

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

**VCAT Reference: D672/2003**

**CATCHWORDS**

Domestic building – Counterclaim – abuse of process - Anshun estoppel – Duty of fairness.

**APPLICANTS:** Christopher Gendala, Kristine Gendala

**FIRST RESPONDENT:** AAK Construction Group P/L (ACN 081972072)

**SECOND RESPONDENT:** Vero Insurance Ltd (formerly Royal & Sun Alliance Insurance Australia)

**THIRD RESPONDENT** Les Finnis Architects P/L (ACN 066902083)

**JOINED PARTY:** NF Legal P/L (ACN 083166045)

**WHERE HELD:** Melbourne

**BEFORE:** Senior Member D. Cremean

**HEARING TYPE:** Directions Hearing

**DATE OF HEARING:** 30 September 2005

**DATE OF ORDER:** 7 October 2005

**MEDIUM NEUTRAL CITATION:** [2005] VCAT 2085

**ORDERS**

1. Leave is given to the Third Respondent to file and serve the document titled Third Further Amended Defence and Counterclaim.
2. By 17 October 2005 the Third Respondent must file and served revised Schedule “A” to its Third Further Amended Defence and Counterclaim.
3. By 26 October 2005 the Applicants must file and serve Points of Defence to the Third Respondent’s Counterclaim.
4. I direct the principal registrar to relist this matter for directions or orders before Senior Member D Cremean on 27 October 2005 at 2.15 p.m. (allow 2 hours) with regard to:

- (a) the hearing date of 7 November 2005;
- (b) any application(s) for costs;
- (c) any further or other directions including any with respect to a meeting of experts; a compulsory conference; or mediation.

**SENIOR MEMBER D. CREMEAN**

**APPEARANCES:**

For the Applicants:	Mr K Oliver, Counsel
For the First Respondent:	No appearance
For the Second Respondent:	Mr C Moshidis, Counsel
For the Third Respondent:	Mr M H Whitten, Counsel
For the Joined Party:	No appearance

## REASONS

1. In this matter I provided Reasons for Decision on 12 September 2005. I refused leave to file and serve the Counterclaim.
2. My reasons for refusing such leave were in summary, twofold: the proximity of the hearing date; and the defectiveness of the document proffered as a Counterclaim.
3. In light of observations I made in the latter regard, the Third Respondent has now applied for leave to file and serve an amended document: the Third Further Amended Defence and Counterclaim. The Third Respondent also applies for a revised directions timetable, although professing a preparedness to see the hearing date of 7 November 2005 (for a scheduled 20 days) preserved.
4. The Application for leave is not opposed by the Second Respondent. Previously the Second Respondent had nothing to say about the matter. For some reason its attitude has altered in the intervening period.
5. The Application for leave, however, is opposed yet again by the Applicants. They argue it is an abuse of process for the Third Respondent to be making the application. They refer me to the decision of the Court of Appeal in *D A Christie Pty Ltd v Baker* [1996] 2 V R 582 especially at 602 per Hayne J A: “It is not fanciful to conclude that the making of successive applications may well engender a belief in a Respondent that the Applicant had, in effect, hawked the application from judge to judge until a judge had been found who was willing to accede to the Applicant’s arguments. The vice of such a result is apparent”. They also argue that the new document is no less defective than the previous document in respect of which I refused leave. Reference was made in particular to the contents of Schedule A. As well, it is pointed out that the hearing date remains as before – 7 November 2005 only now it is closer still.
6. The Third Respondent argues that the new document is a substantially reworked one. If there are shortcomings either in it or in the Schedule then, it is said to me, that the Third Respondent must succeed or fail at the hearing as the case may be – this being, in effect, the best document the Third Respondent can provide. It is argued that I should be

mindful of the Third Respondent being shut out by an Anshun estoppel (see *Port of Melbourne Authority v Anshun Pty Ltd* (1980) 147 CLR 3.5) in the event that it is not able to Counterclaim in the present proceedings. The Third Respondent, as I have noted, professes to want to preserve the hearing date but is prepared to bear any costs thrown away by the other party.

7. I should indicate two matters. First, I do not consider an Anshun estoppel would apply if I was to prevent the Third Respondent from counterclaiming by refusing leave. Anshun estoppels only arise, in my view, if a party “could” have counterclaimed but failed to do so. A refusal of leave would mean the Third Respondent “could [not]” have counterclaimed. Unless, that is, it could have brought a fresh proceeding and has failed to do so having been refused leave. Secondly, I do not consider the Third Respondent’s fresh application dated 16 September 2005 is an abuse of process. The Third Respondent is, I consider, only making an application which is similar to the one previously. But a new document is involved which I did not consider on the previous occasion. And it is a matter that has come back to me and not gone to a different Member.
8. I refused leave previously, as I have noted, on two grounds. I was very troubled by the Third Respondent’s defective document. So much so, that I was of the view that leave should be refused even if I did not maintain the hearing date.
9. The Third Respondent’s new document, however, would, in my view, survive the conventional pleadings test. I do not consider it sets out a cause of action which is hopeless. It is no longer incomprehensible in the areas I indicated. I do, however, still think that there are a great many shortcomings in Schedule A which is incorporated into the document. But without that Schedule the proposed Counterclaim could stand alone and would not be liable only to be struck out as hopeless.
10. I must bear in mind the duty of the Tribunal under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998. I am well enough aware of the need for the Tribunal to observe the rules of natural justice. I am aware, as well, of the undesirability of a multiplicity of proceedings. Furthermore, on this occasion the Third Respondent, mysteriously, does not lack the support of the Second Respondent. The situation is not

ideal from the Applicants' point of view, but these matters must be borne in mind.

11. The situation, it seems to me, is different to the last occasion. I no longer have the proximity of the hearing date together with a document which is defective on its face. I have only the proximity of the hearing date and a document which is regular on its face (incorporating, however, a document which is very poorly expressed).
12. I do not consider it would be proper of me, in the circumstances, I have outlined, to refuse the Third Respondent leave to file and serve the new document. Leave (if necessary) is, accordingly granted.
13. This may now impact directly on the hearing date. This can be attended to as a matter of costs, if need be. I am prepared to see that hearing date remain fixed if the Applicants consider they can defend the claims being brought by the Third Respondent within the time permitted. On the other hand if the Applicants are of a different view than I will entertain an application for the case to be adjourned. If the case is adjourned in consequence, the Applicants may incur costs and I would expect that they might make application for an order for costs thrown away. The Second Respondent might also make such an application – its conduct, however, has been far from impressive involving a change of position.
14. I require, however, the Third Respondent, within 7 days, to file and serve as a separate document a revised Schedule “A” which eliminates vaguenesses (especially in paragraphs 1 to 5). This may prevent the need for the Applicants to file and serve a Request for Particulars. The documents may need substantial re-working. I cannot accept that Schedule “A” represents the Third Respondent’s best attempt at being able to give the information set out therein. On its face, it could not possibly do so and I do not accept the assertion that it does.
15. I shall make directions accordingly.

**SENIOR MEMBER D. CREMEAN**