

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D181/2004

CATCHWORDS

Requests for Further and Better Particulars and further discovery – nature of this Tribunal – undesirability of excessive technicality – adequacy of material supplied.

[2005] VCAT 2710

APPLICANT: Arrow International Australia Pty Ltd
FIRST RESPONDENT: Indevelco Pty Ltd
SECOND RESPONDENT: Perpetual Nominees Ltd as custodian of the Colonial First State Income Fund
JOINED PARTY: John Zervos
WHERE HELD: Melbourne
BEFORE: His Honour Judge Bowman
DATE OF HEARING: 6 December 2005
DATE OF RULING: 23 December 2005

ORDERS

1. Application by First Respondent and Joined Party against Second Respondent dismissed.
2. Application by First Respondent and Joined Party against Applicant dismissed.
3. Applications by Applicant against First Respondent and Joined Party dismissed save for issue of experts' reports.
4. Costs reserved.
5. Otherwise adjourned to a date to be fixed.

Judge Bowman
Vice President

APPEARANCES:

For Arrow International Australia Pty Ltd:

Mr B Miller of Counsel

For Indevelco Pty Ltd & Joined Party:

Mr Herskope of Counsel

For Perpetual Nominees Ltd:

Mr Frenkel of Counsel

RULING

GENERAL BACKGROUND

- 1 This matter comes before me in relation to arguments based upon what could be described as points of pleading. Whilst I have not had contact with this particular matter for some time, I do have some familiarity with it, having ruled in relation to an application pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”) on 24th February last.
- 2 The factual background need not be set out in any great detail for the purposes of the applications before me. Suffice to say that the matter concerns a dispute between a builder, an owner, and a provider of finance. Arrow International Australia Pty Ltd (“Arrow”) is the builder. Indevelco Pty Ltd (“Indevelco”) is the owner. Perpetual Nominees Ltd (“Perpetual”) is the financier of the owner. The joined party, John Zervos (“Zervos”), is a director of Indevelco. The dispute centres on a building contract in relation to an apartment building in Francis Street, Yarraville. In addition to the building contract, other relevant documents include a loan agreement, a further loan agreement, and a tripartite deed, the last mentioned of which allegedly provides the link between Arrow and Perpetual.
- 3 It should also be stated at the outset that a large amount of money – potentially over \$600,000 – is involved.
- 4 There have been a number of directions hearings conducted in relation to this matter. A considerable number of interlocutory steps have already been taken. Indeed, it is some barometer of how far the matter has advanced in that regard and how technical the arguments have become that we are now at the stage of discussing, for example, the sufficiency of Amended Further and Better Particulars of the Amended Points of Claim. Whilst this Tribunal does, in appropriate cases, order the filing and serving of documents akin to pleadings, and does upon occasion attempt to put in position more formal case management procedures, the fact remains that this is not a court of pleadings. It is most unfortunate that this proceeding, which was first issued out of the Tribunal on 17th March 2004, has become bogged down in a mire of pleadings.
- 5 In any event, the applications before me could be divided into two groupings. There is an application by Indevelco against Perpetual. Secondly, there is an application by Indevelco against Arrow, and two applications by Arrow against Indevelco. Some time was spent on arguments as to whether applications had in fact been issued. I do not regard those arguments as being of any moment. This directions hearing was fixed some considerable time ago, and fixed for the purpose of dealing with matters of the very kind that have arisen. The parties were present before me and ready to proceed. The matters to be determined were confined to those of which notice had been given and where the parties were in a position to proceed.
- 6 In each instance, Mr Herskope of counsel appeared on behalf of Indevelco and Zervos. Mr Miller of counsel appeared on behalf of Arrow in relation to the

applications involving it. Mr Frenkel of counsel appeared on behalf of Perpetual in the application involving it.

- 7 Because the application involving Perpetual was thought to be simpler and shorter than those involving Arrow, it was first dealt with so that Mr Frenkel could then be excused. Accordingly, I shall now deal with it before turning to the applications involving Arrow.

THE APPLICATION BY INDEVELCO AGAINST PERPETUAL

- 8 This application is, in essence, one by Indevelco against Perpetual on the basis that the Further and Better Particulars of Perpetual's Amended Points of Claim against Indevelco and Zervos are deficient. Perpetual disputes this.
- 9 I shall now summarise the arguments advanced on behalf of the respective parties.

THE CASE FOR INDEVELCO AND ZERVOS

- 10 The arguments advanced by Mr Herskope on behalf of Indevelco and Zervos could be summarised as follows.
- 11 Indevelco's complaint is directed to paragraph 10 of Perpetual's Amended Points of Claim. That paragraph purports to set out particulars of sums advanced by Perpetual to Indevelco and sums advanced by Perpetual to Arrow on behalf of Indevelco. By a document dated 8th September 2005, Indevelco sought Further and Better Particulars of the amounts advanced pursuant to the loan agreement, the further loan agreement and the tripartite deed. It also sought particulars of each request by Indevelco of Perpetual to advance monies on its behalf to Arrow. It also sought particulars of each advance made by Perpetual to Arrow on behalf of Indevelco pursuant to the tripartite deed and the term relied upon by Perpetual in the tripartite deed "to do so in the absence of any request from the first respondent (Indevelco) to make any such advance on its behalf".
- 12 By a document dated 19th September 2005, Perpetual responded to Indevelco's request. However, this response was inadequate. Accordingly, by letter dated 26th September 2005, the solicitors for Indevelco informed the solicitors for Perpetual that the Further and Better Particulars of paragraph 10 that had been supplied were non-responsive and insufficient, and thus the matter ultimately comes before the Tribunal.
- 13 The Further and Better Particulars are non-responsive and insufficient for the following reasons. It is important for Perpetual to know which amounts were advanced pursuant to which agreement. The Further and Better Particulars supplied do not clearly state this. There is some ambiguity, particularly in relation to whether amounts advanced by Perpetual to Arrow on behalf of Indevelco were so advanced pursuant to the loan agreement or the further loan agreement. In addition, the Further and Better Particulars in relation to the amounts advanced pursuant to the loan agreements contain an additional sentence referring to a clause in the further loan agreement which allegedly has the effect of merging the loan agreement into the further loan agreement. In relation to amounts advanced pursuant to the tripartite deed, there is a similar lack of clarity.

The requests for Further and Better Particulars relating to each request by Indevelco of Perpetual in relation to the advancing of monies on its behalf to Arrow have been given a “rolled up” answer that these are not proper requests for particulars. They are proper requests and the particulars enquired of should be supplied.

THE CASE FOR PERPETUAL

- 14 The submissions advanced by Mr Frenkel on behalf of Perpetual could be summarised as follows.
- 15 In relation to the sums advanced by Perpetual to Indevelco or by Perpetual to Arrow on behalf of Indevelco, the Further and Better Particulars supplied, when combined with the particulars originally supplied in paragraph 10 of Perpetual’s Amended Points of Claim against Indevelco and Zervos, make the situation quite clear. The amounts advanced by Perpetual to Indevelco prior to the execution of the further loan agreement were so advanced pursuant to the loan agreement, and dates and amounts are set out. Thus, amounts advanced directly to Indevelco prior to 20th November 2002, were so advanced pursuant to the original loan agreement. Amounts advanced after 20th November 2002 – that is, from 20th March 2003 and onward – were so advanced pursuant to the further loan agreement, it having been executed in December 2002. Similarly, amounts advanced by Perpetual to Arrow were, with the exception of an amount advanced on 20th November 2002, advanced pursuant to the further loan agreement, all of these advances having been made after its execution. Again, dates and amounts have been set out. Apart from the fact that it is common sense, bearing in mind the dates of execution of the loan agreements, this is spelt out in the Further and Better Particulars supplied. The sequence of events is known to the parties and is a fact which cannot be altered. If there were any doubts concerning which advances were made pursuant to which agreement, the Further and Better Particulars supplied removes that doubt. The additional sentence concerning the merger of the deeds was inserted so as to further clarify the position.
- 16 In relation to the particulars sought in relation to requests made by Indevelco to Perpetual to advance monies to Arrow, these are not proper requests for particulars. They do not relate to the pleadings. In any event, as they are allegedly requests made by Indevelco, particulars of such requests should be well known to it. The concluding words of the last request (which I have set out in paragraph 11 above) are based upon hypothesis and call for a concession to be made on a question of law. This is not a proper request for particulars.

RULING

- 17 I preface this ruling with the following observations. They apply equally to the ruling in relation to Perpetual and the rulings which shall be made in the matters involving Arrow.
- 18 Mr Herskope has referred to the fact that, but for jurisdictional matters, this proceeding would be in the Building Cases List of the Supreme Court of Victoria, and, given that a large sum of money is involved, the rules relating to pleadings and the approach that would be adopted in the Supreme Court should

effectively be applied and adopted here. To my mind, that is not to the point. The matter is before the Victorian Civil and Administrative Tribunal. Section 98 of the Act requires this Tribunal to conduct each proceeding with as little formality and technicality, and to determine each proceeding with as much speed as the requirements of the Act and the enabling enactment and a proper consideration of the matters before it permit. This Tribunal is not bound by the rules of evidence or any practices or procedures applicable to courts of record except to the extent that it adopts such rules, practices and procedures. The second reading speech of the Minister delivered when the *Victorian Civil and Administrative Tribunal Bill* was introduced refers to the establishment of a system which is modern, accessible, efficient and cost effective. Certainly, as I have earlier stated, in appropriate cases documents akin to pleadings will be ordered and more formal case management structures put in place. That has occurred in the present case. However, the basic aim remains the disposal of matters with such speed and with such lack of formality and technicality that can be achieved consistent with compliance with the rules of natural justice and the obtaining of a fair result in accordance with the substantial merits of the case – see s.97. It is important that each party understands the case which it is to meet. However, this does not mean that matters should become enmeshed in a web of technicalities. The fact remains that this Tribunal is not a court of pleadings.

- 19 In the present case, in my opinion, the Further and Better Particulars supplied by Perpetual are adequate. The setting out of the details of the sums advanced pursuant to the loan agreements is sufficient, and makes chronological sense. Ultimately Mr Herskope effectively conceded this, but submitted that the additional sentence relating to the merger of the deeds should be excised in each instance. I do not agree. Firstly, that complaint seems to be almost that too much information has been supplied. This is preferable to too little. Furthermore, the additional sentence assists in the understanding of the particulars supplied. As is only logical, the advances made prior to the execution of the further loan agreement were made pursuant to the loan agreement. Those made after the execution of the further loan agreement were made pursuant to it. However, in addition, there is a clause in the further loan agreement which, on its face, merges the two. Therefore, Perpetual is alleging that all sums advanced are now to be treated as having been made pursuant to the further loan agreement. The Further and Better Particulars make this clear and should assist Indevelco in understanding the case which it must meet.
- 20 The same can be said of the particulars given in relation to advances made pursuant to the tripartite deed. As submitted by Mr Frenkel, a particular sum advanced can be so advanced pursuant to either loan agreement and pursuant to the tripartite deed. What Perpetual is saying is that no advances were made by Perpetual to Indevelco pursuant to the tripartite deed. All of the advances made by Perpetual to Arrow on behalf of Indevelco were made pursuant to the tripartite deed. It is to be remembered that it is the tripartite deed which allegedly links Arrow to Perpetual. The Further and Better Particulars already advanced seem to me to be quite clear.

- 21 In relation to the particulars of the requests made by Indevelco of Perpetual, I again agree with Mr Frenkel. Given that the requests enquired of are requests in fact made by Indevelco, particulars should already be in its possession. Furthermore, I can find no reference to requests in paragraph 10 of Perpetual's Amended Points of Claim. I agree with Mr Frenkel in this regard.
- 22 Finally, in relation to the request for particulars of each advance made by Perpetual to Arrow on behalf of Indevelco pursuant to the tripartite deed, when paragraph 10 of the Amended Points of Claim is read in conjunction with paragraph 1(c) of the Further and Better Particulars, the necessary information has already been provided. I agree with Mr Frenkel concerning the words quoted above in paragraph 11 and which are attached to the final request for particulars relating to the tripartite deed. Whether they be based upon an hypothesis or require some type of assumption of fact to be made, they do not seem to me to constitute a proper or necessary request for particulars. Submissions of fact and law of this type will doubtless be dealt with at some future date.
- 23 In summary, in my opinion adequate and proper Further and Better Particulars of its Amended Points of Claim against Indevelco and Zervos have already been supplied by Perpetual and Indevelco's application fails.

RULING IN THE APPLICATION OF INDEVELCO AGAINST ARROW

- 24 Indevelco's application against Arrow also relates to the alleged inadequacy of Further and Better Particulars of Amended Points of Claim. Such Further and Better Particulars were sought in a document dated 19th August 2005. Arrow's response was contained in a document dated 14th September 2005. By a letter dated 26th September 2005, to Arrow's solicitors, Indevelco's solicitors identified various complaints concerning the adequacy of the particulars provided. This resulted in amended particulars being supplied by Arrow. The supplying of those further particulars in fact crossed with the making of the application currently before me. Whilst the Amended Further and Better Particulars of Amended Points of Claim ultimately supplied are considerably more substantial than those originally supplied, nevertheless it is alleged by Indevelco that they continue to be inadequate.
- 25 I shall now turn to the submissions made in respect of this application.

THE CASE FOR INDEVELCO AND ZERVOS

- 26 The Amended Further and Better Particulars supplied are still inadequate. Complaint continues to be made concerning paragraph 2 of the Amended Further and Better Particulars, which paragraph deals with variations, as follows:-
- (i) to paragraph 3(a) which deals with discussions between representatives of Arrow and Zervos;
 - (ii) to paragraphs 6(a)-(d), which deals with the costs associated with consultants, surveyors and the like;
 - (iii) to paragraph 7, which deals with invoices in relation to consultants' fees, building surveyors' fees and Authority fees; and

- (iv) to paragraph 14, which deals with works carried out and invoices relating thereto.
- 27 The response contained in paragraph 2 is insufficient or inadequate in that the details supplied of the variations, which number 71, do not respond to the request. In essence, Indevelco wishes to know who said what to whom, and in what circumstances. In relation to some variations (for example variations 15-18) all that is said is that the costs savings involved has not been disputed by Indevelco. In other instances (variations 31, 36 and 60) it is now said that Arrow does not wish to pursue such variation. These should be excised.
- 28 In relation to paragraph 3(a) again what is sought is the substance of the conversations that took place, the dates on which they occurred, the places where they occurred, and how they happened to take place. What has been provided is a blanket or “rolled up” response which gives no details. In relation to paragraphs 6(a)-(d) of Arrow’s Amended Further and Better Particulars, what has been provided is non-responsive. A bundle of papers effectively listing invoices is not a suitable response, and those representing Indevelco should not have to trawl through such invoices in order to establish how the amounts alleged have been calculated. Indevelco requires intelligible particulars of the amounts claimed.
- 29 A similar criticism is made in relation to paragraph 7. Again, the bundle of attached documents would have to be trawled through in order to have any idea of the way in which the amount claimed has been calculated. Further, in relation to the particulars supplied in paragraph 6 and 7, what can be abstracted from the list of invoices does not tally against what is claimed.
- 30 In relation to paragraph 14, again a similar objection is made. Basically it is a “you work it out for yourself” response.
- 31 It is to be remembered that the amounts claimed in relation to the variations are amounts claimed in relation to the contract and not amounts claimed on a quantum meruit basis.

THE CASE ON BEHALF OF ARROW

- 32 The submissions advanced by Mr Miller on behalf of Arrow could be summarised as follows.
- 33 Dealing with the paragraphs concerning which there is complaint in the reverse order, the following can be said. In relation to paragraph 14, firstly it should be pointed out that Arrow is in fact saying it is entitled to damages on a quantum meruit basis because of the termination of the contract. The various items of cost incurred by it are relevant. It is seeking the total cost of all work done by it. Accordingly, it has supplied by way of particulars the bundle of documents (or attachment) listing the invoices which in turn indicate dates and amounts paid. It is not a question of having to trawl through invoices at length. In fact they are, in essence, listed under headings which coincide with the amounts claimed in paragraph 47 of the Amended Points of Claim. Thus, the date and amount of the invoices constituting the item “concrete” are grouped under that heading in the attachment. Rather than having to trawl through documents, it would take only a

couple of minutes to identify the invoices which relate to the individual amounts claimed. The invoices can then be examined as required, discovery having taken place.

- 34 Paragraph 9 of the Amended Points of Claim, when read in conjunction with the Amended Further and Better Particulars supplied, deals with the variations and the amounts claimed therefore. Paragraph 13 deals with the costs of the consultants, building surveyor and the like. By combining the items set out in the Amended Points of Claim and the Amended Further and Better Particulars provided, the full cost of the project can be ascertained.
- 35 In relation to paragraph 7 of the Amended Further and Better Particulars, again the details can be ascertained from the relevant invoices set out in the attachment. The various items are again grouped under headings which make these costs readily and easily identifiable – see, for example, the additional works listed on page 36 of the attachments or the Authority fees listed on page 35.
- 36 Similarly, the fees payable to consultants and the like can also be readily identified. Thus, the particulars supplied in paragraph 6 are adequate.
- 37 In relation to paragraph 3(a), there were many conversations between the representatives of the parties. Ultimately witness statements will be required, and they will contain details of the various conversations upon which reliance is placed. What is sought is too broad for the purposes of Further and Better Particulars. All communications by way of email have been listed.
- 38 Turning to paragraph 2, details of the variations have been supplied. Where it has been stated, for example, that variations are to the cost advantage of Indevelco, that is because they were variations requested by it. Otherwise the details provided are sufficient.

RULING

- 39 Again, this ruling is made against the background of the approach adopted by this Tribunal in relation to points of pleading, and as set out at the commencement of the previous ruling.
- 40 In my opinion, the particulars supplied by Arrow are sufficient. I have examined the attachment referred to above. I agree with Mr Miller that it is a perfectly adequate way of providing the particulars requested. The various invoices are listed and the amounts set out. They are listed under appropriate headings. It takes very little time to work out the way in which they have been listed and to access the particulars. It is not a question of trawling through documents which are in random order and which may or may not relate to what is in dispute. The typing into Further and Better Particulars of the material contained in the attachment would be an unnecessary and onerous waste of time. The attachment contains sufficient particulars. I accept that the individual invoices are available for inspection. That effectively deals with the complaints relating to paragraphs 6(a)-(d), 7 and 14.
- 41 In relation to paragraph 3(a), I am of the view that the particulars supplied, when read in conjunction with the Amended Points of Claim and the very considerable

details supplied concerning variations, are sufficient. Given that witness statements will doubtless be forthcoming, it seems to me to be almost oppressive to demand particulars of many conversations held over the space of a year. The Amended Points of Claim and the Amended Further and Better Particulars supplied contain considerable detail. The nature of the case to be faced by Indevelco seems to me to be comparatively clear, and witness statements, dealing with more detailed factual matters upon which reliance might be placed, should make it clearer. It is also to be remembered that the conversations of which particulars are sought are conversations in which Zervos took part. Whilst there may be a dispute as to what was said and by whom, the request does not concern matters outside the range of knowledge of Indevelco and Zervos. I also accept the submissions of Mr Miller concerning the adequacy of the Further and Better Particulars which have been supplied and the information which is available in relation to fees paid for consultants, surveyors and the like.

- 42 In summary, I am of the opinion that the Amended Further and Better Particulars supplied by Arrow are sufficient and the application by Indevelco and Zervos fails.

RULING IN THE APPLICATIONS OF ARROW AGAINST INDEVELCO

- 43 The applications by Arrow against Indevelco and Zervos relate to the inadequacy of Further and Better Particulars which have been supplied and to discovery. By a document dated 30th June 2005, Arrow sought from Indevelco Further and Better Particulars of its Points of Defence to Arrow's Amended Points of Claim. By a letter dated 25th August 2005 to the solicitors for Indevelco, Arrow also sought further and better discovery. The request for Further and Better Particulars provoked a response, and the request for further discovery was the forerunner to a chain of correspondence. Further orders are now sought in each regard.
- 44 I shall now turn to the submissions made in relation to these applications. Whilst Arrow is making two applications, there is considerable overlapping of the issues, and I shall summarise the submissions made on behalf of the parties and deliver my ruling without the insertion of any sub-headings.

THE CASE ON BEHALF OF ARROW

- 45 Arrow is entitled to know the basis upon which retention of the deposit occurred, and pursuant to which clause of the contract. Arrow is entitled to know the details of the case which it has to meet. In relation to variations, it is Arrow's case that it was Indevelco that made the relevant requests. It is no proper answer to the request for Further and Better Particulars of the variations to simply list the party that raised such variation. It is equally not a sufficient response to simply list the variations that are allegedly not proper without further particulars. Indevelco is alleging that some variations were not proper, and full particulars should be supplied in relation to these allegations.
- 46 In relation to further discovery, and also to the inadequacy of the Further and Better Particulars, reference is made to paragraph 4 of the Further and Better Particulars provided. In answer to a request for full and precise particulars of the

amount Indevelco should have claimed for each of the variations where it is alleged the amount claimed is excessive, it is inadequate to respond that Indevelco will provide an expert report containing detailed costings in due course, particularly when such expert report has never been provided.

- 47 In addition, the discovery provided by Indevelco has been demonstrably inadequate. Documents which should have been discovered have not been discovered, and this can be ascertained from the documents discovered by Arrow. Apart from specific examples, Arrow, and indeed Perpetual, have discovered substantially more documents than has Indevelco. In particular, there has been obviously inadequate discovery in relation to pre-contractual negotiations. Additionally, contracts in relation to the sale of units have not been discovered.

THE ARGUMENT ON BEHALF OF INDEVELCO

- 48 Indevelco admits that it has not discovered any report by an expert. In order to understand why this has occurred, the litigation history of the matter requires examination. Effectively the matter had to start again following the orders of Senior Member Young on 18th May 2005. Essentially, there is now no order in place requiring the exchange of expert reports. (I shall not go into the details of litigation history which would appear to support this submission).
- 49 Some of the documents of which discovery is sought relate to pre-contract negotiations. Accordingly, their relevance must be questioned. Other documents sought by way of further discovery are also irrelevant. This is particularly so in relation to the contracts for the sale of units.

RULING

- 50 In my opinion, the applications by Arrow against Indevelco also fail, with one exception. That exception relates to the provision of an expert report containing detailed costings. Indeed, regardless of the litigation history, an order for the exchange of expert reports would seem desirable. This is particularly so in the case of Indevelco which, in paragraphs 4, 9 and 11 of its Further and Better Particulars has specifically referred to the provision of such a report as supplying the Particulars requested.
- 51 As has been previously mentioned, in my opinion both sides possess adequate material in relation to the variations. In this regard, and indeed generally, I am satisfied that the provision of witness statements will remedy any deficiencies that may exist in relation to the cases to be advanced. I need not repeat again my observations concerning the nature of this Tribunal and the manner in which cases should be conducted. With the exception of the provision of an expert's report, I am quite satisfied that Arrow has been, or will be, adequately informed as to the case which it is required to meet.
- 52 I am not going to make any order for the discovery of documents in relation to pre-contractual negotiations. The relevance of this issue is not entirely clear to me. In any event, Arrow seems well informed of the content of these documents even if Indevelco has not specifically discovered them. From what I can gather,

they are documents or correspondence that were exchanged between the parties. It also seems to me that a question mark hangs over the relevance of the contracts for the sale of the unit. I am not going to make an order in relation to the discovery of them. As with the documents in relation to pre-contractual negotiations, if these documents are ultimately proven to be relevant and Indevelco is demonstrated to be taking Arrow by surprise on an important issue, I am confident that the person ultimately hearing this dispute will, in the interests of natural justice, take the appropriate steps and grant the appropriate relief. However, at this stage I am not prepared to order further discovery in relation to matters of doubtful relevance.

- 53 In relation to the listing of variations, I am of the view that adequate Particulars have been supplied. Ultimately, as conceded by Mr Miller, the request for Further and Better Particulars really resolved into a complaint concerning the failure of Indevelco to supply an expert's report.
- 54 Thus, with the exception of the making of an order in relation to the provision of experts' reports, I am not prepared to make any order in relation to further discovery by Indevelco or the provision of Further and Better Particulars by it. Accordingly, apart from the exception to which I have just referred, the applications by Arrow fail.
- 55 I shall reserve the question of costs and hear argument concerning it at a convenient date and time. A further timetable, including the exchange of experts' reports, can then be set. Hopefully, sooner rather than later, the tortuous progress of this piece of litigation towards final hearing can be brought to a conclusion.

Judge Bowman
Vice President