VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D710/2008

CATCHWORDS

Application to withdraw admissions – relevant considerations

APPLICANT	JG King Project Management Pty Ltd (ACN 095 695 079)
RESPONDENT	Mulkarra Drive Properties Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	24 March 2010
DATE OF ORDER	15 April 2010
CITATION	JG King Project Management Pty Ltd v Mulkarra Drive Properties Pty Ltd (Domestic Building) [2010] VCAT 435

ORDER

1. The applicant is granted leave to withdraw admissions in its Reply and Defence to Counterclaim and to amend its Reply and Defence to Counterclaim in accordance with the Amended Reply and Defence to Counterclaim filed on 1 September 2009.
2. **This proceeding is referred to a directions hearing before Deputy President Aird on 11 May 2010 at 9:30 a.m. at 55 King Street Melbourne – allow one hour at which time any application for costs will be heard and directions made for its further conduct.**
3. Liberty to apply including liberty to apply by consent for the proceeding to be referred to a further compulsory conference before Senior Member Levine.
4. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For the Applicant	Mr K Oliver of Counsel
For the Respondent	Mr D McAndrew of Counsel

REASONS

1 In November 2005 the respondent engaged the applicant builder to construct a number of independent living units in Aspendale Gardens. There are two separate contracts for stages 2A and 2B and the total contract price exceeded $6.5 million. On 24 September 2008 the applicant commenced these proceedings seeking payment of what it says is the outstanding balance under the contract of $138,776.48 plus interest and costs. The claim was revised when Points of Claim were filed dated 9 January 2009 under which the amount claimed is $213,018.59 plus interest and costs. The respondent has counterclaimed and seeks payment of $138,776.47 for completion and rectification costs, and $705,100 for liquidated damages plus interest, costs and an indemnity in respect of any GST liability. The alternative claims are not relevant here.

2 In paragraph 4A of its Points of Defence and Counterclaim dated 2 March 2009, the respondent sets out the terms of the contracts and claims an entitlement to liquidated damages relying on project programmes which it says were included in the tender documents, and written terms of the contract whereby it claims liquidated damages if the works were not completed by the dates set out in the construction programmes.

3 In paragraph 1 of its Reply and Points of Defence to Counterclaim dated 27 April 2009 the applicant 'admits there were terms of the First Agreement and Second Agreements [the contracts] as alleged in paragraph 4A thereof.'

4 On 31 August 2009 the respondent filed an 'Application for Orders/Directions' seeking orders 'that the Applicant's Reply and Points of Defence to Counterclaim dated 27 April 2009 be struck out.' This application was supported by an affidavit from the respondent's solicitor, Anthony Paul Rockman in which he deposed to the failure of the applicant to provide adequate particulars in response to the respondent's request for further particulars. On 1 September 2009 the applicant filed and served, without leave of the tribunal, an amended reply and defence to counterclaim, and further and better particulars. In the accompanying facsimile its solicitors said:

> In the circumstances, we do not consider there is any need to proceed with the defendant's application made by letter dated 31 August 2009.

5 Relevantly, in the amended reply paragraph 1 by which the applicant admitted the terms of the contracts as set out in paragraph 4A of the respondent's Defence and Counterclaim was deleted, and substituted with a revised pleading by which, amongst other things, it denied that a construction programme formed part of the either contract. The matter came on for directions before me on 9 September 2009 when I made orders confirming the compulsory conference already listed for 21 September was to proceed, and listed the applicant's application for leave to withdraw admissions, made orally at that directions hearing, for hearing before me on

27 October 2009. I also made directions for the filing of affidavit material by both parties; by the applicant by 6 October, and by the respondent, in reply, by 21 October.

6 The proceeding did not settle at the compulsory conference. On 22 October 2009, more than two weeks after its affidavit material was due, the applicant filed an affidavit of its solicitor, Daniel Quentin Jones in which he deposed to his understanding of the contract documents, as discovered by the respondent which he had inspected. Importantly, he states:

> 10. On or around 27 April 2009, I caused to be filed on behalf of the Applicant in this proceeding the Applicant's Reply and Defence to Counterclaim dated 2 March 2009. At the time the document was filed I had not appreciated the matters set out in paragraphs 5 through 8 above [his observations following inspection of the respondent's discovered documents]. Further direct instructions had not been obtained from Mr T Gilbert [who signed the tender letters].
>
> 11. I have since been instructed and verily believe that Mr T Gilbert will give evidence that:
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> (a) the Respondent's Alleged Programme was not a contractual document;
>
> (b) to the best of his knowledge information and belief due to the informality with which it was agreed between the parties the projects would proceed, no construction programme was ever supplied as contemplated by the Stage 2A Tender Letter and the Stage 2B Tender Letter.

7 Following correspondence from the respondent's solicitors in which they set out their concerns about the material contained in Mr Jones' affidavit, which were not ventilated before the tribunal, consent orders were made in chambers on 19 November 2009 providing for the filing of any further affidavit material by the applicant by 26 November and the hearing listed for 19 November adjourned to 15 January 2010.

8 The date for the filing of further affidavit material by the applicant was subsequently extended by consent until 22 January and the hearing adjourned to 1 March 2010. No further material was filed until 26 February 2010 when the applicant filed an affidavit of Tony Gilbert sworn the same day. At the hearing on 1 March 2010 the applicant sought an indulgence to file any further affidavit material by 5 March 2010 and the exhibits to Mr Gilbert's affidavit were returned to counsel for the applicant so that a complete set could be filed by 2 March. The hearing was adjourned to 24 March 2010 when it proceeded. No further affidavit material was filed on behalf of the applicant.

9 The respondent relies on affidavits of Fadil Sadikay sworn 17 November 2009 and 23 March 2010, Anthony Paul Rockman sworn 23 March 2010 and Francis Christoper Wardrope sworn 23 March 2010.

Should the applicant be granted leave to withdraw the admissions?

10 Simply, yes. The relevant test in considering any application to withdraw admissions was set out by Gillard J in *Jeanes v Commonwealth of Australia* [2005] VSC 488 at [19] where he said:

> I summarise the relevant principles –
>
> • The general rule is that all amendments should be permitted and that includes an amendment to a defence, unless the amendment will cause prejudice to the other party which cannot be overcome in some way.
>
> • No amendment would be allowed if it raised a false issue or did not raise an arguable defence.
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> • The issue is one of justice between the parties ensuring that the real matters in controversy are decided.
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> • The trial is the proper place to determine all claims and defences and it is not appropriate, except in a clear case on a summary application to amend, to exhaustively investigate the facts and the law.
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> • The burden of proof or persuasion may be crucial on an application where there are disputed facts.
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> • It is not the law that a defendant is not permitted to resile from an admission unless it was shown the admission was made inadvertently or through error; justice is the determinant.
>
> • It is unnecessary to show that there was some error or mistake which led to the form of the pleading and that there is a reasonable explanation for having made the admission, before a party may seek to withdraw the admission. A court usually requires some explanation for the change in approach, but the absence of same or whether it was an adequate or inadequate explanation can hardly determine the outcome of the application in the face of compelling reasons of justice.

11 In summary, a party should be permitted to withdraw an admission *'unless the amendment will cause prejudice to the other party which cannot be overcome in some way'*. Further the adequacy of an application *'can hardly determine the outcome of the application in the face of compelling reasons of justice'*.

12 Under s97 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') the tribunal is required to determine cases fairly and according to their merits. In order to fulfil this obligation all issues in dispute should be fairly and squarely before the tribunal. Under s98 of the VCAT Act the tribunal is required to afford all parties natural justice and procedural fairness. So, if I were satisfied the respondent would suffer irretrievable prejudice leave should not be granted.

13 Extensive affidavit material has been filed by the parties which are primarily concerned with the substantive question – whether a construction programme formed part of the contract documents. The exhibits comprise three lever arch folders all of which reinforce my view that there is a very

real issue to be tried as to the terms and conditions of the contracts and, in particular, the documents comprising the contract documents.

14 The respondent has not been able to point to any prejudice it would suffer that is not otherwise compensable. This is not a case where the principles recently enunciated in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 militate against the granting of leave. Here the application to withdraw the admissions was made early in the proceeding. The Points of Defence and Counterclaim are dated 2 March 2009, and the Reply and Defence to Counterclaim are dated 27 April 2009. The application to withdraw was made on 9 September 2009. In the intervening period the parties were distracted by issues and concerns relating to discovery and the provision of particulars by the applicants. The date for the filing of lists of documents by both parties was extended twice and the parties given leave to make application for further discovery – that date was also extended a number of times. There was also a dispute about the adequacy of the particulars provided by the applicant in response to the respondent's request for further and better particulars.

15 The delay in the hearing of the application was caused by the difficulties encountered by the applicant in obtaining further affidavit material after the respondent refused to accept the explanation set out in Mr Jones' affidavit of 22 October 2009: that at the time the reply and defence to counterclaim were filed, he had failed to fully appreciate the significance of the admissions made apparently without instructions.

16 Subject to hearing from the parties, it would seem appropriate that the applicant pay any costs thrown away of the respondent occasioned by the withdrawal of admissions.

17 I will refer this proceeding to a directions hearing so that orders can be made for its further conduct, and will reserve the costs of this application with liberty to apply.

DEPUTY PRESIDENT C. AIRD