; and
- b. the builder failed to file any expert reports demonstrating the building surveyor’s responsibility for the **Owners’** loss.

### THE OWNERS’ SUBMISSIONS

Subsequent to the building surveyor’s application, but prior to the hearing of the application, the builder went into liquidation. This resulted in the **Owners’** claims against the builder being stayed pursuant to section 500(2) of the *Corporations Act 2001* (Cth) (“**Corporations Act**”).

<sup>1</sup> (Building and Property) [2015] VCAT 297

As a result of the builder going into liquidation, the Owners submitted that it would be appropriate for the hearing of the building surveyor's application to be adjourned until the determination of their claims by the builder's insurer. Alternatively, they sought an adjournment for a short time to decide whether to bring a separate claim against the surveyor.

The Owners also submitted that the building surveyor should not be removed as a party to the proceeding because it could prejudice the insurer's rights of subrogation, and any claim the Owners might wish to bring against the building surveyor.

## VCAT'S DECISION

VCAT refused to adjourn the hearing of the building surveyor's application, holding that its decision in relation to the building surveyor's application would not be impacted upon by any decision of the builder's insurer, or the Owners' decision as to whether they wish to make a separate claim against the building surveyor.

VCAT also rejected the building surveyor's application for the builder's claim against it to be dismissed or struck out for want of prosecution, or alternatively, for engaging in conduct which disadvantaged the surveyor, relevantly holding:

- a. the builder's failure to comply with VCAT's orders prior to the joinder of the building surveyor is not a relevant consideration for the purposes of the building surveyor's application;
- b. the builder's failure to comply with VCAT's orders and attend a directions hearing occurred at a time when the builder's previous solicitors had ceased acting, and the builder was in the process of appointing new legal representation. Therefore, the builder's non-compliance was not sufficient to warrant an order under section 76 or section 78 of the VCAT Act; and
- c. the builder has filed expert reports in the proceeding in relation to the Owners' claim, and it therefore cannot be said that it has done nothing in support of its claim for contribution against the building surveyor.

VCAT also declined to dismiss the builder's claims against the building surveyor, holding that as a result of the builder being put into liquidation, its defence – including its claim for contribution against the building surveyor under the proportionate liability legislation and its claim for an indemnity from the building surveyor – is stayed pursuant to the Corporations Act.

However, VCAT did order that the proceeding be struck out with a right to apply for reinstatement as a result of the Owners' claim against the builder being stayed due to the builder going into liquidation.

## KEY FINDINGS

The above decision sheds light on what factors are likely to be considered relevant to an application to dismiss or strike out a claim of concurrent wrongdoing. In this regard, we note that:

- » the failure to file any expert reports specifically evidencing that a concurrent wrongdoer is liable for an applicant's loss and damage is in itself insufficient to amount to a want of prosecution under section 76 of the VCAT Act;
- » conduct of a party occurring prior to the joinder of another party, including breaches of the Tribunal's orders, is not relevant when considering an application to dismiss proceedings for want of prosecution under section 76 of the VCAT Act, or engaging in conduct that caused a disadvantage to another party under section 78 of the VCAT Act; and
- » failures by an unrepresented party to comply with VCAT orders and to attend directions hearings are unlikely to be sufficient to warrant an order dismissing the proceedings under section 76 or section 78 of the VCAT Act.

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