

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D705/2004

CATCHWORDS

Domestic building – separate question – resisting orders made.

FIRST APPLICANT	Roger William Johnston
SECOND APPLICANT	Elizabeth Ann Johnston
FIRST RESPONDENT	Victorian Managed Insurance Authority
SECOND RESPONDENT	Paul Pavlovski
THIRD RESPONDENT	Banyule City Council
FOURTH RESPONDENT	Mornington Peninsula Shire Council
FIFTH RESPONDENT	Craig Matheson
SIXTH RESPONDENT	Elmant Pty Ltd (ACN 077 561 276)
SEVENTH RESPONDENT	George Kotefski
EIGHTH RESPONDENT	Tyrone Diskin
NINTH RESPONDENT	John Conquest
JOINED PARTY 1	Mara Pavolvski
JOINED PARTY 2	Ilieva Pty Ltd (ACN 082 391 357)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Directions Hearing
DATE OF HEARING	25 June 2008
DATE OF ORDER	25 June 2008
CITATION	Johnston v Victorian Managed Insurance Authority & Ors (Domestic Building) [2008] VCAT 1272

ORDER

- 1 The Applicants have leave to file and serve Amended Points of Claim in terms of the proposed amended pleading by 26 June 2008.

- 2 The First Respondent must file and serve an Amended defence by 1 July 2008.
- 3 The First Respondent must file and serve its submissions and any affidavits by 11 July 2008.
- 4 The Ninth Respondent must file his submissions and any affidavits by 30 July 2008.
- 5 **The hearing scheduled for 5 and 6 August 2008 shall proceed. The question to be determined is varied to the following effect:**

“I set aside for separate hearing the question of whether the purported Terms of Settlement dated 29 November 2007 between the Applicants and the First Respondent are binding, enforceable law, **and if so what is their proper construction and legal effect**, and give rise to an entitlement in law to the declaration claimed in paragraph AA in the prayer for relief **or the ancillary relief claimed in paragraph AB in the prayer for relief of the Applicants’ fifth further amended points of claim.**”
- 6 Costs reserved.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr A. Monichino of Counsel
For the First Respondent	Mr J. Collier, Solicitor
For the Second Respondent	Mr P. Pavloski in person
For the Third Respondent	No appearance
For the Fourth Respondent	No appearance
For the Fifth Respondent	No appearance
For the Sixth Respondent	No appearance
For the Seventh Respondent	Mr T. Diskin in person
For the Eighth Respondent	No appearance
For the Ninth Respondent	Mr G.P. Harris of Counsel
For Joined Party 1	No appearance
For Joined Party 2	No appearance

REASONS

- 1 This matter has been going on for a very long time and I am keen to see it proceed without delay. I have previously observed it is an unfortunate proceeding.
- 2 Orders for a preliminary hearing were made on 24 April 2008.
- 3 I saw utility in that course in accordance with the principles in *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669.
- 4 All relevant parties were represented at the hearing on 24 April 2008.
- 5 No application was made for adjournment on the ground of unpreparedness by the Ninth Respondent. If one is not sought on that basis I think I can only assume a party is not unprepared. It was not apparent to me in any event that the Ninth Respondent's legal representative was unprepared although he may have only come into the matter at a late stage.
- 6 No objection of substance was expressed, as I recall, to the setting down of the preliminary question.
- 7 Objection is now taken by the Ninth Respondent to the hearing of the separate question – 2 months later.
- 8 In the meantime steps have been taken in accordance with the directions and orders I made.
- 9 None of the matters put to me today was put to me on the previous occasion (when there was opportunity to put them). I do not sit in appeal from my orders properly made and authenticated.
- 10 Preliminary hearings are contemplated by the Rules of the Courts and I am satisfied this is a proper case for one. Of course, there can be problems (alluded to in the authorities) with the hearing of separate questions but they are not unable to be overcome and the approach of determining a preliminary question, if proper, is often adopted. I have regard to the tests of “utility, economy and fairness” referred to by Hollingworth J in *David Jones Ltd v Perpetual Ltd* [2008] VSC 61 at [29]. I regard those tests as satisfied in this case based on the submissions made to me.
- 11 I cannot see that wider issues of negligence (from paragraph 89 onwards in the Draft Fifth Amended Points of Claim) are involved. See paragraphs 22A and 22B of same.
- 12 Opposition is not expressed by the First Respondent.
- 13 To have the Ninth Respondent await the outcome of the hearing seems intolerable, I should add, as was pointed out to me.
- 14 In my opinion the matter should proceed as directed (with some variations).
- 15 I reserve costs.

SENIOR MEMBER D. CREMEAN