VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D153/2005

CATCHWORDS

Domestic Building, adjournment.

APPLICANTS	Constantinos Houndalas, Kevin Moran
RESPONDENT	Robert Burnham
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	11 October 2006
DATE OF ORDER	12 October 2006
CITATION	Houndalas v Burnham (Domestic Building) [2006] VCAT 2121

ORDER

1 **The hearing date of 30 October 2006 is vacated.**

2 The date by which the Respondent shall file and serve his Expert Report is extended to 8 November 2006.

3 The date by which the parties shall file and serve their Witness Statements is extended to 8 November 2006.

4 The date by which the parties shall file and serve their Witness Statements in Reply is extended to 15 November 2006.

5 **This proceeding is set down for hearing on 20 November 2006 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.**

6 The Principal Registrar is directed to send copies of these Orders to the parties by facsimile without delay.

7 Costs of and associated with this Compliance Hearing and the adjournment are reserved. Should the Applicants so apply, they are to be dealt with at a Directions Hearing before me, and the Principal Registrar is directed to list such Directions Hearing without delay.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	Ms K. Bizos, Solicitor
For Respondent	Mr S. Murray, Solicitor

REASONS

1 On 13 September 2006 this proceeding came before me for a Compliance Hearing. Various dates were extended. The hearing date of 30 October 2006 was maintained. Order 6 of the Directions of 13 September 2006 was:

> Should the Respondent fail to comply with any further directions of the Tribunal, the Tribunal will entertain an application from the Applicants under section 78 of the *Victorian Civil and Administrative Tribunal Act* 1998.

2 It came before me again yesterday on application by the Applicants of 25 September 2006 for a further Compliance Hearing. The Applicants' solicitors stated that the Respondent had failed to pay costs previously fixed at $250.00 which were to be paid forthwith. I understand these costs have now been paid.

3 On 13 September 2006 the Respondent was given until 9 October 2006 to file and serve his expert report. Previous orders for expert reports had been made on 1 March 2006, on 16 December 2005, 17 June 2005 and on 21 April 2005. On each previous occasion with the exception of 17 June 2005, the Applicants were to file and serve their expert report(s) between two and six weeks before the Respondent. The Applicants filed two expert reports on 30 August 2006.

4 On 21 September 2006 the Respondent's previous solicitors, Doyles Construction Lawyers, filed Notice of Solicitor Ceasing to Act. The Respondent was represented at yesterday's Directions Hearing by Mr Shane Murray of Melbourne Building and Construction Solicitors. Mr Murray said that on the advice of his client's previous solicitors, he had intended not to file and serve any expert report, but Mr Murray had advised him that such a report is necessary. Mr Murray commenced acting for the Respondent two days ago.

5 The real question is whether it is reasonable to adjourn the hearing to enable the Respondent to obtain an expert report. The proceeding commenced in March 2005 and has been before the Tribunal on eleven occasions including yesterday. Ms Bizos, solicitor, for the Applicants, referred me to the decision of Judge Bowman in this proceeding of 6 July 2006. In particular she referred me to paragraphs 6 to 27, which set out a history of the interlocutory steps. The Respondent was certainly tardy in filing and serving his Points of Defence, but did so on 21 July 2006.

6 Mr Murray referred me to paragraph 33 and following of His Honour's decision, but it is noted that those paragraphs do not represent his view of the facts. They are a brief re-statement of the case for the Respondent. His Honour's summation of the Applicants' behaviour is best described at paragraph 53 of his decision:

> I am not of the view that [the Applicants have] failed to comply with orders of the Tribunal without reasonable excuse.

7 Further, His Honour was keen to maintain the hearing date of 30 October 2006. At paragraph 58 he said:

> In my view, it is highly desirable that the hearing date of 30th October 2006 remain.

8 And at paragraph 59 he said:

> Pursuant to s.98(1)(d) of the Act, it is mandatory that the Tribunal conduct each proceeding with as much speed as the requirements of the Act and a proper consideration of the matter before it permit. In the present case, both legal representatives have expressed the desire on the part of their respective clients to get on with the matter. That is commendable, particularly bearing in mind that this application has already been on foot for some sixteen months. I am sure that, with some co-operation and ongoing consideration of the objects of the Act, the matter can now progress to its ultimate hearing on 30th October next.

9 As I indicated during yesterday's hearing, I am most disinclined to adjourn the hearing date. The Respondent chose not to obtain an expert report in a timely manner, and did not engage new solicitors with the urgency that the stage in the proceeding would seem to demand. Had the Respondent not engaged a new firm of solicitors, it is unlikely that the adjournment sought would have been granted. However, having regard to the decision of the High Court in *State of Queensland & Anor v JL Holdings Pty Ltd* [1997] HCA 1, an application for a step necessitating adjournment is not something which may be lightly dismissed. In that case Dawson, Gaudron and McHugh JJ quoted the majority of the Full Court of the Federal Court where they said:

> If it is arguable, the applicants should be permitted to argue it, provided that any prejudice to [the respondent] might be compensated by costs.

10 They included an extract from the speech of Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1987] AC 189 where His Lordship said:

> … justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes …"

11 Their Honours' analysis was:

> In this case, which is of a commercial nature, the litigants are on the one side a developer and on the other side government, and there is nothing which would indicate any personal strain which would justify the conclusion that costs are not an adequate remedy for prejudice caused by the amendment sought to the pleadings.

12 The same cannot be said in this proceeding. The parties are all individuals and the dispute concerns the construction of a house. Further, where costs

are ordered in the Domestic Building List at the Tribunal, they are rarely higher than County Court Scale D. Such costs awards almost never fully recompense the party who receives them for their legal expenditure, and they do not take into account the opportunity cost of time spent in litigation. Nevertheless, I have discovered that it is possible to accommodate the hearing, which will now be set down for 10 days, before Christmas. On this basis I will allow the adjournment in order to enable the Respondent's new solicitors to prepare properly for the hearing. Further, *JL Holdings* provides a cautionary tale for those who might deny an adjournment. On 26 May 1995 the Federal Court disallowed the amendments to pleadings, in part because hearing dates would be lost and the matter would not be re-listed until the following year. The High Court's decision was delivered on 14 January 1997.

13 This is not an invitation to the Respondent to re-plead his case. The adjournment is given only on the basis that the hearing can commence this year. It is noted that the parties are ready for hearing with the exception of any further expert witness reports, witness statements and witness statements in reply.

14 Ms Bizos said that if I were to rule that the hearing date be maintained, her client would not be making an application for costs. I foreshadowed that if I were to rule otherwise, I would entertain an application from the Applicants for any costs thrown away by virtue of the adjournment and of the Compliance Hearing.

SENIOR MEMBER M. LOTHIAN