**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D181/2004

**DOMESTIC BUILDING LIST**

## CATCHWORDS

Domestic building, costs, interlocutory proceedings, withdrawal of claims for quantum meruit and misleading and deceptive conduct, uninvited further submissions

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| **APPLICANT** | Arrow International Australia Limited (ACN 081 136 352) |
| **FIRST RESPONDENT** | Indevelco Pty Ltd ( ACN 061 216 635) |
| **SECOND RESPONDENT** | Perpetual Nominees Ltd as custodian of The Colonial First State Income Fund (ACN 000 733 700) |
| **JOINED PARTY** | John Zervos |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Senior Member M. Lothian |
| **HEARING TYPE** | Directions Hearing |
| **DATE OF HEARING** | 21 March 2007 |
| **DATE OF ORDER** | 16 May 2007 |
| **CITATION** | Arrow International Australia Limited v Indevelco Pty Ltd (Domestic Building) [2007] VCAT 811 |

## ORDER

1 The Applicant must the pay First Respondent's, Second Respondent's and Joined Party's costs of the Directions Hearing of 21 March 2007 and costs (if any) thrown away by virtue of its withdrawal of claims for misleading and deceptive conduct and quantum meruit. Failing agreement, the costs are to be assessed by the Principal Registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act* 1998 on a party-party basis on County Court Scale D.

2 Should all parties make a joint written request for continuation of the Compulsory Conference, the Principal Registrar is directed to list it before Senior Member Lothian at the earliest available date.

**SENIOR MEMBER M. LOTHIAN**

## APPEARANCES:

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|---|---|
| For the Applicant | Mr Miller of Counsel |
| For the First Respondent | Mr D. Noble, Solicitor |
| For the Second Respondent | Mr N. Frenkle of Counsel |
| For the Joined Party | Mr D. Noble, Solicitor |

## REASONS

1 On 1 March 2007 I made orders following a compulsory conference. The effect of order 1 was that building experts for the Applicant ("Arrow") and First Respondent ("Indevelco") were required to attend a meeting of experts on 3 April 2007, to be chaired by Mr John Anderson, in order to agree on a schedule of the works necessary to achieve compliance with the contract. It was common ground between the parties that all but 11 units in the development had been sold.

2 On 21 March 2007 there was a Directions Hearing. It was listed by the Tribunal in response to letters from solicitors for Arrow of 2 March 2007 and solicitors for Indevelco of 5 March 2007.

3 The letter from Norman Czarny & Associates for Arrow of 2 March 2007 stated in part:

> We believe that [Order 1] was intended to require the building experts to consider only the works required to bring the 11 units still owned by [Indevelco] to compliance with the building contract and request clarification by the Tribunal as to this aspect of the orders.

4 The letter from Noble Lawyers for Indevelco of 5 March 2007 responded in part:

> We have yet to receive a copy of those orders [of 2 March 2007] however we understand from counsel that an order was made requiring the preparation of a joint expert's report containing an agreed scope of works for rectification of the defects in the Applicant's works. We understand from counsel, and it is apparent from the said letter, that the Tribunal placed no limitation on the number of units to which the scope of rectification works shall relate.
>
> However, the Applicant's solicitors have asked the Tribunal to clarify the matter. Our client contends that the form of order should remain as stipulated at the directions hearing that was held following the conclusion of the compulsory conference.

5 By letter of 16 March 2007, Arrow sought to add the question of whether there should be a preliminary hearing. The issue for the proposed preliminary hearing was whether the Second Respondent ("Perpetual") is obliged to pay Arrow pursuant to a collateral contract. This application was opposed by the other parties and I dismissed it in order 2 (set out below), but noted that this does not prevent Arrow again seeking a preliminary hearing at the commencement of the hearing proper.

6 The orders of 21 March 2007 were:

> 1. In circumstances where the Applicant has abandoned its claim for quantum meruit and in the interests of clarity, the work to be considered by the building experts on 3 April 2007 is limited to the 11 properties which are now owned by the First Respondent.

2. The application for a preliminary hearing concerning the possible liability of the Second Respondent to the Applicant is dismissed at this time on the basis that the question proposed is insufficiently precise and not certain to resolve the dispute between them.
3. By 4 April 2007 the Applicant must file and serve further Amended Points of Claim which reflect the withdrawal of the claims regarding quantum meruit and misleading and deceptive conduct.
4. The decision on the question of costs is reserved and a written determination by Senior Member Lothian will be provided.

7 Applications for costs were made on behalf of Perpetual, represented by Mr N. Frenkle of Counsel, who sought costs of the day, and also costs thrown away by reason of withdrawal of the claim for misleading and deceptive conduct.

8 Indevelco and the Joined Party, Mr Zervos, both represented by Mr D. Noble, solicitor, sought costs of the day, and also costs thrown away by reason of withdrawal of the claim for quantum meruit.

9 I reserved my decision regarding costs, to consider it in the context of this litigation.

10 The relevant part of s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides as follows:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

11 This proceeding has been the subject of a significant number of interlocutory applications, some of which have resulted in orders for costs. For example, on 8 September 2004, Senior Member Robert Davis made an order that Indevelco pay Arrow's and Perpetual's costs for failure to file Points of Defence in accordance with an earlier order. On 17 August 2005 Judge Bowman made an order that Perpetual pay Arrow's costs of an unsuccessful application pursuant to s75 of the Act. He said at paragraph 7:

> The application by Perpetual pursuant to s.75 involved a discrete and quite complex issue, very capably argued by experienced counsel, and argued against a background of litigation that is itself very complex and which has been conducted very much in the manner of a commercial cause. Both the proceeding itself and the application before me have been conducted in an adversarial fashion.

12 On 6 July 2006 Judge Bowman ordered Indevelco and Mr Zervos to pay Perpetual's costs of various interlocutory proceedings of 23 December 2005 and the subsequent costs hearing of 6 December 2005. He said:

> Nothing has changed in relation to the litigation itself. It remains complex, being conducted in an adversarial fashion and very much in the manner of a commercial cause, and with a very considerable amount of money being involved. The discrete application before me was also complex and contested in an adversarial fashion by very capable counsel.

13 On 26 July 2006 his Honour declined to make orders for costs connected with two earlier hearings in circumstances where Arrow was "certainly not successful to the degree that would attract an order for costs." The conclusions I draw from the manner in which Judge Bowman has dealt with costs in this proceeding is that although interlocutory proceedings are likely to attract an order for costs, it cannot be assumed this will be so in every contested appearance before the Tribunal.

### Quantum meruit and misleading and deceptive conduct claims abandoned

14 I find that both these heads of claim are substantial and that their withdrawal or abandonment is a significant change to the pleadings.

15 It is possible that there will not be substantial costs – Mr Miller of Counsel submitted on behalf of Arrow that Perpetual could not have incurred much by way of costs thrown away, as the defence to the claim for misleading conduct was no more than half a page of denials. My response during the hearing was that the issue is entitlement rather than the amount to which a

party might be entitled. Mr Noble also remarked that Mr Miller did not deny the entitlement, other than to say that it would be "minimal".

16 I note that unlike the circumstances of the orders of 17 August 2005 and 6 July 2006, the claims which have been withdrawn are not particularly discrete from the remainder of the dispute between the parties, and delineating their extent could be the subject of substantial argument. For example, on 24 February 2005 Judge Bowman included in his reasons for decisions dismissing an application under s78, the fact that Arrow had pleaded misleading and deceptive conduct.

17 Mr Miller submitted that withdrawal of these issues was not because they lacked merit, but to "clarify and reduce" the scale of the hearing. While taking steps to rationalise proceedings is admirable, the earlier it is done, the less it will cost all parties.

18 I find that Arrow's amendment of pleadings in this manner is, in the words of s109(3)(a) to conduct "the proceeding in a way that unnecessarily disadvantage[s] another party." It might or might not amount to vexatious conduct; that was not argued before me. However I note that sub-sub-sub-sections (i) to (vi) of s109(3)(a) are examples of matters to be taken into account, not an exhaustive list.

19 I am satisfied it is fair that Arrow be ordered to pay the costs (if any) of Indevelco, Perpetual and Mr Zervos thrown away, and I so order.

### Claim for costs of the day

20 Had the directions hearing been limited to the scope of the meeting of experts it is possible that there would have been no order for costs between Arrow and Indevelco. However I accept the submission of Mr Noble that attendance at the Directions Hearing was necessary to consider the costs consequences of withdrawal by Arrow of the heads of claim discussed above. In the circumstances I find it is fair that Indevelco, Perpetual and Mr Zervos be awarded their costs of the day, and I so order.

### Scale

21 Mr Noble sought costs on the Supreme Court Scale because of the magnitude of the dispute. In circumstances where costs in this proceeding have previously been awarded on County Court Scale D I consider it is appropriate to maintain consistency.

### Later submission on behalf of Arrow

22 On 22 March 2007 Arrow's solicitors wrote to the Tribunal, enclosing further submissions from Mr Miller. They had neither sought nor been granted leave to make any further submissions. In fact, during the directions hearing at which costs were discussed, I said that I was not inviting written submissions.

23 It is clear that the Tribunal cannot have regard to such submissions in the absence of exceptional circumstances that were not apparent at the hearing date – see *Stockdale v Alesios & Ors* (1999) 3VL 169, *M Hill and G P Williams v Rural City of Wangaratta & Ors* [2000] VCAT 2593 and *Wharington v Vero Insurance No 3* [2006] VCAT 639. In circumstances where leave of the Tribunal has neither been sought nor granted, there is no indication that the consent of the other parties has been sought and there is no indication that there are exceptional circumstances, I have neither read the further submissions, nor had their contents communicated to me.

**SENIOR MEMBER M. LOTHIAN**