

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D766/2006

CATCHWORDS

Domestic building – complex case – adjournment.

APPLICANT	Abigroup Contractors Pty Ltd, Body Corporate No. PS 502581D (Riviera Apartments) (By Counterclaim)
RESPONDENT	River Street Developments Pty Ltd
JOINED PARTY	187 Settlement Road Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	25 July 2007
DATE OF ORDER	25 July 2007
CITATION	Abigroup Contractors v River Street Devt (Domestic Building) [2007] VCAT 1316

ORDER

- 1 The compulsory conference fixed for 8 August 2007 is to proceed.**
- By 8 August 2007 the Respondent must file and serve any further affidavit(s) of non-expert persons together with copies of exhibits.
- By 15 August 2007 the Respondent must file and serve any copies of materials of an expert nature it intends to rely upon including copies of any expert report(s) complying with VCAT Practice Note 2.
- By 22 August 2007 the Applicant must file and serve any answering affidavit(s) together with copies of exhibits and materials of an expert nature it intends to rely upon including copies of any expert report(s) complying with VCAT Practice Note 2.
- 5 I set this matter down for hearing before Senior Member Cremean (if available) on a date after 3 September 2007 commencing at 10.00 a.m. at 55 King Street Melbourne not including the whole of the week commencing 10 September 2007 or October or November 2007. Allow 10 days.**

- 6 The parties must arrange a running transcript and a tribunal book of documents to be relied on by them appropriately indexed and numbered or as appropriate.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr J. Burnside, QC with Mr J. Twigg of Counsel
For the Respondent	Mr. J. Delany, SC and Mr R. Andrew of Counsel
For the Joined Party	No appearance

REASONS

- 1 This matter is due to commence this day and is fixed for 3 days.
- 2 The matter concerns a claimed right to call for payment of moneys to be made into the Domestic Builders' Fund under the *Domestic Building Contracts Act 1995*. The amount involved is above \$7 million.
- 3 The Respondent seeks an adjournment of the matter to a later date.
- 4 This is opposed by the Applicant.
- 5 The Respondent submits *inter alia* that it is prejudiced if an adjournment is not granted. That is, that it has received affidavits on 19 July 2007 to which it wishes or may wish to file answering materials on affidavit also. It relies also upon late delivery of a report of an expert accounting nature from a Mr Kus (dated 19 July 2007 but sent on 23 July 2007). The latter it is claimed changes the nature of the case the Respondent must meet.
- 6 The Applicant submits *inter alia* that that report is based on materials in the provision of the Respondent itself and that opportunity existed before now to deal with the new affidavits.
- 7 It is said too that with respect to the Respondent's application that I am entitled to be "very sceptical" – that no plausible case for an adjournment has been made out. No evidence on oath has been called, it is pointed out.
- 8 On the other hand, the Respondent repeats its position that it would be unfair to proceed over its objection. Reference is made to a decision of his Honour Judge Bowman in *Moutidis* concerning the effect of a payment in of monies under s53 of the Act.
- 9 A position is advanced by the Applicant of commencing the matter and adjourning it off part heard.
- 10 The Applicant submits also that in all the circumstances if an adjournment is granted it may be significantly placed at financial risk. It is said I must have regard to justice on both sides.
- 11 The Respondent however points to the requirement in the directions that materials be filed by 6 July 2007 and submits the Applicant is clearly in breach of same.
- 12 In reply the Applicant points out that the Respondent failed to file its completed materials by that date also – pointing out that exhibits were not delivered.
- 13 This is a very complex matter involving many millions of dollars taking place against a background of a number of proceedings – in this Tribunal and in the Supreme Court.
- 14 I consider my duty is to abide by s97 of the *Victorian Civil and Administrative Tribunal Act 1998* – always to proceed fairly and according to the substantial merits in all proceedings.

- 15 In that regard I refer to the statement by the High Court of Australia in *Queensland v J L Holdings* (1997) 141 ALR 351 at 357 that justice is the paramount consideration. No principle of case management can supplant the aim of achieving justice: *Seven Network v News Ltd* (No. 16) [2006] FCA 574 at [14] per Sackville J. And as Smith J. observed in *Belini v Dinmkovski* [2006] VSC 17 – natural justice and a reasonable opportunity to call evidence require that adjournments be given in appropriate cases.
- 16 I am satisfied I should adjourn this matter and that overall the interests of justice demand that. I am not persuaded I should do so only upon the provision of sworn evidence. Neither party has called evidence in that regard. Nor am I satisfied that by doing so the Applicant will be prejudiced in any plausible way that I can ascertain. Finally, I do not consider I should commence to part-hear the matter – that would be to expose the Respondent to an injustice of having to proceed which is the point in issue.
- 17 I am satisfied I should adjourn the matter considering the lateness of the materials provided to the Respondent. And considering also the detailed nature of those materials – in particular the Kus report. It is not so much the contents of that report as their assemblage – delivered only a day or two ago – which will require detailed perusal. I think it fair that the Respondent have a chance to properly consider its position with respect to the same.
- 18 I have regard to my duty under s97 and to the other authorities I mention.
- 19 I do not consider I should be very sceptical of the Respondent – nor do I consider I should form an adverse view about either party in the circumstances I am presented with.
- 20 I accordingly adjourn the matter and make directions.
- 21 I reserve costs. Each party has failed to abide by directions to the letter: a party seeking costs must have its own house in order. I act under s109 to reserve costs. I am not satisfied I should exercise discretion to order costs in favour of the Respondent.

SENIOR MEMBER D. CREMEAN