

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D705/2004

CATCHWORDS

Domestic building – separate question – whether same should be determined in favour of Applicants – non compliance with directions – costs.

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 (discontinued 5/8/08)
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	Hearing
DATE OF HEARING	18 September 2008
DATE OF ORDER	27 November 2008
CITATION	Johnston v Victorian Managed Insurance Authority & Ors (Domestic Building) [2008] VCAT 2403

ORDER

- 1 I declare that:
- (a) the Terms of Settlement between the Applicants and the First Respondent are binding and enforceable at law;
 - (b) upon the proper construction of the Terms of Settlement, their legal effect is to give rise to a limited assignment of the Applicants' rights against the Second Respondent so as to entitle the First Respondent to reimbursement of the Settlement Sum (referred to in the Terms of Settlement) from the Applicants but only after the Applicants have been fully compensated in recovering their claim and costs in the proceeding against the Second Respondent; and
 - (c) the Applicants are entitled to a declaration and it is so declared that:
 - (i) upon the proper construction of the Terms of Settlement the assignment constituted by clause 3 of the Terms of Settlement is an equitable assignment by the Applicants of their rights against the Second Respondent to the extent of the Settlement Sum; and
 - (ii) the Applicants are not bound to discontinue the proceeding brought by them against the Second Respondent.
- 2 As between the Applicants and the First Respondent, and as between the First Respondent and Applicants, I reserve costs of the joinder application and as regards the preliminary question issue.
- 3 I order the Second Respondent, Seventh Respondent and Eighth Respondent to pay the costs of and incidental to the application regarding the Points of Defence and Discovery. In default of agreement by 10 November 2008, I refer assessment of such costs to the Principal Registrar who shall assess same according to Supreme Court Scale.
- 4 Costs otherwise are reserved.
- 5 **The matter remains fixed for a directions hearing on 18 December 2008 at 9.30 a.m. at 55 King Street Melbourne. Allow half a day. All parties must be notified at their addresses for service and at their latest addresses appearing on file and by facsimile.**

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants	Mr A. Monichino of Counsel
For the First Respondent	Mr M. Roberts of Counsel
For the Second Respondent	No appearance
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	No appearance
For the Eighth Respondent	In person
For the Ninth Respondent	Discontinued 5/8/08
For the Joined Parties	No appearance

REASONS

- 1 A hearing was conducted in this matter on 18 September 2008.
- 2 Previously a hearing on 5 August 2008 was adjourned owing to illness of the Second Respondent. I considered he was not well enough to proceed, meaningfully, on that occasion. I did not consider it was fair to go ahead with the hearing in the circumstances. I do not consider this was at all at the instigation of the First Respondent. But the First Respondent supported the adjournment, and rightfully so, in my view.
- 3 At the subsequent hearing on 18 September however neither the Second Respondent nor the Seventh Respondent was present or represented.
- 4 Accordingly, by orders made on 22 September 2008, I directed and ordered that letters be sent to them inviting submissions and making further directions and orders. Specifically I directed their attention to the issue of the preliminary question and the issue of costs.
- 5 After extensions of time, which I granted, I have subsequently received a submission in writing from the Second Respondent by faxed letter dated 20 November 2008. The letter was faxed at 2.51 p.m. Earlier, on 10 November 2008, I had extended time, under paragraph 1(a)(ii) of my Orders on 9 October 2008, to 4.00 p.m. on that date. I was very clear, then, however, that in all other respects my orders made on 9 October were confirmed. Those Orders (of 9 October 2008) had required any submissions to be received by 4.00 p.m. on 12 November 2008. However, I have accommodated the Second Respondent's request for extensions of time. Only so far, though, as submissions are concerned, and not otherwise. I have also sought to accommodate him (and the Seventh Respondent) in them being able to be informed about what transpired at the hearing on 18 September 2008.
- 6 Orders for a preliminary hearing of an issue were made by me on 24 April 2008. On 25 June 2008 that question was re-framed as follows:

“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.**”
- 7 Affidavits in support have subsequently been filed and served on behalf of the Applicants. The principal affidavit is that Stewart Peters sworn 4 August 2008.
- 8 Exhibit SFSP1 to that affidavit sets out the Applicants' Proposed Minute of Orders. Paragraph 1 of that document asks that the preliminary question be answered as follows:

- (a) the Terms of Settlement between the Applicants and the First Respondent (“**the Terms of Settlement**”) are binding and enforceable at law;
- (b) upon the proper construction of the Terms of Settlement, their legal effect is to give rise to a limited assignment of the Applicants’ rights against the Second Respondent so as to entitle the First Respondent to reimbursement of the Settlement Sum (referred to in the Terms of Settlement) from the Applicants but only after the Applicants have been fully compensated in recovering their claim and costs in the proceeding against the Second Respondent; and
- (c) the Applicants are entitled to a declaration and it is so declared that:
 - (i) upon the proper construction of the Terms of Settlement the assignment constituted by clause 3 of the Terms of Settlement is an equitable assignment by the Applicants of their rights against the Second Respondent to the extent of the Settlement Sum; and
 - (ii) the Applicants are not bound to discontinue the proceeding brought by them against the Second Respondent.

9 Paragraph 18 proposes an order that:

The Second, Sixth, Seventh and Eighth Respondents pay the Applicants’ costs of and incidental to the making of the orders in paragraphs 5 to 9 above.

10 Reference is made to paragraphs 5 to 9 and they propose orders that:

- 5. On or before 12 August 2008, the Sixth, Seventh and Eighth Respondents and/or their former solicitor, Messrs Vadarlis & Co, produce to the Applicants for them to inspect and copy the documents listed in the Sixth Respondent’s List of Documents dated 23 April 2008 upon the solicitor for the Applicants undertaking to take reasonable care of the documents whilst they are in his possession and to return the said documents in the same condition as when they were delivered to or collected by him.
- 6. Unless on before 19 August 2008 the Second Respondent:
 - (a) files and serves an amended defence responding to the Applicants’ Fifth Amended Points of Claim dated 26 June 2008 (“**Points of Claim**”); and
 - (b) files and serves a supplementary list of documents,
 the proceeding against the Second Respondent be determined in favour of the Applicants pursuant to section 78(2)(b)(i) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (“**VCAT Act**”) and the matter be listed before the Tribunal for the making of appropriate orders, including an assessment of the Applicants’

damages and an order for costs pursuant to section 109 of the VCAT Act

7. Unless on before 19 August 2008 the Sixth Respondent
 - (a) files and serves an amended defence responding to the Points of Claim; and
 - (b) files and serves a supplementary list of documents,

the proceeding against the Sixth Respondent be determined in favour of the Applicants pursuant to section 78(2)(b)(i) of the VCAT Act and the matter be listed before the Tribunal for the making of appropriate orders, including an assessment of the Applicants' damages and an order for costs pursuant to section 109 of the VCAT Act.
8. Unless on before 19 August 2008 the Seventh Respondent:
 - (a) files and serves a defence responding to the Points of Claim; and
 - (b) files and serves a list of documents,

the proceeding against the Seventh Respondent be determined in favour of the Applicants pursuant to section 78(2)(b)(i) of the VCAT Act and the matter be listed before the Tribunal for the making of appropriate orders, including an assessment of the Applicants' damages and an order for costs pursuant to section 109 of the VCAT Act.
9. Unless on before 19 August 2008 the Eighth Respondent:
 - (a) files and serves a defence responding to the Points of Claim; and
 - (b) files and serves a supplementary list of documents,

the proceeding against the Eighth respondent be determined in favour of the Applicants pursuant to section 78(2)(b)(i) of the VCAT Act and the matter be listed before the Tribunal for the making of appropriate orders, including an assessment of the Applicants' damages and an order for costs pursuant to section 109 of the VCAT Act.
- 11 Opposition to answering the question in the way proposed by the Applicants (set out in paragraph 8 above) was expressed by the Eighth Respondent. The Sixth Respondent is in liquidation. The Second Respondent's position (in his written submission dated 20 November) is that "the Terms of Settlement between the Applicants and the First Respondent are binding and enforceable". This, however, is subject to what else he has written in his submission.
- 12 The First Respondent (VMIA) I might describe as being in a position of studied ambiguity. Neither did it oppose nor did it consent. Despite this, submissions were made to me by Counsel on the kind of assignment said to be involved in the Terms of Settlement.

- 13 Moreover I am seriously in doubt about whether I should hear from the First Respondent in opposition in any event. For, I note that its Outline of Submissions dated 16 July 2008 the First Respondent says, quite specifically, that for the purposes of the hearing on the preliminary question it is prepared to concede that “the terms of settlement [which I will set out shortly] do not preclude the Applicants from continuing to prosecute their claims in this proceeding against Pavlovski”. I regard that as a concession and as one made after due consideration and upon advice.
- 14 Nonetheless, and despite misgivings, I shall take into account for the moment what was said to me on behalf of the First Respondent. I also take into account what was said to me by Mr Diskin. Further I take into account the Second Respondent’s written submissions (of 20 November).
- 15 Having done so, however, I am firmly of the view that the preliminary question should be answered in the way the Applicants contend. Nothing submitted by either the Second Respondent or the Seventh Respondent persuades me otherwise and I have noted in detail what each has said – the latter in person and the former in writing.
- 16 The point in question concerns the operative effect of Terms of Settlement executed on 16 November 2007. Clauses 1, 2 and 3 of those Terms are as follows:
1. Subject to compliance by the applicants with paragraph 3 below, the VMIA shall pay to the Johnstons the sum of \$60,000 (‘the settlement sum’) within 30 days of receipt by Moray & Agnew Solicitors of these terms of settlement executed on behalf of the Johnstons.
 2. The Johnstons hereby release and forever discharge the VMIA, the HGF, the State of Victoria and each and all of their past and present employees, officers, servants, agents, successors and assigns (together ‘the releasees’), from any claims, causes of actions, suits, demands, or liability for, or entitlement to, interest, costs, compensation, damages, indemnity, contribution, or any other relief whatsoever which the Johnstons or either of them now has or may have against the releasees or any of them in relation to, arising out of, or in respect of:
 - (a) the Claim;
 - (b) the proceeding;
 - (c) any of the facts, matters, or circumstances described in;
 - (i) any expert reports prepared on behalf of any party, in relation to the Proceeding or the Claim;
 - (ii) any correspondence to date between the Johnstons on the one hand and the VMIA or the HGF on the other in relation to the premises;

- (d) any defects in the premises which the Johnstons were aware of or should reasonably have been aware of at the time these terms of settlement were executed; and
 - (e) these terms of settlement including any taxation resulting therefrom.
- 3 The Johnstons hereby assign to the State of Victoria their rights against the builder and HIH – and shall, within 14 days, hereof, notify in writing HIH and the builder of such assignment – in relation to, arising out of, or in respect of:
- (a) the Claim;
 - (b) the Proceeding;
 - (c) any of the facts, matters, or circumstances described in;
 - (i) any expert reports prepared on behalf of any party in relation to the Proceeding;
 - (ii) any correspondence to date between the Johnstons on the one hand and the VMIA or the HFG on the other in relation to the premises;
 - (iii) any defects in the premises which the Johnstons were aware of or should reasonably have been aware of at the time these terms of settlement were executed; and
 - (iv) these terms of settlement including any taxation resulting therefrom.

It was drawn to my attention that Recital B to the Terms says:
 “The Johnstons allege, *inter alia*, that in 1998 Elmant Pty Ltd (“the developer”) retained Paul Pavlovski (“the builder”) to construct, or manage and arrange the construction of, a dwelling on the premises. ”

- 17 One question which arises under these Terms is what exactly was it that the Applicants assigned? One position is that they have, by the Terms, given over all their rights to the First Respondent (in the name of the State) in respect of any recovery against the Second Respondent. Another, is that the Terms should be read in a much more limited fashion so as not to include an assignment over of rights against him.
- 18 The circumstances leading to the signing of the Terms of Settlement are dealt with by Dr Johnston in the affidavit he swore on 23 June 2008. I quote from paragraphs 15-21 of the same as follows:
- 15. Stewart Peters has drawn my attention to another copy of the Terms of settlement with the VMIA which I am informed by him was on Conquest’s file. Now produced and shown to me and marked “**RWJ9**” is a copy of Terms of settlement with VMIA dated 16

November 2007 which I am informed by Stewart Peters and believe has been obtained from Conquest's file. My signature appears on the Terms. I have no recollection of signing this document dated 16 November 2007. I do not know why this copy of the document exists in addition to that dated 29 November 2007.

16. I have no legal training. I believed that the Terms of Settlement did no more than give effect to the in-principle agreement that VMIA would pay \$60,000 inclusive of interest and costs in return for my wife and I giving up our claim against it. I had understood that our claim against the VMIA was for up to \$100,000 plus interest and costs whilst our claim against Pavlovski was in the order of \$1.5 million. At no stage did Conquest advise me that the VMIA was only prepared to settle the proceeding brought against it on the basis that the Applicants assign all of our rights against Pavlovski to the VMIA.
17. I did not appreciate that by signing the Terms of Settlement my wife and I would be giving up any, let alone all, of our rights against the builder, Pavlovski. This was not explained to me by Conquest. If the terms of Settlement had that effect, I would have expected Conquest as my legal advisor to explain this fact to me. If Conquest had explained to me that by signing the Terms of Settlement my wife and I would, or might be, giving up all of our rights against Pavlovski, I would not have signed the Terms of Settlement.
18. In about mid January it came to my attention that the VMIA was contending that by signing the Terms of Settlement my wife and I had given up all of our rights against Pavlovski. This came as a complete surprise to me.
19. Accordingly, I instructed Conquest to offer to refund the settlement sum by tendering cheques in the same amount as the settlement sum.
20. I was subsequently advised by Conquest on about 25 February 2008 that the tender had been rejected by Moray & Agnew on behalf of the VMIA.
21. Throughout the period of settlement negotiations from 8 October 2007 and following (refer to above) my

instructions to Conquest has always been to pursue the claim against Pavlovski.

- 19 None of the details deposed to in these paragraphs seems implausible. None seems other than likely to be so. More particularly is this the case when Dr Johnston has not been challenged on any of the materials in this affidavit. No one has ever sought to cross-examine him in the matter. Nor has Stewart Peters, the solicitor, been challenged (by way of cross examination) on any of the matters he deposes to in any of his Affidavits.
- 20 Moreover it would not seem at all likely to me that by the Terms Dr Johnston and his wife, acting rationally, would have intended to give up their valuable rights against the Second Respondent. Why would they give up a claim alleged against him for over \$1 million by signing the Terms for payment of a very modest amount? This was, in effect, the question I was asked rhetorically. I think the Terms, so far as material, must indeed be read as far as material, as a limited assignment only, as was submitted to me. The Terms were drawn up by the First Respondent and I consider they must be read in light of the statutory position of that party. That is, its position must be viewed in light of s41(1) of the *House Contracts Guarantee Act* 1987 as amended and what is made requisite before the First Respondent must pay out. Moreover, I refer to s45 of the Act. In all the circumstances, and having regard to Dr Johnston's uncontradicted affidavit evidence, and to the authorities I was referred to, it seems to me that I should not take it as having been intended by the Applicants to forego claims against the Second Respondent by the assignment. And I do not take the terms as having been intended to do that, considering factual matrix surrounding their execution. I apply s97 of the *Victorian Civil and Administrative Tribunal Act* 1998 and have regard, as I must, to the substantial merits of the case, moreover. The argument based on Recital B, as indicative of the intentions of the Applicants, I reject. The result is that the Assignment is, in my view, a limited one only.
- 21 It follows I cannot agree with the Second Respondent when he states (in his Submission of 20 November) that the First Respondent "always stated that they [sic] would like to stay mute" Or that it "is unjust that the Applicant [sic] and it's [sic] solicitor should use VCAT to resolve an issue between themselves which affects other parties, and is separate from the matter that VCAT is hearing". The First Respondent, as appears below in paragraph 22, has not stood "mute" and the issue between the Applicants and their solicitor does indeed directly impact on the proceeding as to whether it has been settled in its entirety or not. I see the Tribunal as having jurisdiction to decide this issue. I am not persuaded by the Second Respondent's submission that jurisdiction is lacking.
- 22 In any event, as I have said, the First Respondent has made its position plain enough: the Terms, it concedes, "do not preclude the Applicants from continuing to prosecute their claims ... against Pavlovski". This is a significant concession - all the more so, when it was the First Respondent

itself which drew up the Terms. It is well placed, having taken advice, to state what concessions it may properly make. And I consider its concession is one both properly and reasonably made. I cannot agree that the Second Respondent is correct in saying in his Submission (of 20 November) that the First Respondent “always stated that they [sic] would like to stay mute, not as Mr Monichino [Counsel for the Applicants] asserts, that they [sic] accepted his position, and have back flipped”.

- 23 I consider it fair and proper to answer the preliminary question in the way proposed and contended for by the Applicants. Nothing said by Mr Diskin deters me from this view. I cannot agree with the submissions of Mr Pavlovski.
- 24 I make the declarations accordingly.
- 25 The Applicants also seek their costs from the First Respondent of and incidental to:
- (a) their joinder of the Ninth Respondent as a party to the proceeding; and
 - (b) the hearing and determination of the preliminary questions, including but not limited to the costs of preparation of the affidavit material and legal submissions on behalf of the Applicants in respect of the trial of the preliminary questions
- 26 On this question I heard submissions from both the Applicants and the First Respondent (which opposed the making of the order). Reference was made to correspondence passing between the parties and their respective legal advisers. In particular, reference was made to Mr Collier raising with Mr Conquest various matters including the position of the Second Respondent if the Terms were signed. I am inclined to the view that Mr Conquest should have paid greater attention to what was being said to him. I am not inclined to the view that proposing a preliminary question to be tried was an improper course. As I recall, this was something favoured by Mr Collier. But his submissions in that regard need to be seen against a background of the communications between himself and Mr Conquest.
- 27 In the end I do not feel satisfied I can make the orders sought by the Applicants at this stage. I would need further detail. Similarly, as regards a costs application by the First Respondent against the Applicants. Witnesses – including Mr Conquest and Mr Collier – will need to be cross-examined before I can do other than express the tentative views I have given.
- 28 In all the circumstances, as between the Applicants and the First Respondent, and as between the First Respondent and the Applicants, I reserve costs as regards the joinder application and as regards the preliminary question issue.
- 29 I am clear, however, having regard to s109(3)(a)(i) of the *Victorian Civil and Administrative Tribunal Act 1998*, that under s109(2) it is fair to depart from s109(1) to order the Second, Seventh and Eighth Respondents to pay

the costs of and incidental to the application for the orders (I have made previously) concerning filing and service of defences and lists of documents. Mr Diskin, frankly, said he could offer no reasonable excuse for having failed to comply and the Seventh Respondent has said nothing in his own defence. I do not regard the Second Respondent's written submission (of 20 November) as dealing with this issue directly. I am unable to detect any "reasonable excuse" on the part of either the Second, the Seventh or Eighth Respondents for failure to comply.

- 30 As regards the Second, Seventh and Eighth Respondents I consider it fair to make the orders for costs on Supreme Court Scale as sought. The case is exceedingly complex and large in amount. I do not order indemnity costs and I was not asked to do so. In default of payment, I refer their assessment to the Principal Registrar.
- 31 As regards compliance with orders made on 9 October 2008 and not extended by orders made on 10 November 2008, I note the provisions of s126 of the Act (in particular s126(3)). I draw the attention of the parties (including the Second Respondent) to this.
- 32 Costs otherwise are reserved.
- 33 I will hear all parties at the directions hearing on 18 December 2008. All parties are required to attend the same or be represented at it. I again refer the Second, Seventh and Eighth Respondents to the possibility of pro-bono assistance via the Law Institute or the Victorian Bar.

SENIOR MEMBER D. CREMEAN