

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D397/2002

CATCHWORDS

Domestic Building, self-executing order, extension of time for compliance under S126 of the Victorian Civil and Administrative Tribunal Act, Tribunal extending time on its own initiative

APPLICANT: J G King Pty Ltd (ACN 006 627 210) T/as J G King

RESPONDENT: Barbara J Evans

WHERE HELD: Melbourne

BEFORE: Senior Member M. Lothian

HEARING TYPE: Directions Hearing

DATE OF HEARING: 28 October 2005

DATE OF ORDER: 7 November 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2367

ORDERS

1. The Respondent's application under s75 of the Victorian Civil and Administrative Tribunal Act 1998 that the Applicant's Points of Claim of 27 May 2003 be struck out is adjourned for hearing on a date to be fixed by the principal registrar.
2. The Directions of 31 August 2005 are amended as follows:
 - a. Under order 3 the time for filing and serving fully itemised and particularised Points of Counterclaim with respect to paragraph 11 only of the Further Amended Points of Defence and Counterclaim is extended to 14 November 2005. The Respondent may chose to abandon any pleadings in paragraph 11 by 14 November 2005.
 - b. Under Order 4, the date by which the Applicant must file and serve Points of Defence to the amended Points of Counterclaim is extended to 21 November 2005.
 - c. Under Order 5, the date for the parties to file and serve fully itemised particulars of loss and damage is extended to 7 December 2005.

- d. Under Order 6, the date for the Respondent to file and serve witness statements including witness statements in reply is extended to 7 December 2005
- e. Order 14 is amended to provide:

“Should the Respondent fail to comply with either Order 3 or 5 or both of them by the date specified in that order, the counterclaim shall stand struck out and the counterclaim shall therefore stand determined in favour of the Applicant save as to costs and interest. Should the Respondent fail to comply with Order 6 by 7 December 2005 the counterclaim and defence shall stand struck out and both shall therefore be determined in favour of the Applicant save as to interest and costs”.

3. The orders of 31 August 2005 are otherwise confirmed.
4. With respect to Order 19 of 31 August 2005, it is found that “transcript” means not just recording the proceeding, but also the transcription, that is, providing a written copy.
5. The parties have leave to seek costs of and associated with the directions hearing of 28 October 2005 by 21 November 2005, which, if sought, shall be heard by Senior Member Lothian.
6. The Principal Registrar is directed to serve copies of these orders on legal representatives for the parties forthwith by facsimile transmission and marked “urgent”.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant:	Mr Reigler of Counsel
For the Respondent:	Mr Herskope of Counsel

REASONS

1. At the directions hearing of 31 August 2005, there were orders as follows:
 - “2. By 28 September 2005 the Respondent shall file and serve amended Points of Defence which shall include the material facts relied upon, and details of any set-off claimed.
 3. By 28 September 2005 the Respondent shall file and serve fully itemised and particularised Points of Counterclaim.
 - ...
 5. By 30 November 2005 the parties shall file and serve fully itemised particulars of the loss and damage claimed.
 6. By 30 November 2005 the Respondent must file and serve Witness statements...
 - ...
 14. Should the Respondent fail to comply with orders 2, 3, 5 or 6 by the date specified herein, the Counterclaim shall stand struck out, and the proceeding shall stand determined in favour of the Applicant save as to costs and interest.
 - ...
 19. The Respondent is to pay the costs of the transcript for this day”.
2. On 27 September 2005 the Respondent filed Further Amended Points of Defence and counterclaim by facsimile (“the Counterclaim”)
3. On 29 September 2005, Solicitors for the Applicant wrote to the Tribunal, saying in part:
 - “2. The only points of counterclaim which have been received by the Applicant are contained within the document headed “Further Amended Points of Defence and Counterclaim dated 27 September 2005”. That document is not fully itemised and particularised as required by Deputy President Aird’s orders.”
4. The letter went on to list items in paragraphs 10 and 11 of the Counterclaim which the

Applicant claims were not fully itemised or particularised.

5. On 30 September 2005 the Respondent's Solicitors wrote to the Tribunal. Omitting the formal parts, the letter said:

“We refer to the above matter and to the letter you received from [Solicitors for the Applicant] dated 29 September 2005.

In reference to our client's Further Amended Points of Defence and Counterclaim the Applicant claims “that document is not fully itemised and particularised as required by Deputy President Aird's orders”.

Our client vehemently denies the allegation made by the Applicant. The self-executing order does not apply. The letter ... is misconceived. Accordingly, we consider that the Applicant's request to have the matter struck out and a directions hearing of their costs of the proceedings and interest scheduled is vexatious and a waste of the Tribunal's resources.

If the Tribunal sets the matter down for a hearing as a consequence of Landers & Rogers letter we will seek our costs as against the Applicant on an indemnity basis”.

6. On 4 October 2005 the Tribunal wrote to the parties to notify them of the date for the directions hearing.
7. On 18 October 2005, Solicitors for the Applicant wrote to the Tribunal about another issue – they say it was reported to them by Sparke & Cannon, the court and tribunal transcribers, that: “the Respondent's Solicitor has agreed to pay the costs recording [sic] the transcript, but has declined to pay the costs of typing of the transcript”.
8. On 21 October 2005 the Respondent's Solicitors wrote to the Tribunal to say that “at the return of this matter on 28 October we will be making an application that the Applicant's Points of Claim dated 27 May 2003 be struck out as they are embarrassing and do not disclose a cause of action”. At the hearing the Respondent was treated as having made this application which was adjourned for consideration at a future directions hearing.
9. Mr Reigler for the Applicant contended that Order 2 of the Orders of 31 August 2005 had not been complied with, therefore the Respondent's counterclaim is struck out and

the proceeding is determined in favour of the Applicant. It is accepted that Mr Reigler was referring to Order 3, regarding the Counterclaim. The Applicant sought formal orders that:

- “1. The Respondent pay the Applicant \$36,844.00 on the claim;
2. The Respondent’s Counterclaim is struck out;
3. The Respondent pay the Applicant interest on the claim according to the *Penalty Interest Rates Act* 1983 from the commencement of the proceeding on 5 July 2002 [it is noted that the Application was filed on 8 July 2002] until 29 September 2005, and
4. The Respondent pay the Applicant’s costs of the proceeding.”

10. As mentioned above, the Respondent did file the amended counterclaim, but there were a few allegations not particularised. The matters given as examples by the Applicant were of allegations that:

- “1. The Applicant failed [to] proceed with the works with due diligence;
2. The Applicant failed [to] proceed with the building work in a competent manner;
3. The Applicant, without reasonable cause, wholly suspended the carrying out of the building work before completion;
4. The Applicant refused to comply with the requirements of the contract;
5. The Applicant intimated that it was unable and unwilling to complete the building work; and
6. The Applicant abandoned the contract.”

11. Mr Reigler said that these were all new allegations which had not been in previous iterations of the Counterclaim.

12. Mr Herskope did not attempt to argue that these items were properly particularised, although a letter was received on 31 October 2005 from Solicitors for the Respondent regarding the sufficiency of the Counterclaim. As I had advised the parties my decision would not be given until 3 November 2005 at earliest, I chose to consider the letter, and invited the Applicant to respond. I was referred to a passage in *Freeman v Rabinov* [1981] VR 539 where Lush J said, quoting from *Reis v Woolf* [1952] QB 557 that a self

–executing order relating to particularisation can only:

“... be treated as an order dealing with the time of compliance rather than the mode of compliance. The order does fix a time very precisely, and I think it can and should fairly be construed as a time order. I do not, of course, mean that any document with writing on it will do. It must be a document made in good faith and which can fairly be entitled ‘particulars’ ...”

13. At the invitation of the Tribunal, solicitors for the Applicant responded to the letter. Their point is taken that this is not a case where there is a dispute as to the adequacy of particulars which have been provided, because particulars of these items have not been provided.
14. It is found that Point 2 of Mr Reigler’s list is adequately dealt with by reference to the reports of experts, but the others on his list are not. Further, the link between these alleged breaches and the damages claimed in paragraph 18 is far from clear. Unlike *Reis v Woolf* there is a likelihood that if the Respondent were permitted to go forward with the matter pleaded as at present, the Applicant would not understand the full extent of the Counterclaim it has to answer, which could result in an adjournment during the hearing, or another aborted hearing. Neither outcome is fair to the Applicant.
15. Mr Herskope relied on possible anomalies in paragraph 14 and the repeated assertion that the result sought by Mr Reigler would be “perverse”.
16. Paragraph 14 only expressly strikes out the Counterclaim. It does not mention the defence although it is arguable that the “proceeding” referred to is both the claim and the Counterclaim. In circumstances where the defence is not struck out the claim is not automatically successful, although the Applicant’s defence to the Counterclaim is successful.
17. Mr Herskope also asserted that because Order 14 refers to compliance by the “date specified herein” and the relevant orders specify 28 October 2005 for Orders 2 and 3, and 30 November 2005 for Orders 5 and 6, it follows that “the date” referred to is the latter – 30 November – so the application for formal orders is premature. It is inconceivable that the orders of 31 August 2005 could be interpreted other than that each obligation should be fulfilled by the date specified in its own order. Mr Herskope’s

submission about the dates is rejected.

18. It is found that the result of the Respondent's failure to properly particularise the Counterclaim is unclear but must have resulted in either a self executing order in the claim and counterclaim, or in the counterclaim alone. Mr Reigler said that the Respondent could issue fresh proceedings, but the breaches alleged are, in the main, seven years old. If the Respondent were forced to start again, she might be statute barred for part or all of her claim.
19. In accordance with my own decision in *Ng v Rockman* [1999] VCAT 31, the Tribunal may set aside a self-executing order, even after the date of execution has passed. This decision was appealed to the Supreme Court where it was over-turned on other grounds. Justice Beach said in *Ng v Rockman* [1999] VSC 470, "On 3 June 1999 the tribunal found that although it had power to set aside the self executing order (which it undoubtedly did), that in the exercise of its discretion it would not do so".
20. Further, the Tribunal may, of its own initiative, extend "any time limit fixed ... for the doing of any act in a proceeding" under s126 of the *Victorian Civil and Administrative Tribunal Act* 1998. A similar issue arose in *Haintz Building Group Pty Ltd v Dodd* [2002]VCAT 294 where time was extended under s126 and further orders were made under s130 of the Act.
21. In accordance with *World Link Assets Pty Ltd v James Kay* [1999] VCAT DB 5, the Tribunal's discretion is unfettered, and I choose to exercise it to extend the time during which the Respondent must either delete the pleadings which are not fully particularised, or provide those particulars.
22. Some considerations in deciding to extend time are:
 - The hearing is not until 15 February 2006. The time-table can be adjusted to maintain the hearing date;
 - Some or all of the Respondent's rights could be statute-barrred if she were forced to start again;

- If the Respondent could start again, a separate hearing would be necessary which would further delay the finalisation of matters between them, and cause both to incur further costs, and
- Analogously with the High Court decision in *Queensland v J L Holdings* (1997) 189 CLR 146, where costs can ameliorate an indulgence to a party which might cause delay, this step should be taken to prevent a potential injustice.

23. For these reasons the Tribunal is willing to consider an application for costs from either party.

24. In consequence under order 3 of 31 August 2005 the time for filing and serving full itemised and particularised Points of Counterclaim with respect to paragraph 11 only of the Further Amended Points of Defence and Counterclaim is extended to 14 November 2005. The Respondent may chose to abandon any pleadings in paragraph 11 by 14 November 2005.

25. Under Order 4, the date by which the Applicant must file and serve Points of Defence to the amended Points of Counterclaim is extended to 21 November 2005.

26. Under Orders 5 and 6, the dates are extended to 7 December 2005.

27. Order 14 is amended to provide:

“Should the Respondent fail to comply with either Order 3 or 5 or both of them by the date specified in that order, the counterclaim shall stand struck out and the counterclaim shall therefore stand determined in favour of the Applicant save as to costs and interest. Should the Respondent fail to comply with Order 6 by 7 December 2005 the counterclaim and defence shall stand struck out and both shall therefore be determined in favour of the Applicant save as to interest and costs”.

28. The orders of 31 August 2005 are otherwise confirmed.

29. With respect to Order 19 of 31 August 2005, it is found that “transcript” means not just recording the proceeding, but also the transcription. As defined by the Chambers Dictionary, transcript is “... a written or printed copy, especially a legal or official copy

of ... proceedings ...”

30. The parties have leave to seek costs of and associated with the directions hearing of 28 October 2005, which, if sought, shall be heard by Senior Member Lothian.

SENIOR MEMBER M LOTHIAN