VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D672/2003**

CATCHWORDS

Domestic building – Application to file and serve Counterclaim – relevant principles.

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)
FOURTH RESPONDENT:	NF Legal P/L (ACN 083166045)
WHERE HELD:	Melbourne
BEFORE:	Senior Member D. Cremean
HEARING TYPE:	Compliance Hearing
DATE OF HEARING:	1 September 2005
DATE OF ORDER:	12 September 2005
MEDIUM NEUTRAL CITATION:	[2005] VCAT 1901

ORDERS

1. Application to file and serve the Counter claim is refused.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants:	Mr K Oliver of Counsel
For the First Respondent:	No appearance
For the Second Respondent:	Mr M Saw, Solicitor
For the Third Respondent:	Mr M H Whitten of Counsel
For the Fourth Respondent:	No appearance

REASONS

1. I am asked by the Third Respondent to provide these written reasons for my decision on 1 September 2005 refusing it leave to file and serve a counter claim in the form exhibited to the Affidavit of Benjamin Patrick, solicitor, of Ebsworth and Ebsworth, sworn 31 August 2005.

2. I am not satisfied that I am obliged to provide such reasons having regard to the terms of sl17 of the *Victorian Civil and Administrative Tribunal Act* 1998. I refer also to paragraph 20 of these reasons. Nevertheless I do intend to do so. In that way I can formally record my disapproval of the Third Respondent's conduct in this matter and of its documentation.

3. I decided I would receive Mr Patrick's Affidavit despite it being filed and served only a day before the hearing. Its lateness was not satisfactorily explained to me.

4. The non-compliance hearing on 1 September 2005 was caused due to failures by both the Second and Third Respondents to comply with directions. The Second Respondent, however, remedied its non-compliance shortly before the hearing.

5. The behaviour of the Third Respondent in this proceeding has been such that Mr Patrick in his Affidavit was forced to apologise on its behalf. In paragraph 16 he says: "We humbly apologise for the delay in the filing and serving of the witness statements and the preparation of the proposal [sic] Second Further Amended Defence and Counterclaim". The excuse he proffers is this: "The complexity of the issues and the volume of work required to be done has proved to be a burden which we did not originally anticipate". I propose to accept that excuse at face value, despite misgivings.

6. Filing and service of an Amended Defence was not opposed by the Applicants. Having perused the document, it seemed proper I should allow it to be filed and served. The Second Respondent had nothing to say about the matter. However, I allowed the document to be filed and served only up to paragraph 48 (excluding

paragraph 32 (f)) because, from that point on, the Counterclaim commences. Leave to file and serve the Counterclaim was opposed by the Applicants and I upheld their objection. Therefore, I did not allow the Counterclaim to be filed and served. Again the Second Respondent had nothing to say about the matter.

7. The Applicants opposed the filing and service of the Counterclaim on two grounds – proximity of the hearing date and the unsatisfactory nature of the document itself. In reply I was referred to the decision of the High Court in the *State of Queensland v J L Holdings Pty Ltd* [1997] HCA 1. It was argued it would be unjust if I was not to allow the Counterclaim to be filed and served. In that way it could be heard and determined at the same time as the principal proceeding.

8. Practitioners, however, and this case is no exception, misunderstand the effect of the ruling in the *State of Queensland v J L Holdings Pty Ltd*. It is true that Dawson, Gaudron and McHugh JJ say this: "Justice is the paramount consideration in determining an application such as the one in question". It is true also that they say of the case management in that case that it "should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties". But that is what the case relates to – a refusal by the primary judge (Keifel J) to allow a defence to be amended to add a new ground of defence. The case does not relate to counterclaims which are not defences but are, in reality, separate proceedings. The judge had disallowed an amendment of the defence some 6 months or so before the trial date. The High Court held that she had acted wrongly in doing so. But the High Court did not intend to say that, as a result of its ruling, procedural directions, and case management techniques, no longer apply. As Branson J has said in *Hopeshore Pty Ltd v Melroad Equipment Pty Ltd* [2004] FCA 1445 at [38]: "Nothing in the *State of Queensland v J L Holdings* detracts from the acknowledgement by Toohey and Gaudron JJ in *Sali v SPC Ltd* (1993) 116 ALR 625 at 636 that the contemporary approach to court administration recognises that the conduct of litigation is not merely a matter for the parties but is also a matter for the court". Practitioners who quote the ruling in *State of Queensland v J L Holdings* to justify or excuse failures to comply with any procedural directions at all, in the hope such failures can be overlooked

course, misunderstand what the High Court decided.

9. This case is quite different. In this case I have, in fact, allowed the Defence to be amended. I have done so even though the hearing date is only about 2 months away. The case is, in fact, fixed for hearing on 7 November 2005 for a period of 20 days. That hearing date, I wish to note, was arranged as far back as 15 April – nearly 5 months ago. An earlier hearing date of 2 May was vacated.

10. The Third Respondent professed, as I recall, that it wanted to preserve the hearing date. But I was satisfied, on the basis of the submissions made to me, that, if the Counterclaim was to proceed, the impact on the hearing date would be profound. This would be so especially for the Applicants. Within a period of about 2 months before the hearing date, they would be facing an independent action against them. They had already prepared all their witness statements in the case, and complied with all directions, so I was assured, but now they would have to re-draw those documents or prepare new ones. That would have the effect of diverting them away from the pursuit of their own proceeding. At a time when they would ordinarily be preparing themselves for their own action, they would have to be facing the task of defending another. The Third Respondent had had a year or two to prepare its defence but the Applicants would have had barely 2 months. That did not seem fair to me. Nor was it satisfactorily explained to me why it was that the Third Respondent had not sought to counterclaim long before now. And, exactly, why *should* the Applicants be deprived of their hearing date – until some time in 2006 – if I was to adjourn the proceeding over, so as to accommodate a late strategy by the Third Respondent? Why *should* I prevent the Applicants from proceeding on the date which had been fixed?

11. Following an observation by me, it was submitted I should really view the Counterclaim, which was proposed, as a set-off. The prayer for relief gives that impression, as does paragraph 65. However, it is not clear to me that the Third Respondent is anywhere making an unqualified acknowledgement of indebtedness and then seeking to set off an amount against that amount. See *Re K L Tractors Ltd* [1954] VLR 505 at 507. In any event, I am quite satisfied that, in substance, and in reality, the Third Respondent properly calls this part of its document a "Counterclaim". See

Bow McLachlan & Co Ltd v The Camosun [1908-10] ALL ER Rep 931.

12. In my view, the Third Respondent has had ample time to raise a counterclaim and had not yet done so. Its failure yet to do so was not properly explained to me. As I have noted, I agreed that to allow the counterclaim at this very late stage could prejudice the hearing date. Or, if the hearing date was to be maintained – as the parties requested as I believe – then it could seriously disadvantage the Applicants. It seemed to me that emphasis on the *State of Queensland v J L Holdings Pty Ltd* was entirely misplaced. I did not consider the High Court's ruling in that case in any way obliged me to allow the Counterclaim to be filed and served especially following the Third Respondent's hitherto inactivity.

13. Nor did I consider I was bound to allow the counterclaim to be filed and served by reason of the decision in *Howarth v Adey* [1996] 2VR 535 which was not cited to me. That case related to an amendment to a statement of claim – an already existing action – to enlarge a case of negligence. But I was not being asked to allow the Third Respondent to amend its counterclaim – I was being asked to allow it to bring one. That, it seemed to me, was a critical factor of difference.

14. However, even if the hearing date was further away than 7 November 2005, I did not consider that I should allow the counterclaim to be filed and served constituted in its present form. This applies, therefore, even if I was not to preserve the hearing date. In several parts the document is incomplete or unfinished. In other parts I have to say it is incomprehensible or unintelligible. Still further, in several areas it conflates material facts with particulars.

15. As regards such counterclaim being incomplete or unfinished, I refer to paragraphs 59 and 64 (a) and (b). These advise the applicants will be provided with the relevant information "prior" to trial. Further I refer to its incompleteness in the way of stating material facts only inclusively. See paragraphs 50, 51 and 58 (especially (b)). The vagueness brought about by this method of drafting means that the Applicants are not properly informed of the case they must meet. There would seem to me to be an elementary denial of natural justice if the Counterclaim was allowed to be filed and

served in its present form.

16. The counterclaim also, it seems to me, is embarrassing. I do not see how the Applicants could meaningfully respond to paragraph 50 alleging there were further terms "including" and "inter alia" those set out. Use is also made of the expression "and/or" which leaves the reader in doubt as to what exactly is being alleged. See the particulars under paragraph 50, paragraph 51.4, paragraph 51.5, paragraph 56. The last of these confusingly refers to the "Owners' breaches and/or repudiation of the Architect agreement". The Third Respondent, obviously, it would seem, does not quite know how to put its case. But how, in such circumstances, can the Applicants be called upon to respond if the Counterclaim is allowed to be filed and served in this form?

17. The counterclaim is also embarrassing for incomprehensibility in areas. Paragraph 64, it seems to me, is utterly confusing; referring to and repeating paragraphs 56 to 63 (which themselves contain multiple alternatives), and then alleging "breaches and/or repudiation", it then goes on to state an allegation "further or alternatively", then alleging "alternatively", and then concludes by claiming variations, damages and "alternatively" restitution. It is simply not possible to make any reasonable sense of what the Third Respondent is seeking to allege and I confess surprise that greater care has not been taken by Ebsworths in preparing the document. I have not mentioned paragraph 61, but it is, at best, vague and, at worst, lacking sense at all. It commences by saying "In or about late 2002" – as if that specifies any meaningful time – and then under the Particulars refers to discussions between two persons "during the period". This, it seems to me, is a meaningless reference. The substance of such discussions is not set out, moreover.

18. I consider I have indicated sufficiently that I should not allow the Third Respondent to file and serve the Counterclaim on the grounds I have mentioned and which were to the effect submitted to me. The document is unsatisfactory in numerous respects and in many areas is unable to be understood. It would be oppressive if I was to allow it to be filed and served and if I was then to call upon the Applicants to respond to it. It is no excuse to say, as was said to me on behalf of the Third Respondent, that the

Applicants could always file and serve a Request for Further and Better Particulars. It should not be for the Applicants to be requesting information the Third Respondent, on any proper analysis, should be providing. In that regard, I am reminded again of the proximity of the hearing date.

19. For these reasons, I agreed with the submissions of the Applicants.

20. In consequence, I declined to give the leave asked of me. The Third Respondent, however, did not submit – as it might have done – that its request for leave is unnecessary in the sense that it can always file and serve a cross-claim. A cross-claim in the form of the present Counterclaim would not, in my view, I should add, survive an attack under s75 of the Act. But, then again, I must add I am not saying that the Third Respondent does not have an arguable claim to advance in a properly drawn document. I have not decided anything about the merits of the case, sought to be advanced by way of the defective Counterclaim document.

21. I, accordingly, refused leave.

SENIOR MEMBER D CREAMEAN