

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

domestic building LIST	vcat reference No. D345/2007
CATCHWORDS	
Demolition of evidence, Inspection, Natural Justice	

APPLICANTS	Val Christou, Vince Salviani
RESPONDENT	Milieu Developments Pty Ltd (ACN: 116 234 792)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Young
HEARING TYPE	Compulsory Conference
DATE OF HEARING	27 September 2007
DATE OF ORDER	10 October 2007
CITATION	Christou v Milieu Developments Pty Ltd (Domestic Building) [2007] VCAT 1894

Order

By 22 October 2007 the Applicants must file and serve Points of Claim setting out the claims made and any losses alleged, such claims and losses to be fully detailed and particularised.

By 19 November 2007 the Respondent must file and serve Points of Defence specifying the material facts relied upon. Any set-off claimed must be fully set out.

By 19 November 2007 the Respondent may file and serve a counterclaim in the form of Points of Counterclaim (with the fee payable) which shall include fully itemized particulars of the counterclaim, loss and damage claimed, and the relief or remedy sought. Points of Counterclaim may accompany Points of Defence in the one document.

By 10 December 2007 the Applicants shall file and serve Points of Defence to any Counterclaim specifying the material facts relied upon. Any set-off claimed must be fully set out.

By 24 December 2007 the parties must each:

file at the Registry and forward to each other a list of all documents in their possession or control, or in the possession or control of an agent, relevant to the proceedings; and

make such documents available for inspection and photocopying upon 24 hours written notice.

Where experts are retained:

they must prepare their reports in accordance with Practice Note VCAT 2: Expert Evidence; and

by 28 January 2008 copies of their reports must be exchanged by the parties and copies thereof filed at the Registry.

By 25 February 2008 the parties must file and serve a Statement of Evidence proposed to be given at the hearing by each of their witnesses. Each statement must consist of a narrative of the evidence to be given in chief by the witness concerned.

By 10 March 2008 the parties may file any Statement of Evidence in Reply.

A party will not be allowed to present any evidence in chief at the hearing which is not contained in a witness statement/outline without justifying the need to do so to the Tribunal. A party wanting to call such additional evidence may be ordered to pay costs if a hearing is delayed.

10. Each party must arrange for all their witnesses to be in attendance at the hearing to give oral evidence. If a party does not desire to cross-examine another party's witnesses, that advice must be given to the party concerned in writing not less than seven (7) days before the hearing.
11. **This proceeding and any counterclaim is set down for hearing on 24 March 2008 commencing at 10.00 a.m. at 55 King Street, Melbourne with an estimated hearing time of 10 days. Costs may be ordered if the hearing is adjourned or delayed because of a failure to comply with directions**

12. The parties may each be represented by professional advocates at the conference.
13. To enable the Respondent to inspect the existing footings and conduct any expert inspection and testing once the Applicant's allegations of the footing deficiencies are known, the Applicants shall not demolish the existing postings until 5 November 2007 or 14 days after the service of the Applicants' Points of Claim whichever comes later.
14. Costs are reserved.

SENIOR MEMBER R. YOUNG		
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<u>APPEARANCES:</u>	
For the Applicants:	Mr. L. Schwarz, Solicitor.
For the Respondent:	Mr. J. Foster of Counsel.

Reasons

- 1 At the request of the Applicants I set out my reasons for making the orders set out above. The orders for the interlocutory timetable were made in consultation with the parties and both parties agreed to the orders and the dates therein.
- 2 In relation to Order 15 above, the Applicant's Solicitor informed me that the Applicants had written to the Respondent informing it that they intended to demolish the existing footings immediately after this compulsory conference. I am not sure of this information as I was not provided with a copy of the correspondence.
- 3 I had some initial concerns as to giving these reasons considering that the proceedings of any compulsory conference are confidential to the parties. However, the discussion at the compulsory conference related mainly to the contents, effect and adequacy of the joint report prepared for the parties by a geotechnical engineer, Rock Solid Pty. Ltd.; together with the Respondent's failure to carry out its own inspection of the existing footings. At the outset let me say that I do not consider that the joint report was prepared under the confidentiality privilege that attaches to compulsory conferences, but was open for use by both parties in the proceeding. Nor do I consider that any assessment of the Respondent's conduct in relation to the carrying out of inspections and the gathering of evidence from the site would be similarly privileged. Therefore, provided I deal only with these two matters I do not consider that the publication of these reasons can be regarded as a breach of any party's privilege of confidentiality.
- 4 Further, I was informed at the compulsory conference that at the directions hearing before Deputy President Aird on 23 August 2007 that the parties discussed with the Deputy President the arranging of an independent expert to assess the Applicants' allegations and provide a joint report to the parties with the fee for such report being borne equally between them; and, the parties conclude that this was the best approach and such a report was arranged to be prepared by Rock Solid. This was not subject to any orders of the Tribunal and must therefore be regarded an informal arrangement between the parties. Rock Solid findings and opinions are set out in its report of 24 July 2007. It appears that the investigations were carried out and the report prepared by Mr Mark Dishon, BSc, geotechnical engineer.
- 5 The Applicant's submitted to me that the demolition of the existing footings had been discussed at the directions hearing and I was informed that the Deputy President had said that the footings should not be

demolished until the investigations were completed and the Respondent had an opportunity to inspect them. However, such observations of the Deputy President were not formalised in orders and; therefore, the arrangement of the joint report can only be seen as an informal arrangement between the parties.

6 It became apparent during the Compulsory Conference that the joint report of Rock Solid was not easily understood, neither as to what measurements had been undertaken and what they represented, nor, were their opinions clearly and fully expressed so that the reasons as to why Rock Solid considered the footing work to be defective were not readily apparent; neither was the extent of each item of defective work. Further, it was not readily apparent from the Rock Solid report as to the extent of rectification work that the company considered would be necessary to rectify the non-conforming work. It appears to me that before the parties can make proper use of the joint report Rock Solid will have to be asked to clarify and expand on a number of observations and opinions in the report which address the major issues.

7 The Applicants application outlined their allegations as to the deficiencies in the existing footings as:

- (a) many of the strip footings are not positioned in accordance with the approved plans;
- (b) at many locations the concrete cross section of the footings is not in accordance with the approved engineering design; and,
- (c) at numerous locations in the footings the incorrect reinforcement was used in the footing or the reinforcement has been incorrectly placed when compared to the approved drawings and engineering design.

From the discussions at the compulsory conference it appeared to me that the matters addressed in the Rock Solid report require further explanation by the company as follows, and I would not consider this an exhaustive list:-

- (a) from the depictions of a partial cross section of a footing in the joint report's diagrams it was not readily apparent if the footing was in the correct location; or, whether it had sufficient bearing width to comply with the approved engineering design; further, it was not obvious what extent of the footing was shown in the cross sections in the diagrams; what is the meaning and import of the reference "Distance from String Line" on the partial cross section diagrams;
- (b) the report on specific footings at test pit locations do not give:

- (i) bearing width at the base of the footing
- (ii) set out the author's specific reasons for his opinion that a footing does not comply with AS 2870-1996.

8 I note that the Rock Solid report had been amplified by a letter of Mr M. Bishon dated 5 September 2007 in which he appears to be answering specific queries put to him by the Applicants and the Applicants' Solicitor. The Rock Solid letter cannot readily be understood without the correspondence or requests from the Applicants or their legal representative that set out the specific questions put to Rock Solid. A copy of these questions should be made available to the Respondent and the Tribunal.

9 At the conclusion of the compulsory conference the Respondent sought an order that it have permission to inspect the existing footings, and that the Applicants not be allowed to remove the footings until they had so inspected.

10 The Applicants opposed any order that prevented them removing the existing footings on the basis that:-

- (a) there had been a discussion about giving the Respondent having access to inspect the existing footings at the directions hearing before Deputy President Aird and the Respondent had not taken the opportunity to inspect the existing footings;
- (b) the Rock Solid report had been available since the end of July 2007 and the Respondent had made no attempt to inspect the existing foundations to clarify for itself the issues in the joint report by Rock Solid.

Therefore, the Applicants considered that the Respondent had been given sufficient time to inspect the existing footings and that they should be able to demolish such footings when they wished. When requested by the Tribunal to identify the detriment the Applicant's would suffer in the event that the footing demolition was delayed the only detriment they could point to was delay in completing the construction of the house which they submitted had already been delayed more than 6 months due to the defective footings.

11 I refused to allow the Applicants to demolish the existing footings when they wish; firstly on the basis that to allow such to happen would be an egregious breach of the natural justice that should be accorded to the Respondent. This proceeding involves almost exclusively allegations of defective footings and to allow them to be removed prior to the Respondent having been given an opportunity to inspect them at a time when it has been made aware of the Applicant's allegations in detail and

have had the opportunity of obtaining expert opinion, would deprive the Respondent of gathering any direct evidence for itself and this could seriously prejudice its defence. Even if I regarded the Respondent had been slack in gathering direct evidence from the site; I would not allow the Applicant to destroy the most relevant evidence to the proceeding in a case where the Respondent had not been put on notice by Tribunal order that unless at gathering evidence by a specific date that evidence may disappear.

- 12 However, I do not regard the Respondent has been dilatory. At present, the case against the Respondent has only outlined generally in an application to the Civil Claims List and there are no specific details as to the existence and extent of any alleged defects; other than reports attached to the application. The Respondent is entitled to know the case against it in sufficient detail to properly prepare a defence and to consider if it is entitled to make a counterclaim. I do not consider the Respondent will be in that position until the Applicants have provided the Points of Claim. Further, I do not consider that the Respondent was obliged to inspect the site when it did not understand the joint report of Rock Solid.
- 13 I consider that the Applicants must provide the Respondent with detailed specific Points of Claim particularized so that all of its current expert reports are specifically referenced with particulars to the material allegations. It is after the serving of the Points of Claim that I consider the Respondent must attend and conduct onsite investigations it may wish to carry out; and, this is the reason that Order 15 is in its current form.

SENIOR MEMBER R. YOUNG