

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D395/2004

CATCHWORDS

Domestic building – non-compliance with directions date – no extension of time.

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| APPLICANT | Dr Jennifer Marie Martin |
| RESPONDENT | Fasham Johnson Pty Ltd |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member D. Cremean |
| HEARING TYPE | Costs Hearing |
| DATE OF HEARING | 30 November 2006 |
| DATE OF ORDER | 30 November 2006 |
| CITATION | Martin v Fasham Johnson Pty Ltd (Domestic Building) [2006] VCAT 2478 |

ORDER

- 1 Application refused.
- 2 Reserve liberty to apply for costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

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| For the Applicant | Mr G. Kuek, solicitor |
| For the Respondent | Mr A. Laird of Counsel |

REASONS

- 1 This has been a most unpromising exercise from beginning (in 2004) to end.
- 2 On 30 November 2006 I refused the application made on behalf of the Applicant to extend time so as to enable compliance with the orders I made on 26 October 2006.
- 3 Those orders required filing and service of Amended Points of Claim in the form taken to have been filed that day or in a different form by 10 November 2006. See paragraph 1. I was quite specific that no further opportunities to file and serve Amended Points of Claim would be provided by the Tribunal, unless an order was sought and applied for and granted. See paragraph 2. I did not, at the time, contemplate that an order would be needed under that paragraph. But I was careful not to fetter a discretion. And I have approached the hearing of this application with an open mind, I should add.
- 4 The Applicant by her lawyer chose to redraft the Points of Claim (her sixth attempt at doing so) and so went down the path of choosing to do different Points of Claim. Had she not done so, she would not have sought to extend time to file and serve the amended document. But did she do this in compliance with paragraph 1 by 10 November 2006? No. Therefore an order was sought under paragraph 2. It was that order which I have refused to make in her favour.
- 5 How is the Applicant's lawyer going to explain this to the Applicant? How will he explain the delay to her? She is his client and is entitled to a full explanation.
- 6 The undisclosed circumstance is this: the Applicant is also the wife of her solicitor. Her solicitor is Mr Gabriel Kuek and he has briefed Mr David Perkins in this matter until the latter was suspended from practice on 13 November 2006 for 6 months as I understand it. That happens to be the date of the "new" Amended Points of Claim.
- 7 Previously I struck out the Amended Points of Claim in this matter on 18 April 2006 as in effect being unintelligible. I gave leave to replead. That decision was appealed to the Supreme Court where, apart from one aspect of the matter relating to a costs order formulation, my decision was upheld by Gillard J and costs ordered. That decision of his Honour was appealed to the Court of Appeal where Eames J A and Neave J A upheld Gillard J. Costs were ordered again. Contemplation was then given, as I understand it, to appealing to the High Court but that was not pursued.
- 8 In the meantime a stay application decision was reserved by me and I heard and determined it on 26 October 2006 by rejecting the application, after the Supreme Court had given its rulings. An application that I was biased I rejected as unfounded.

- 9 So the position is that the matters then proceeded on 26 October and I disposed of the bias contention and the stay application.
- 10 Draft Points of Claim were produced and were sought to be filed. I, out of some sympathy for the Applicant, allowed them to be filed and allowed them to stand as filed or in amended form. Their failings were obvious. I suggested to Mr Perkins that he or someone else who was experienced as a Barrister should be looking at the document. My fear was that a cause of action could get lost by the successive failures of Mr Kuek to generate a document resembling a pleading. I am very concerned that he has not secured independent representation for his wife.
- 11 The Applicant had until 10 November to comply with paragraph 1 but as I have noted that was not achieved.
- 12 My reasons for declining to extend time (by three days but only one business day) to enable compliance include these:
- a This is now the 6th attempt at producing Points of Claim. A long period of time has now gone by.
 - b The Points of Claim which have been produced on this occasion are no more impressive than any of the last 5 failures. They allege, for instance, a cause of action arising under the *Trade Practices Act 1974* (Cth) - under which the Tribunal, however, has no jurisdiction. They are vague and imprecise and seriously deficient in particulars. They assert absurd causes of action e.g. that the Builder is liable for the consequences of a burglary in December 2005 by (allegedly) handing over 8 rather than 9 keys in March 2005. They ask for “Exemplary damages because of the intentional, high handed, and outrageous behaviour [effectively blackmail] by the builder towards the owner”. The full range of errors is apparent even upon a cursory examination of the document. No respondent should be called upon to plead to the same.
 - c There is no satisfactory explanation for the delay (given that on this occasion the need for due compliance was emphatically made known). The affidavit of Mr Kuek (affirmed 29 November 2006) is completely unconvincing. He says he spent in excess of 80 hours working on a statement required by Mr Perkins. I could not examine that statement because it was claimed as privileged but a sizeable document which I saw was said to be the statement in draft form. He then says he was with Mr Perkins on 8, 9 and 10 November 2006 providing instructions in the matter. I fail to see how all this time could have been occupied on this matter. It is simply astounding considering I would have thought even a relatively inexperienced barrister could have produced a workable document after perhaps an afternoon’s work allowing for breaks.

- d There is nothing on oath or affirmation before me to indicate an arguable case, and how one might be put, in this matter. The obligation is on the Applicant, I think, to show this. Mr Kuek argued I should look at the whole file to determine this point. I reject that. It is for him to make out his grounds and not for me to hunt around for them for him.
 - e The serious prejudice being caused by the Respondent by constantly having to deal with a moving target - an incomplete, and unparticularized, document varying each time. The Respondent is incurring serious legal costs but not the Applicant herself who is represented by her husband and the barristers (6 in all so far) he chooses to brief. That is, unless he is charging his wife for his legal services.
 - f The indulgence sought by the Applicant was not encouraged along, as it were, by an offer to pay the Respondent's costs incurred (yet again) except if I ordered it (if I understand Mr Kuek's submissions). There are also costs I believe (and significant orders for costs at that) remaining unpaid by the Applicant in the proceeding. But that is not determinative.
- 13 Each of these factors I have weighed in the balance as required by *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344, and I have come to the conclusion, without any hesitation at all, that I should not extend time. I had to stand the matter down to enable Mr Kuek to obtain a copy of the decision in that case because he had never heard of it before despite it being well known amongst practitioners practising in the area.
- 14 The point has been reached, I consider, that no reasonable cause of action can obviously be advanced after so many failed attempts at trying to plead it legally. This matter as it stands must be drawn to a close. No determination however has been made on the merits.
- 15 But my decision on this occasion is simply that I refuse to extend time. If this means the Applicant's cause of action remains struck out (not dismissed, I would add) then that is entirely the fault of her husband, her solicitor and the Counsel he has briefed. There would be nothing, I would think, to prevent the matter being re-commenced.
- 16 I reserve liberty to the Respondent to apply for the costs of the proceeding.

SENIOR MEMBER D. CREMEAN